

GUIDANCE FOR DEVELOPING SUPERFUND MEMORANDA OF
AGREEMENT (MOA) LANGUAGE CONCERNING STATE VOLUNTARY
CLEANUP PROGRAMS

This document gives guidance to EPA staff on how to draft MOAs with States on State voluntary cleanup programs. It is not a regulation, and does not create legally binding obligations on any person, including States and EPA. Whether or not EPA follows the guidance in any particular case will depend on the circumstances. EPA may change the guidance in the future.

**GUIDANCE FOR DEVELOPING SUPERFUND MEMORANDA OF AGREEMENT (MOA)
LANGUAGE CONCERNING STATE VOLUNTARY CLEANUP PROGRAMS**

I. PURPOSE

This guidance will assist the U.S. Environmental Protection Agency's (EPA) Regions and States in developing or amending Memoranda of Agreement (MOA)¹ regarding EPA/State relationships with respect to sites being addressed by State voluntary cleanup programs. Regions should use this guidance in determining whether to acknowledge the adequacy of a State voluntary cleanup program through an MOA. For those sites included within the scope of the MOA, Regions and States can agree that EPA will not exercise cost recovery authority and does not generally anticipate taking a removal or remedial action² at certain sites being addressed by a State's voluntary cleanup program except under limited circumstances. The decision to sign an MOA is discretionary upon the part of the Regional Administrator.

II. INTRODUCTION

A. State Voluntary Cleanup Programs

A State voluntary cleanup program is an alternative to the conventional CERCLA or State Superfund-like enforcement approach to cleaning up contaminated sites. States are developing voluntary cleanup programs to speed up the cleanup of non-National Priorities List sites, which, generally speaking, pose a lower risk than those sites listed on the National Priorities

¹ These MOAs are developed under the National Contingency Plan definition of a Superfund Memorandum of Agreement (SMOA), which is a nonbinding, written document executed by an EPA Regional Administrator and the head of a State agency to establish the nature and extent of EPA and State interaction during the removal, pre-remedial, remedial, and/or enforcement response process. The SMOA generally defines roles and responsibilities; it is not a site-specific document although attachments may address specific sites.

²EPA may obtain access, conduct site assessment or information gathering as necessary to determine whether an imminent and substantial endangerment exists.

List (NPL).³ These voluntary cleanup programs are designed to achieve results that are acceptable to the State in terms of costs and protection of the environment and human health.

Many States have established voluntary cleanup programs. The key ingredients of a documented State voluntary cleanup program include established authority, investigative and remedial procedures, cleanup targets appropriate to sites, State sign-off conditions and procedures, and liability provisions. These voluntary cleanup programs allow volunteers, such as site owners and developers, to identify and clean up sites, to use less extensive administrative procedures, and to obtain some relief from future state liability for past contamination. These sites might otherwise not be cleaned up because of their relatively low priority, and because these sites are too numerous for other State or Federal cleanup programs to address within a reasonable time frame.

State-established voluntary cleanup programs allow private parties to initiate and proceed with a cleanup with varying levels of State oversight and enforcement conditions. This guidance is intended to be flexible enough to accommodate variability among State voluntary cleanup programs; however, the guidance does describe a minimum set of criteria that a State voluntary cleanup program should meet before EPA signs an MOA with the State concerning its voluntary cleanup program.

In this guidance, EPA uses the term "voluntary" to mean "private party-initiated." It does not imply a lack of State oversight and/or approval of cleanup activities. Some State voluntary cleanup programs require the "voluntary" party to enter into an enforceable consent agreement.

III. IMPLEMENTATION

A. Scope and Applicability

The principles outlined in this policy may apply to all sites, **except as specified below.**

³The NPL means the list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response.

1. Those sites designated as Higher Risk (or Tier I) sites⁴, either under the screening process described in the Attachment to this guidance, or under an alternative screening process or mechanism proposed by the State and approved by EPA Headquarters, are not eligible for inclusion within the scope of an MOA.

2. Those sites proposed for or listed on the National Priorities List (NPL); or, those sites where ranking packages proposing their inclusion on the National Priorities List (NPL) are submitted to EPA Headquarters, are not eligible for inclusion within the scope of the MOA.

3. Those sites for which an order or other enforcement action is issued or entered under CERCLA or sections 3008(h), 3013(a), or 7003(a) of RCRA, and is still in effect, are not eligible for inclusion within the scope of an MOA.

4. Those sites undergoing RCRA corrective action pursuant to RCRA section 3004(u), 3004(v) or 3008(h) are not eligible for inclusion within the scope of an MOA. (However, see below for details on certain situations where exceptions may be made to this restriction for facilities or portions of facilities where correction action has not yet been initiated under an order or permit.)

The Region and the State may agree to apply the principles of the MOA to voluntary cleanups that have already begun if the State's voluntary cleanup program met the requirements of this guidance at the time those voluntary cleanups commenced. The MOA should clarify that EPA is not waiving its claims for past costs under CERCLA or other relevant authority (to the extent EPA has incurred such costs), and the MOA does not affect EPA's ability to recover these costs.

B. Site Designation

Generally, sites that are included within the scope of the MOA will be those types of sites that are often less-contaminated or that pose lower risk to public health, welfare or the environment; these types of sites are not typically addressed by EPA CERCLA cleanup actions. For purposes of this guidance, EPA

⁴Higher Risk (or Tier I) sites are sites that, while not currently proposed for listing on the NPL, have greater potential for being addressed under CERCLA authorities.

will designate these sites as Lower Risk (or Tier II) sites. EPA's expectation for Lower Risk (Tier II) sites covered by an EPA/State MOA concerning State voluntary cleanup programs is that EPA cleanup actions should be necessary only under very limited circumstances, and that the contact for cleanup of Lower Risk (or Tier II) sites is the State.

EPA has developed a site designation and screening mechanism that distinguishes Higher Risk (or Tier I) and Lower Risk (or Tier II) sites (See Attachment). The MOA should explain that States or volunteering parties will use this screening mechanism, which is attached, to designate a site as Higher Risk (Tier I) or Lower Risk (Tier II). A State may propose to EPA Headquarters an alternative screening process or mechanism for designating sites as Higher Risk (or Tier I) or Lower Risk (or Tier II). The State should demonstrate that the proposed alternative screening mechanism achieves results consistent with the results of the process described in the Attachment. If EPA Headquarters approves the alternative site tiering process, the MOA should attach the description of the alternative screening process. The MOA should also recognize that alternative method as a way to designate sites as Higher Risk (or Tier I) or Lower Risk (or Tier II).

The MOA should state that documentation of the decision designating a site as Higher Risk (or Tier I) or Lower Risk (or Tier II) should be kept in the file maintained by the State voluntary cleanup program, and be made available to EPA upon request. The MOA should also specify that the State is responsible for the site designations. If EPA subsequently determines that a site was improperly designated as Lower Risk (Tier II), the provisions of section III. D. "EPA CERCLA Action" do not apply to that site. The sites addressed through a State voluntary cleanup program that do not have documentation establishing a site as Lower Risk (Tier II), should not be eligible for inclusion within the scope of an MOA concerning EPA CERCLA cleanup actions.

C. Applicability to Facilities subject to RCRA Requirements

This guidance is also applicable to CERCLA actions at sites subject to RCRA requirements, subject to the restrictions in Section III. A., above, and as discussed below. Generally, this guidance could apply to two types of sites subject to RCRA: (1) sites at which there are only generators of hazardous waste; and (2) hazardous waste treatment, storage or disposal facilities (TSDFs).

Generators. Sites at which there are only generators of hazardous waste are typically cleaned up by State cleanup programs (or, in some cases, the Federal CERCLA program) and are within the scope of the MOA unless otherwise excluded by the restrictions in Section III.A., above.

TSDFs. Hazardous waste treatment, storage or disposal facilities (TSDFs) are typically cleaned up by EPA or authorized States under the RCRA corrective action provisions (See, RCRA Sections 3004(u) and (v) and 3008(h)). TSDFs or portions of TSDFs where corrective action has not yet been initiated under an order or permit may be included within the scope of the MOA on a case-by-case basis. At the Federal level, the CERCLA program has already generally deferred cleanups of RCRA TSDFs, including those RCRA TSDFs currently being addressed in authorized States under order or permit, to the RCRA program (see, 60 FR 14641; March 20, 1995).

Effect of RCRA Authorization. Under RCRA section 3006, EPA may authorize States to carry out the RCRA program (including corrective action requirements), subject to EPA oversight. In a State authorized to implement RCRA corrective action, EPA expects the State to be the primary implementor of RCRA requirements at all facilities subject to corrective action, including facilities that have, have had, or should have had, RCRA interim status. Authorized States may, at their discretion, allow cleanup of TSDFs or portions of TSDFs under a State voluntary program. In an authorized State, TSDFs or portions of TSDFs where corrective action has not yet been initiated under an order or permit may be addressed by the policy discussed in Section III. D. of this guidance on a case-by case basis.

Effect of cleanup under a State voluntary program on RCRA permitting requirements. In authorized and non-authorized States, a voluntary cleanup at a TSDF does not avoid the requirements that TSDFs obtain RCRA permits and that RCRA permits address corrective action. In cases where voluntary cleanups occur prior to permit issuance, EPA or the authorized State, at the time of permit issuance, must determine whether or not a voluntary cleanup satisfied all corrective action requirements or whether additional corrective action activities are needed (e.g., if the voluntary cleanup addressed only a portion of the facility subject to corrective action). Voluntary cleanups can substantially accelerate the corrective action process by, for example, allowing it to proceed before permit issuance or, where a permit has been issued, by allowing more immediate remediation

of certain areas which are not covered by the permit, unless otherwise excluded by the restrictions in Section III.A., above.

D. EPA CERCLA Action

The Regions should state in the Memorandum of Agreement the following:

For sites being investigated or cleaned up consistent with the practices and procedures of a State voluntary cleanup program that meets the criteria discussed in this guidance, EPA will not exercise its cost recovery authority unless:

- a. the Administrator determined that the release or threat of release may present an imminent and substantial endangerment to public health or welfare or the environment; or,
- b. the State requests the Administrator to take action; or,
- c. conditions at the site, that were unknown to the State at the time the response action plan was approved, are discovered, and such conditions indicate, as determined by the Administrator or the State, that the response action is not protective of human health or the environment; or,
- d. the cleanup of the site is no longer protective of human health or the environment, as determined by the Administrator or the State, because of a change or a proposed change in the use of the site.

Except as provided in (a) through (d) above, EPA does not generally anticipate taking removal or remedial action at sites involved in State Voluntary Cleanup Programs addressed by a signed EPA/State Superfund Memorandum of Agreement.

E. EPA/State Coordination

The outcome of these MOAs is EPA acknowledgment of the adequacy of a State voluntary cleanup program, and EPA's intention to rely on States to be responsible for addressing sites included within the scope of MOAs concerning these State voluntary cleanup programs. EPA and States should be developing MOAs in the context of the new framework for the State/EPA partnership, which EPA and State Environmental Managers endorsed in July 1994. A key principle governing the EPA/State relationship is that each State/EPA relationship must be based on

an understanding of -- and consent for -- a clear assignment of roles and responsibilities. This principle envisions utilization of the comparative advantages and inherent strengths that each party brings to the relationship. Adherence to this principle should help avoid duplication of effort, and maximize the number of sites cleaned up through the efficient use of EPA and State resources.

Prior to signing an MOA concerning a State voluntary cleanup program, the Region should review all relevant documents concerning the voluntary cleanup program to determine if the State voluntary cleanup program meets the six criteria discussed below. A Region may wish to conduct a State visit to review the State voluntary cleanup program prior to signing an MOA.

The MOAs concerning State voluntary cleanup programs should include a provision that EPA will review the MOA upon significant changes to the State voluntary cleanup program, and that the State will provide EPA with prompt notice of changes to their laws, regulations, resource levels, guidance, policies and practices governing such programs. The MOA should also state that EPA will periodically conduct reviews of State Voluntary Cleanup Programs where EPA has signed MOAs with States for the purpose of assessing how effectively EPA and the States are meeting the goals and expectations described in the MOA.

These reviews of signed MOAs should be conducted on a staggered basis so that all MOAs signed in a Region are not up for review at the same time. At a minimum, the initial review of an MOA should be conducted three years after the date EPA signs an MOA; at a minimum, subsequent reviews of MOAs should be conducted every five years thereafter. While this guidance does not invalidate MOAs signed by EPA and States before the effective date of this guidance, an EPA Region should begin its staggered reviews by starting with those MOAs. Reviews of existing voluntary cleanup MOAs should be conducted to assess the consistency of State voluntary cleanup programs with this guidance.

When an interested party expresses concern to EPA about a specific site covered under the MOA, EPA may contact the State, which would be responsible for providing documentation to EPA that designates the site as a Lower Risk (Tier II) site. EPA and the State should discuss the party's concern as well as the status of the site under the State voluntary cleanup program. If the public expresses significant concerns to EPA about any aspect of the State voluntary cleanup program, EPA and the State will

discuss how the MOA is being implemented, and whether the State's voluntary cleanup program continues to meet the requirements set forth in this guidance.

Prior to EPA deciding to sign an MOA concerning State voluntary cleanup programs, the Region will discuss with the State its views and record on NPL listing, and will consider that information as a factor in deciding whether to sign an MOA. EPA will include the State's views and record on NPL listing as part of its periodic reviews of how effectively the MOA is being implemented.

F. Criteria for a State Voluntary Cleanup Program

Before a Region and State sign an MOA that acknowledges the adequacy of a State voluntary cleanup program, the Region should ensure that the State voluntary cleanup program meets the criteria described below. The MOA should make clear to any private party that recovery of response costs under CERCLA will require that the cleanup action meet the requirements outlined in the National Contingency Plan (See 40 CFR §300.700 et.seq.).

1. Community Involvement

Public involvement activities ensure that the public is both informed of and, if interested, involved in planning for response actions. Under voluntary cleanup programs, the State and/or the private sector may provide the opportunity for community involvement activities. General methods of providing the opportunity for meaningful community involvement may include practices, policies, guidance, or regulations on conducting community involvement on a site-by-site basis.

The State voluntary cleanup program should provide opportunities for meaningful community involvement that are responsive to the risk posed by the site contamination and the level of public interest. While States should be afforded discretion in how their program provides such opportunities, State programs should, at a minimum, provide for adequate notification of the proposed voluntary cleanup plan to affected parties. The community involvement criterion can be substantively met, on a site-by-site basis, by the State voluntary cleanup program through any of the methods suggested below. At sites where a significant segment of the community does not speak English as a first language, there should be provisions for providing site information in languages other than English.

a. Notifications about voluntary response actions to local government officials and community groups;

b. Publication of legal notices about voluntary response actions in city or community newspapers (or other media, such as radio, church organizations and community newsletters) at key milestones in the response action process;

c. Other forms of notification about voluntary response actions;

Where the public has been involved in site activities and demonstrates an interest in participating in response action planning and implementation, additional meaningful public involvement opportunities may include:

d. Preparation of a public involvement plan that establishes opportunities for public involvement. Such a plan may provide background about the site, response actions already conducted, and the history of public involvement at the site; identify the specific opportunities for public participation in cleanup decisions that will take place; and, describe activities that will be undertaken to address and incorporate public concerns in the cleanup.

e. Involvement of the public in understanding the risk reduction aspects of the voluntary cleanup.

f. The publication and distribution of site fact sheets.

g. Conduct of community interviews, including interviews through notification and communication with community organization officials, environmental justice groups, civic groups, environmental interest organizations, and church organizations.

h. Numerous other methods to solicit public participation and comment.

i. Public meetings or hearings, either formal or informal.

j. Local land use planning activities on current and/or future uses of sites.

2. Protectiveness

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A State voluntary cleanup program should ensure that voluntary response actions are protective of human health, welfare, and the environment. Reasonably anticipated future land uses should be considered in establishing protective contaminant concentrations. All voluntary response actions must comply with any Federal, State or local laws that apply to that site. Ways to determine protectiveness may include, but are not limited to:

- a. Background contaminant concentrations;
- b. Site specific risk assessments, based on U.S. EPA's Risk Assessment Guidance for Superfund, Part A and B, and associated policy updates, e.g., soil screening guidance, or on State regulations and guidance;
- c. Contaminant-specific models such as the biokinetic uptake model for lead;
- d. Applicable and/or Relevant and Appropriate Requirements, such as Maximum Contaminant Levels (MCLs) for groundwater;
- e. Consistency with a human health risk range, as defined in 40CFR§300.430(e)(2)(i)(A)(2) for known or suspected carcinogens, or a hazard index for threshold contaminants, as defined in 40CFR§300.430(e)(2)(i)(A)(1); or,
- f. Risk-based corrective action assessment.

2A. Response Selection

Response actions should be conducted cost-effectively, consistent with projected future uses at the site. All response actions must comply with any Federal, State and local laws that apply to the site. Long-term reliability should also be a goal when selecting response actions. Response actions may include one or more of the following:

- a. Treatment (active or passive) that eliminates or reduces the toxicity, mobility, or volume of hazardous substances, pollutants, or contaminants;
- b. Containment of contaminated media to acceptable exposure levels;
- c. Transport to off-site treatment;

d. Restricted access to and/or use of the site through institutional controls that are enforceable over time.

3. Resources/Technical Assistance

The State should demonstrate that its voluntary cleanup program has adequate resources, including financial, legal and technical, to ensure that voluntary response actions are conducted in an appropriate and timely manner, and that meaningful outreach efforts are made to the affected community. The State agency should make available both technical assistance, and streamlined procedures where appropriate, to ensure expeditious voluntary response actions.

4. Certification of Response Action Completion

A State Voluntary cleanup program should provide adequate mechanisms for the written approval of response action plans and a certification or similar documentation indicating that the response actions are complete. In situations where a State uses alternative mechanisms to approve cleanup decisions, all approval determinations will be considered the same as the State making the determinations, and as such, the State will be viewed as responsible for such decisions.

5. Oversight Authorities

A State voluntary cleanup program should provide adequate oversight to ensure that voluntary response actions, including site assessments/characterizations, are conducted in such a manner to assure protection of human health, welfare and the environment, as described above. For sites with nonpermanent remedies, especially nonpermanent remedies premised on the restricted use of the land, the State voluntary cleanup program should meet this criterion by including a requirement that the State program receives progress reports on site conditions, or by reserving the State program's right to conduct site inspections. If the State voluntary cleanup program does not require the State to monitor a site after the final cleanup report is approved, then the State voluntary cleanup program could meet this criterion by reserving the State's authority to remove the cleanup certification under certain circumstances, such as a change in the site's use, a failure of institutional controls, or the discovery of additional contamination.

6. Enforcement Authorities

The State voluntary cleanup program should show the capability, through enforcement or other state authorities, of ensuring completion of response actions if the volunteering party(ies) conducting the response action fail(s) or refuse(s) to complete the necessary response activities, including operation and maintenance or long-term monitoring activities.

E. Reporting Requirements

The Region and the State should negotiate the need for reporting site names and the status of the sites by name to best suit the needs of that Region and State. The MOA should state, however, that the State agrees to maintain a list of site names (and locations) covered by the MOA and to make such list available to EPA and the public upon request. The State Agency should report, at a minimum, the following information to the Region on an annual basis.

a. Number of sites in each stage of the State voluntary cleanup program;

b. Number of sites entering the voluntary cleanup program the previous year; and,

c. Number of sites having received State agency approvals of full or partial completions in the previous year.

EPA should state in the MOA that it will conduct selective audits of sites within the scope of the MOA for the purpose of assessing how the site designation methodology attached to this guidance, or an alternative site designation mechanism approved by EPA Headquarters, is being implemented by either the State or the volunteering party. Regions and States should discuss the status of CERCLIS⁵ sites covered by the MOA at least semi-annually to ensure EPA/State coordination on sites covered by the MOA. This is especially important since EPA decides which sites are removed from CERCLIS.

IV. FINANCIAL ASSISTANCE TO STATES TO SUPPORT VOLUNTARY CLEANUP PROGRAM ACTIVITIES

EPA recognizes that most State voluntary cleanup programs

⁵CERCLIS is the abbreviation of the CERCLA Information System, EPA's comprehensive data base and management system.

are intended to be self-sustaining. Most of the voluntary programs with active State oversight require the private party to pay an hourly oversight charge to the State environmental agency in addition to all cleanup costs. Some States require application fees that can be applied against oversight costs.

However, EPA does recognize that States may need financial assistance to help establish new State voluntary cleanup programs and to help enhance existing State voluntary cleanup programs. To accomplish this, the Region may enter into cooperative agreements with the State to provide funding to the State for certain purposes.

The Region may provide Fund money to States for development and enhancement of voluntary cleanup programs through core program cooperative agreements. OSWER has developed guidance for use of core program cooperative agreement funding of State voluntary cleanup program infrastructure. (See May 1, 1997 memorandum from Timothy Fields, Jr., Acting Assistant Administrator, OSWER, entitled "Approach for Regional Funding of State Voluntary Cleanup Programs.") If the Region intends to provide funds to the State for voluntary programs, the Region should identify its resource needs for State voluntary cleanup programs in its annual budget development process.

V. TECHNICAL ASSISTANCE TO STATES TO SUPPORT VOLUNTARY CLEANUP PROGRAM ACTIVITIES

EPA will also provide technical assistance to States to support voluntary cleanups. EPA will share with States information contained in publicly available national databases. EPA will share any lessons learned or national expertise it has gained through the CERCLA program with States who face similar assessment and cleanup problems at voluntary cleanup sites.