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Superfund State Contracts

A REFERENCE FOR STATE AND TERRITORIES:
HOW TO GET THE MOST OUT OF YOUR SUPERFUND
STATE CONTRACTS

*ASTSWMO Remedial Action Focus Group
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Executive Summary

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Remedial Action Focus Group (FG) is comprised of State and Territorial (State) members from all EPA regions. This document was prepared by the ASTSWMO Remedial Action Focus Group, with assistance from the U.S. Environmental Protection Agency (EPA) OSRTI under Cooperative Agreement RT-83500901. ASTSWMO has prepared this document to assist States with the preparation, negotiation, and implementation of Superfund State Contracts (SSCs). This document is intended to help States recognize and understand key SSC decision points and provide some implementation strategies to assist with the successful site cleanup.

1.0 Introduction

The mission of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Remedial Action Focus Group is to research issues associated with the remediation of hazardous substances at State and federal Superfund sites and the infrastructure development needs of these State programs. This mission includes providing States with the research tools, studies and training necessary to develop and enhance their programs, and to carry out their responsibilities in the federal Superfund program. The Focus Group actively evaluates the potential impacts and relevance of Superfund program issues to the States. The Focus Group works closely with EPA staff to identify priority issues and approaches to resolving those issues.

ASTSWMO has prepared this document to assist States with the preparation, negotiation, and implementation of their SSCs. An SSC is a binding agreement between the EPA and an individual State that defines the terms and conditions for both parties to share remedial action costs at a specific site. SSCs must be in place before EPA uses appropriated funds to conduct a remedial action, and ensure all statutory assurances are addressed. The site must be listed on the National Priorities List (NPL) and located in the agreeing State. SSCs cover only those costs for which there are no viable parties to pursue.

As States enter into an SSC, they will face a few key decisions that may impact the successful completion of the required remedial action (RA) and the State's funding obligations. This document is intended to help States recognize and understand these decision points and provide some implementation strategies to assist with the successful site cleanup.

1.1 Background

Section 104(c)(3) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) requires the State in which a non-federal NPL site is located to agree to share the costs of the site's RAs with EPA. Either an SSC or a Cooperative Agreement (CA) between the State agency and EPA is required to obligate federal Superfund monies to finance those actions. States are not responsible for sharing the costs of cleanup at sites where the potentially responsible parties pay for the cleanup, or where federal facilities are funded by the federal agencies that administer them. Rather, the federal government and the States share those orphan cleanup costs for which there are no viable parties to pursue.

Federal funds cannot be obligated for cleanup without an agreement between EPA and the State – this is one of the critical points in the cleanup process where States have some leverage to influence future actions. SSCs can also be used by the State agency to document the need for funding from State legislators.

The regulatory framework for SSCs and CAs is provided in 40 Code of Federal Regulations, Part 35 [40 CFR§ 35], Subpart O.¹ EPA has published model clauses in the document titled, *Classic Two-Party Superfund State Contract (SSC) Model Clauses*, August 1990, and in late 2015 EPA revised their model SSC provisions. (http://www.epa.gov/sites/production/files/2015-11/model_ssc_provisions_final_11-12-15.docx) However, the State can negotiate the SSC language to ensure that their needs are met; however, consultation with EPA Headquarters may be required. Each State has different laws, processes, and guidance that may require that the model SSC language be customized during the negotiation process.

The SSC documents the responsibilities of the lead Agency and the support Agency. It includes provisions that outline the basic purpose, scope, and administration of the Contract, and it includes the site-specific Statement of Work (SOW) (which should be attached to the SSC; see Section 3.1).

The purpose of the SSC is three-fold. First, the SSC obtains the necessary CERCLA assurances pursuant to §§104(c)(3), 104(c)(9), and 104(j) of CERCLA, as amended. Second, the SSC describes the response activities to be conducted and the benefits to be derived. Third, the SSC documents the State's involvement in the cleanup process, pursuant to §121(f) of CERCLA, as amended, and 40 CFR 300.515(g).

¹ The SSC is entered into pursuant to §104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as amended; the National Oil and Hazardous Substances Pollution Contingency Plan, 55 F.R. 8666 *et seq.* (40 CFR Part 300, March 8, 1990, hereinafter referred to as the "NCP"); other applicable Federal regulations including 40 CFR Part 35, Subpart O, and 2 CFR Parts 200 and 1500.

1.2 Role of SSCs in the Cleanup Process

As shown in Figure 1-1, a typical cleanup remedy will have proceeded through the initial site discovery, NPL listing, Remedial Investigation (RI), Feasibility Study (FS), Proposed Plan, Record of Decision (ROD), and Remedial Design (RD) prior to the actual RA, the phase where cost-sharing is generally invoked with the SSC. States are advised to enter into negotiations with EPA early in the process, prior to Proposed Plan, to understand and participate in the remedy selection and, particularly, the RA and Operational & Maintenance.

The SSC contains only the costs of the RA and defines the point where the RA ends and O&M begins. The SSC does not cover costs associated with long-term O&M; those costs are borne by the States. Notably, CERCLA does not require States to agree to share costs of removal actions, which are typically less costly due to their smaller scope as long as the State or a political subdivision is not found to be a Responsible Party. Consequently, federal Superfund monies may be used to finance the entire cost of removal actions.

1.2.1 Removals

Removal actions are sometimes warranted on specific NPL facilities because of the immediate threat the facility poses to human health and the environment. States are supportive of removal actions since they help address immediate concerns. However, there are SSC considerations that should be contemplated, including the impact on the RA costs and the SSC Statement of Work. CERCLA prohibits the EPA from charging a State for any cost share provisions on removal actions². By supporting a removal action, the State could see a significant cost savings by removing the imminent threat as well as future RA costs if the site is eventually listed on the NPL.

² If the Site was operated by the State, either directly or through contractual relationship or otherwise, at the time of any disposal of hazardous substances at the facility, the State must provide 50 percent (or such greater share as EPA may determine appropriate, taking into account the degree of responsibility of the State for the release) of the cost of removal.

Chronology of a Superfund Cleanup

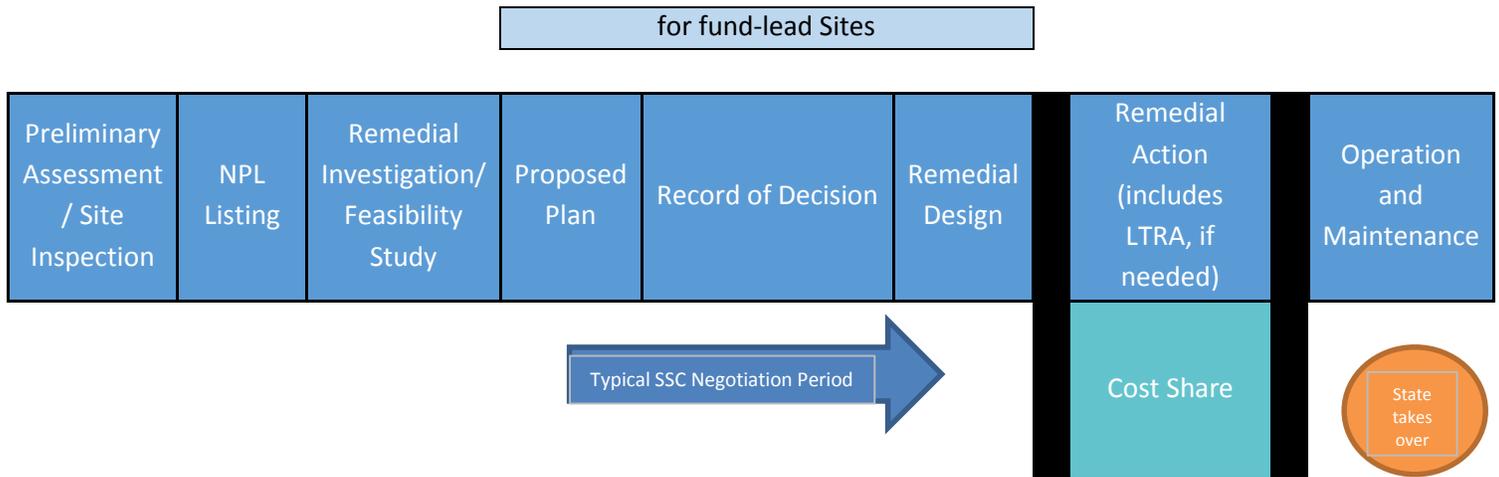


Figure 1-2: Role of SSC in a fund-lead cleanup.³

1.3 Overview of the SSC

Code of Federal Regulations (40 CFR § Part 35, Subpart O) defines a SSC as follows:

§35.6015 Definitions

Superfund State Contract (SSC). A joint, legally binding agreement between EPA and another party or parties to obtain the necessary assurances before an EPA-lead remedial action or any political subdivision-lead activities can begin at a site, and to ensure State or Indian Tribe involvement as required under CERCLA section 121(f).

The requirement for a SSC is further established as follows:

§35.6800 Superfund State Contract

A Superfund State Contract (SSC) with a State is required before EPA can obligate or expend funds for a remedial action at a site within the State and before EPA or a political subdivision can conduct the remedial action. An SSC also ensures State or Indian Tribe involvement consistent with CERCLA sections 121(f) and 126, respectively, and obtains the required section 104 assurances (See §35.6105(b)). An SSC may also be used to document

³ Figure taken from “Superfund State Contracts: Fun(d) for Us, Fun(d) for You” presented at the ASTSWMO State Superfund Managers Symposium, June 19, 2012, by Jennifer Wilbur, EPA Office of Superfund Remediation and Technology Innovation.

the roles and responsibilities of a State, Indian Tribe, and political subdivision during any response action at a site. A political subdivision may be a signatory to the SSC.

Among the many SSC provisions as described in 40 CFR §35.6800, States entering an SSC are asked to provide:

- A statement of intent to follow EPA policy and guidance.
- A designated primary contact and representatives to act on behalf of the signatory.
- State assurances: The State must make assurances to EPA including that it will:
 - Assume all future O&M costs;
 - Ensure waste capacity and operates in compliance with the Resource Conservation and Recovery Act (RCRA), Subtitle C;
 - Pay its cost share; and
 - Accept transfer of real property acquired during remedial action.
- Cost share: May be cash, credit or in-kind services.
- Site access: The State is expected to use its own authority to secure access to the site and adjacent properties, as well as all rights-of-way and easements necessary to complete response actions.
- Compliance with federal administrative requirements.

Throughout the SSC negotiation process, States will face some key decision points. The SSC process provides some opportunity for States to influence the process because, absent an SSC or CA between EPA and the State, federal Superfund monies cannot be obligated for cleanup of that site. States may want to consider the following:

- What is the best and most practical method for the State to pay its cost share – cash, credit/in-kind services?
- What provisions should be included for the State review of the RA?⁴
- What kind of payment documentation will be kept?
- What does the State want from the EPA regarding the site remedy before closing out the SSC?

With some planning and forethought, States should be able to utilize the SSC to ensure smooth execution of the RA phase and remedy transfer.

⁴ Reference Section 5.2.3 of the Remedial Design/Remedial Action Handbook, OSWER 9355.0-04B, June 1995

1.4 Cooperative Agreements

The primary purpose of this paper is to discuss SSCs; however, some RD and RA projects are conducted through a CA, which is discussed here. Code of Federal Regulations (40 CFR § Part 35, Subpart O) defines a CA as follows:

§35.6015 Definitions

A legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

CAs can be entered into for various purposes:

- Pre-Remedial Response Cooperative Agreements
- Remedial Response Cooperative Agreements
- Enforcement Cooperative Agreements
- Removal Response Cooperative Agreements
- Core Program Cooperative Agreements
- Support Agency Cooperative Agreements

CERCLA allows for a cooperative agreement to be used in lieu of, or in addition to, an SSC. The various scenarios that are best suited for an SSC, CA, or both are explained in Figure 1-2.

When and How to Use an SSC or CA

Who and How?	SSC Required?	CA Required?
EPA lead (fund-)	Yes	No, unless State uses in-kind services for cost share, which are documented in Support Agency CA (SACA)
EPA lead (Special Account)	No, unless RA becomes Fund-financed	No
State/Tribal lead (Fund or Special Account)	No	Yes, but CERCLA assurances are not required for Special Account financed actions nor for Tribal leads
State- financed	No	No
Political Sub-division lead (Fund)	Yes, State provides CERCLA assurances	Yes, because EPA is transferring funds to the political sub-division
EPA funds for State/Tribal/Local support	No	Support Agency CA (SACA) is used to transfer funds; no CERCLA assurances

Figure 1-2: When to use a Superfund State Contract or Cooperative Agreement

2.0 Considerations during the RI/FS and Remedy Decision Process

Throughout the RI/FS and remedy decision processes, State Superfund project managers should assess the possibility that an RA may require Superfund monies. Project Managers should continue to assess this even after the ROD is signed, in case settlement monies ultimately are insufficient to fully fund the RA, or if the responsible parties (RPs) go bankrupt. The State should develop an understanding of the financial viability of each potentially responsible party (PRP) by coordinating with EPA on its PRP search and/or through its own enforcement efforts.

The State program should be prepared to provide timely input to EPA during the remedy selection process. The ability to do this requires allocating appropriate internal staff resources to engage with EPA and may also require that the State obtain external assistance. The State and EPA project managers should be in close communication to ensure that the State understands EPA's timelines, understands EPA's contemplated approach, and provides input throughout the remedy selection process. Deferring State engagement and input to its review of the draft FS report may limit the State's ability to suggest alternative or innovative cleanup approaches. The RI/FS phase of the project is an opportune time to identify possible "in kind" services (see Section 5.3) to offset the State match. Also, in some instances, the State may choose to perform an interim action to better manage long-term costs or to meet its own requirements.

The State program should keep in mind that the State should not have to cost share tasks that should be part of the RI/FS. This may become an issue if EPA presents an RI/FS with a recommendation that data gaps be filled, or that remedy design elements be addressed, once a remedy is selected. If EPA elects to address data gaps or design elements at a later date, the SSC should specifically state that these tasks are not subject to cost share. For design-build projects, it will be necessary to estimate the proportion of costs related to the remedial design, and thus is not subject to cost share. However, once there is an executed SSC, a Statement of Work, and the Remedial Action has commenced, there will a 90/10 cost share.

Decisions made during the remedy selection phase of a known or potential Fund-lead project set the stage for the work that will eventually be performed under an SSC. During the FS and Proposed Plan stage of the project, States should evaluate whether the remedial alternatives can be adjusted to minimize the State's O&M costs and obligations. For some remedies (such as groundwater pump and treat systems), O&M costs can far exceed the project's capital costs. The State will need to identify a stable funding source for remedies requiring O&M and for the associated project oversight.

If the estimated cost of a contemplated remedial alternative is not feasible for the State, this needs to be communicated to EPA as soon as possible during the remedy decision process. In these instances, it might be possible to pursue a different remedial alternative that achieves

similar results at a significantly reduced O&M cost to the State. Also, the State and EPA can negotiate a feasible payment plan in the SSC for the RA cost obligation for the State.

Finally, the State will want to ensure that the ROD provides a clear selected remedy and establishes clear remedial action objectives (RAOs). The selected remedy and RAOs provide the basis for the SSC SOW.

The language used in the ROD defines when a project will transfer to the State:

- If the remedy is to restore beneficial use of the groundwater or surface water resource (i.e., restoration remedy), the project may include a long-term response action (LTRA) period prior to transfer (see Figure 2-1).
- If the remedy is to provide source treatment, control a plume, or provide drinking water supply treatment, the remedy will transfer once the Operational and Functional (O&F) has been determined.

Table 2-1 provides examples of ROD language for restoration and non-restoration groundwater or surface water remedies. For projects that have both restoration and non-restoration components, the SSC should identify when each remedy component will be transferred to the State for O&M if appropriate.

Note that groundwater or surface water restoration can be an objective of both interim and final remedies. An O&F determination will initiate the interim remedy LTRA period, and the remedy will transfer to the State after ten years if the cleanup levels and RAOs have not been achieved. If restoration remains as an objective for the final remedy, the responsibility for O&M remains with the State and does not reset the LTRA period that was initiated by the O&F determination of the interim action (EPA, 2006).

The National Contingency Plan (NCP) indicates that restoration remedies must have an endpoint within a reasonable timeframe for achieving the cleanup goals established in the ROD. The ROD should identify the metrics that will be used to track progress toward these reaching the cleanup goals.

Table 2-0. Example ROD Language for Groundwater and Surface Water Remedies

Non-Restoration Remedies

“...installation of groundwater extraction wells for the purpose of restricting further migration of contaminants in the groundwater.”

“...installation of a subsurface barrier in order to eliminate the current source to ground water contamination.”

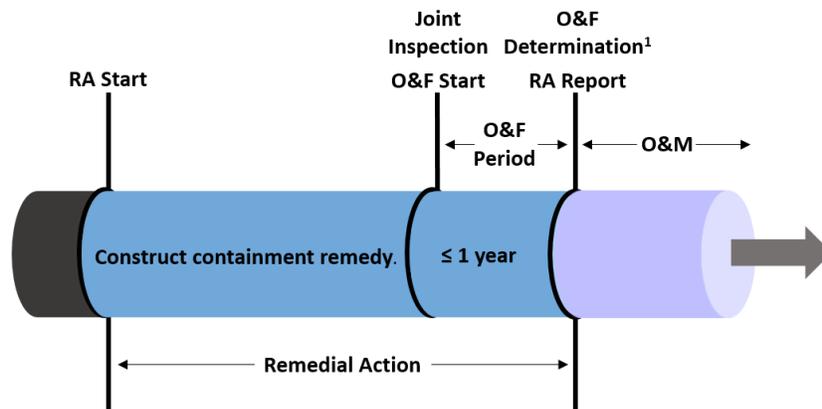
Restoration Remedies

“This Record of Decision addresses a final remedy intended to restore the shallow aquifer to beneficial use for drinking water.”

“Restore the Upper, Middle and Lower Aquifers to drinking water quality by decreasing the concentrations of the contaminants of concern ... to below the cleanup standards.”

“These objectives reflect EPA's regulatory goal of restoring usable groundwater to its beneficial uses wherever practicable, within a time frame that is reasonable...”

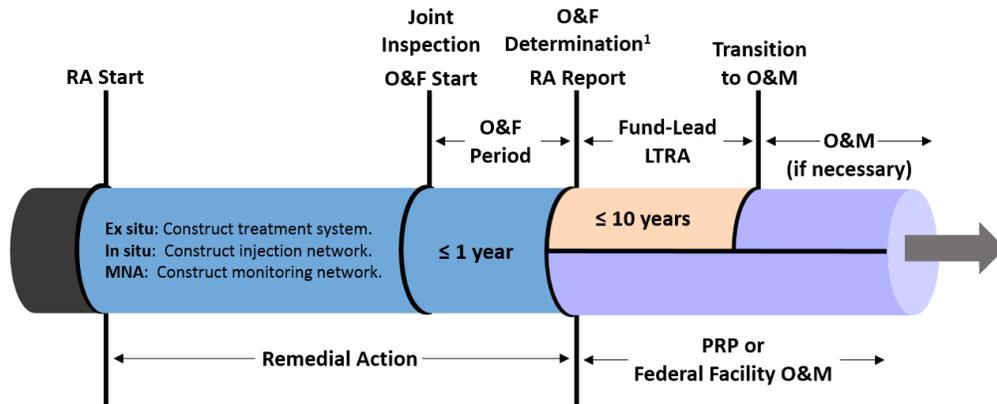
Source and Groundwater Containment Remedy



¹ The O&F Determination is made automatically when one year has passed or is made concurrently in a joint inspection if less than one year has passed since the start of the O&F period.

Figure 2-0.1 Timing of Remedy Transfer from RA for Source and Groundwater Containment

Groundwater and Surface Water Restoration Remedy



¹The O&F Determination is made automatically when one year has passed or is made concurrently in a joint inspection if less than one year has passed since the start of the O&F period.

Figure 2-0.2. Timing of Remedy Transfer from RA to O&M for Groundwater and Surface Water Restoration

3.0 Consideration When Entering a Superfund State Contract

The federal government is mandated by CERCLA to provide the States and Indian Tribes substantial and meaningful involvement in the Superfund process (Federal Register, Vol 72, No. 84, 40 CFR Parts 9 and 35, May 2, 2007).

To resolve state match requirements for CERCLA Sites, EPA has been given two mechanisms by Congress: the SSC and the CA. The SSC is a legally-binding agreement used to document State assurances and record the cost share of a remedial action that the State is obligated to fund. A CA (which is not the subject of this guidance) is a vehicle by which the federal government transfers something of value to the States. For more information on CA's, please see 40 CFR Part 35, Subpart O.

3.1 Statement of Work

The Statement of Work is typically an attachment to the SSC that describes the purpose and scope of activities and the tasks to be carried out as part of the proposed project.

3.1.1 Define Project

When negotiating an SSC, it is important that the State and EPA have a clear and detailed description of what work will be performed during the RA and what work will be considered Post Construction Completion (PCC) activities. These are generally the O&M components of the remedy. In general, a State's O&M responsibilities are to ensure the continued protection of human health and the environment that was gained by implementing the remedy. More specifically, the State's responsibility is to manage the remedy's engineering and institutional control components that will be transferred to the State. These can include engineered systems such as:

- Caps and covers
- Consolidation areas and/or landfills
- Extraction systems (vapor, groundwater, etc.)
- Sediment control structures
- Extent of short and long term monitoring
- Inspection and oversight

And institutional controls (IC's) such as:

- Easements
- Deed restrictions
- Environmental notices
- Public database entries
- Ordinances

It is also important to estimate the life cycle of these systems. Could the system be operational for five years, thirty years, or in perpetuity? In each case, additional engineering design, replacement of unit operations, field oversight, laboratory needs, and legal efforts may be required.

The State's responsibility begins when the remedial system is considered O&F. O&F is defined as either one year after construction is complete, or when the remedy is determined concurrently by EPA and the State to be functioning properly and is performing as designed, whichever is earlier. During the development of the O&M plan (which should start in the remedial design phase), make sure the parties are clear on the site-specific definition of O&F. If a deed restriction is required in the ROD, then make it clear who obtains and holds the restriction. This information should be described in the Institutional Control Implementation and Assurance Plan (ICIAP).

3.1.2 Identify Work Covered and Not Covered

After defining a detailed statement of work for the project, determine what work will be paid for by EPA, what is expected to be funded by the State, and what potential costs will require a cost share. An example of an item that needs to be clarified is who pays for system expansions (i.e., if an additional privately-owned treatment system or subslab system is required than was estimated to be needed in the statement of work).

Following the construction phase, EPA and the State will agree—at some point following system shake down—that the remedy is O&F. This is a critical date, as it can signal the start of up to ten years of LTRA, which is the last period that EPA will fund. It is important for the State to have EPA optimize the remedy and increase the effectiveness and/or reduce the cost without sacrificing long-term protection of human health and the environment.

3.1.3 Cost Estimate

The ROD will contain an estimate of the remedial action, ICs, and O&M costs for the project, which is derived from the feasibility study (FS) cost estimate. It is important to remember that the O&M cost estimate developed in the FS is calculated prior to a formal design and, therefore, the estimate is determined without the benefit of the engineers estimate developed during the design. As such, the FS and O&M estimate should be treated as an approximation accurate within a range of +50% to -30%. Further, there is often a period of time from the ROD to when the State takes over responsibility of O&M. Between those events, there can be changes to the scope of the remedy (e.g. extent of contamination to be treated) that may affect O&M costs, and changes in market conditions (e.g. commodity prices) that would influence costs. As such there are many factors to consider when evaluating the accuracy of the ROD's O&M estimate. The RA and O&M costs from the FS are updated during RD and RA. The State will have access to more current information throughout the RD/RA process.

In 2007, the ASTSWMO Long-Term Stewardship Focus Group evaluated O&M costs. The weighted annual average O&M costs for 15 fund lead remedies was \$167,000 in 2007 dollars. The range was from \$2,500 to \$871,000 per year (ASTSWMO 2007). When applying current inflation rates for 2016, the value came to \$191,799.27. O&M costs are very site-specific, but the dollar amount can be substantial, depending on the remedy.

3.2 Funding

3.2.1 Recognition of Fund Commitment

CERCLA requires EPA to enter into a Superfund State Contract (SSC) with the States:

The President [of the United States] shall not provide any remedial action ... unless the state in which the release occurs first enters into a contract or cooperative agreement with the President . . . (§104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA))

For EPA to clean up a site, a State needs to finalize an SSC which will bind the State to fund a portion of the remedy. The basis for the cost of the remedy is the estimate memorialized in the ROD. The genesis of the cost estimate is found in the FS and redefined in the Proposed Plan. Therefore, for the State to have meaningful input into the cost of the remedy—including their State share—it should involve itself during the FS stage.

However, States can negotiate this payment schedule, especially for very costly remedies. Some States, for example, have negotiated annual payments for large dollar remedies.

3.2.2 Negotiations

Negotiations on the SSC should start early in the remedial process, which will require States to be fully cognizant of the findings and costs discussed in the FS. The initial SSC draft should be broached when discussions begin about the scope of the Proposed Plan, and developed further during the remedial design, since the State must sign the SSC before EPA allocates funds for the remedial action.

Negotiations should start during the FS at the project manager levels as alternatives and costs are being developed. The State should engage in discussions with EPA during the Proposed Plan development. EPA staff typically include the EPA project manager, EPA Remedial Section Chief, and (if available) the EPA Regional Liaison to the State.

EPA's determination if a remedy is to be considered a Long Term Response Action (LTRA) is important to the State. Under the NCP, the up to 10-year period between the O&F determination and the start of O&M is considered an LTRA. LTRA will be considered at Fund-lead sites with restoration of groundwater or surface water. If the remedy is eligible for an LTRA period, the EPA will fund the project up to ten years or until the level of protectiveness, as defined in the ROD, is achieved, whichever comes first. From the State's perspective, remedies with active engineering components (such as groundwater pump and treat) should be classified as an LTRA when appropriate. During the Proposed Plan analysis, States and EPA should begin discussing the

applicability of an LTRA for the remedy. It is important that the State work with EPA to optimize the remedy and increase the effectiveness and/or reduce operational costs without sacrificing long-term protection of human health and the environment during LTRA and before transferring the site to O&M.

3.2.3 State Assumption of O&M Responsibility

Remedies that require O&M may have active remedial components, such as pump and treat or bioremediation. They can include containment remedies such as landfill caps, or vertical or horizontal barriers. O&M will require monitoring, periodic repairs and sometimes, replacement of remedial components. The State will get the O&M Plan, O&M Manual, and ICIAP from EPA prior to transfer. States should also insist that EPA's contractors provide training to State staff on how to operate remediation systems.

4.0 State Assurances

According to 40 CFR § 300.510, Subpart F of the NCP, a Fund-financed remedial action undertaken pursuant to CERCLA section 104(a) cannot proceed unless the State provides its applicable required assurances. The assurances must be provided by the State before initiating remedial action pursuant to: a) an SSC for EPA-lead (or political subdivision-lead) remedial action, or b) a cooperative agreement for a State-lead remedial action. These are commonly known as CERCLA State Assurances or CERCLA Assurances.

It's important to understand descriptions of the CERCLA Assurances and a few key terms when providing written, contractual assurances (Sections 4.1 through 4.5 below). States must provide EPA the following written assurances, which are required by CA's and SSC's for Superfund Response Actions, as described in 40 CFR § 35.6805 (i):

4.1 CERCLA Assurance: Operation and Maintenance

Operation and maintenance of a remedy includes activities necessary to maintain the effectiveness of the remedial action. The provision assumes that O&M has the potential to be costly to States. Attention to and awareness of O&M portions of a remedial alternative are needed, ideally at the beginning of the remedy selection phase. The transition of a remedial action from RA phase to the O&M phase generally occurs when it has been determined that the remedy is O&F. The definition of O&M differs slightly between the appropriate rules and is cross-referenced within the rules. This is significant because States are generally responsible for assuring the O&M. In addition, pursuant to 40 CFR § 300.510(c)(1), the State also assures that any institutional controls implemented as part of an RA under the SSC are in place, reliable, and will remain in place. Section 104(3)(A) of CERCLA requires that O&M of implemented remedial actions will remain in effect for the expected life of such actions.

Several factors will impact the total project costs and the associated State share:

- How O&M is defined;
- When the O&M begins; and
- When the RA is deemed complete.

The RA project period is an important consideration when negotiating with EPA. As further discussed below, States should insist on adequate time to complete the RA and ensure that the workplan and timeframe provide a truly operational and functional remedy with adequate equipment life to complete remedial action prior to beginning the O&M phase. EPA has published guidance regarding O&M in the Superfund Program: *Operation and Maintenance in the Superfund Program*, OSWER 9200.1-37FS, EPA 540-F-01-004, May 2001.

O&M begins at the completion of the RA when the remedy becomes operational and functional, or one year after construction is complete. If the O&F period is less than one year conduct a joint inspection to review the RA and determine that it is operational and functional as defined in the NCP. This may be a subjective determination, open for differing interpretations, or it may be a provision that falls twelve months after construction is complete. States will likely want to better define conditions and procedures for acceptance that are more proscriptive than “joint inspection”. Model SSC Provision 23 states that EPA and States are encouraged to include remedy-specific inspection factors related to the functioning and performance of the remedy. After the RA is operational and functional, the State must agree to perform future operation and maintenance of the remedial actions for their expected operational life. EPA does not provide funding for O&M past the RA. A comprehensive understanding of the RA and associated facilities—such as the duration of O&M; the condition of the treatment equipment at the time the State assumes control; and the point at which the State and EPA agree the RA is operational and functional - can help reduce costs for the State.

Operational and Functional (def.). A remedy becomes “operational and functional” either one year after construction is complete, or when the remedy is determined concurrently by EPA and the state to be functioning properly and is performing as designed, whichever is earlier. EPA may grant extensions to the one-year period, as appropriate. [40 CFR § 300.435 (f) (2)].

O&F is defined under the O&M provisions of the NCP. It is not defined in 40 CFR § 35, Subpart O. The NCP language allows for a “concurrent” decision by EPA and the State or one year, whichever occurs first. A significant difference in the language is that 40 CFR §35.6805(i), pertaining to SSCs, says that the State’s responsibility for O&M generally begins **when EPA**

determines the remedy is operational and functional or one-year after construction completion. This is unique to the SSCs. This definition is not found in the CA section of Subpart O, §35.6105(b)(1), nor is it found in either Subpart E, Hazardous Substance Response [40 CFR § 300.435] or Subpart F, State Involvement [40 CFR § 300.510] of the NCP.

With regard to establishing O&M and O&F, the NCP states the State and EPA shall consult on a plan for O&M prior to the initiation of a RA. And: After a joint EPA/State inspection of the implemented Fund-financed RA under § [300.515\(g\)](#), EPA may share, for any extension period established in § [300.435\(f\)\(2\)](#), in the cost of the operation of the remedy to ensure that the remedy is O&F. In the case of restoration of ground or surface water, EPA shall share in the cost of the State's operation of ground- or surface-water restoration remedial actions as specified in § [300.435\(f\)\(3\)](#).

Clearly the NCP and the SSC section of Subpart O both refer to the remedy being operational and functional as a condition for the beginning of the O&M phase. In most SSCs, the responsibility for O&M is transferred to the State one-year after construction completion. There is also a provision, under certain conditions, for surface and groundwater restoration remedial actions (for up to ten years) to be considered part of the RA. These costs are LTRAs and therefore require cost-share, allowing the Fund to cover up to 90% of the LTRA operating costs. Early involvement and consultation on an O&M plan should begin prior to the initiation of the RA as required in the NCP, 40 CFR § 300.510.

Section 7 further discusses: a) the timing of the project period; b) RA activities completed before determining that the remedy is operational and functional; and c) establishing clear acceptance criteria for the RA. All of these considerations could have a significant impact on the total site remedy costs for the State. Section 7 provides additional information regarding the importance of O&M and the O&F decision point of the project.

4.2 CERCLA Assurance: 20-year waste capacity

This is a requirement to assure that waste management capacity is in place either in the State or through a regional agreement. In accordance with CERCLA section 104(c)(9), *EPA shall not provide any remedial action pursuant to CERCLA section 104 until the State in which the release occurs enters into a cooperative agreement or Superfund State contract with EPA providing assurances deemed adequate by EPA that the State will assure the availability of hazardous waste treatment or disposal facilities which:*

(i) Have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the state during the 20-year period following the date of such cooperative agreement or Superfund state contract and to be destroyed, treated, or disposed;

- (ii) Are within the state, or outside the state in accordance with an interstate agreement or regional agreement or authority;*
- (iii) Are acceptable to EPA; and*
- (iv) Are in compliance with the requirements of Subtitle C of the Solid Waste Disposal Act [40 CFR § 300.510 (e)(1)].*

EPA's 2014 National Capacity Assessment shows that there is adequate national capacity for the treatment and disposal of hazardous waste through calendar year 2039. This EPA compiled assessment included 2011 Biennial Report data provided by the States.

4.3 CERCLA Assurance: Off-site Storage, Treatment, or Disposal

The intent of this requirement is to ensure that the specific requirements for wastes derived from this site can be met at an existing facility, and that the treatment or disposal facilities are in compliance with applicable laws. If EPA a) has contracted for off-site disposal or treatment, and b) has required respondents to provide adequate capacity for waste disposal that (at a minimum) meets the requirements of Subtitle C of the Solid Waste Disposal Act, then c) the State's acceptance of EPA's selection would constitute this assurance according to new SSC contract terms proposed by EPA.

If more than 10 yards of waste must be transferred out-of-State, the State must provide written notification of out-of-State or out-of-an-Indian-Tribal-area-of-Indian-country shipments in accordance with 40 CFR 35.6120.

The notification must be in writing and must provide the following information, where available:

- (1) The name and location of the facility to which the CERCLA waste is to be shipped;
- (2) The type and quantity of CERCLA waste to be shipped;
- (3) The expected schedule for the shipments of the CERCLA waste; and
- (4) The method of transportation of the CERCLA waste.

Notification must be provided to:

- (1) The appropriate State environmental official for the State in which the waste management facility is located; and/or
- (2) The appropriate Indian Tribal official who has jurisdictional authority in the area where the waste management facility is located; and
- (3) The EPA Award Official.

4.4 Real Property Acquisition

Real property (def.). Land, including land improvements, structures, and appurtenances thereto, excluding movable machinery and equipment [40 CFR § 35.6015 (a)]

EPA may acquire an interest in real estate in order to conduct a remedial action only if the State in which the interest to be acquired is located provides assurances, through a contract, cooperative agreement or otherwise, that the State will accept transfer of the interest upon completion of the remedial action. For purposes of this paragraph, “completion of the remedial action” is the point at which operation and maintenance (O&M) measures would be initiated pursuant to § [300.435\(f\)](#) [40 CFR § 300.510 (f)].

Although the State may accept an interest in the property earlier, it must accept an interest in the property at the completion of the RA phase. This is to keep responsibility for the site at a more local level and avoid perpetual federal interest in the property.

4.5 Provision of State Cost Share

4.5.1 Determination of Cost Share

Allowable costs (def.). Those project costs that are: Eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles; **and approved by EPA** in the Cooperative Agreement and/or Superfund State Contract [40 CFR § 35.6015 (a)] [emphasis added].

A clearly-defined written understanding of the work and cost share provisions is needed to ensure that States get full credit for work performed and money spent. Additionally, if States want additional work performed as part of site remediation, this work needs to be defined in the SSC/CA but the State must be aware that the EPA can only implement actions specified in the ROD. Section 4 provides a full discussion on costs, payments, and required approvals and documentations.

Cost Share (def.). The portion of allowable project costs that a recipient contributes toward completing its project (i.e., non-Federal share, matching share) [40 CFR § 35.6015 (a)].

Pursuant to §§104(c)(3) and 104(d)(1) of CERCLA, as amended, EPA must determine whether the State or political subdivision performed operations at the site at the time of release in order to determine the State’s cost share. The State share is either:

- 10% of the allowable costs, where a facility, whether privately or publicly owned, was not operated by the State or political subdivision thereof, either directly or through a

contractual relationship or otherwise, at the time of any disposal of hazardous substances at the facility,

or

- 50% percent or more of the allowable costs, where a facility was operated by a State or political subdivision either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances at the facility.

4.5.2 Cost Share Assurance

It should be noted that an SSC does **not** obligate EPA to provide funds. However, it does obligate a State to pay its share of funds expended. Payments may be lump-sum or incremental but must be defined in a payment schedule. The cost share obligation may be paid in three ways:

- Cash;
- Credit; and/or
- In-kind or services.

Each of these mechanisms is discussed below in Section 5, including EPA approvals and record-keeping requirements needed for EPA recognition and acceptance of a State's share. State agencies "assuring" payment is often problematic and possibly in violation of State law. Most States require legislative appropriation for funding. EPA has provided various forms of contract language in regional SSCs to address this issue under the Provision for State Cost Share section. The 2015 Model Provisions include updated language on cost share assurances. States are cautioned to make sure that the language can offer sufficient protection to allow for the State legislative process. Additionally, the timing of the billing and payment cycles may be optimized to reflect the State's budgeting and appropriation schedule—a consideration when establishing the payment schedule.

5.0 Cost Sharing Options

As discussed in Section 4.5.2, there are multiple ways for States to contribute their cost share. The most common are cash, credit, and in-kind or services. However, there are other scenarios to consider, such as special account funds and over-payments.

5.1 Cash

Cash payments are made by States in either lump sum or over the life of the remedial action. Cash is the most common way that States pay their SSC obligations. Lump sum payments may be paid up front when the SSC is signed, or EPA will follow the invoice frequency terms in the SSC and send invoices based on the amount of money spent by EPA during the predefined time periods. States make cash payment when the EPA regional office sends the State the invoice for the required amount. It is important that the State keep all invoices and proof of payments in the site's SSC file, as this will be required during financial reconciliations.

5.2 Credit

Credits are site-specific expenditures that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-federal funds for remedial action. These actions must be consistent with the permanent remedy at the site. Credits are direct costs that have billed or time charges to document how much money was spent by the State. Examples include the cost of materials acquired or purchased; travel expenses incurred to carry out the activity; or compensation of employees' time specifically related to the remedial action.

It is important to document in the SSC or SSC amendment those credit(s) that are pre-approved by EPA. This is important in several ways, foremost to document that both parties agree that the State expenditures can be used as credit for the SSC. It also establishes what documentation is required, and the frequency with which it is submitted.

A State may be asked to include the following in a credit documentation package; however, check with the EPA Region up front to understand what is required:

- **Transmittal letter.**
- **The SSC amendment or other document that supports EPA authorizing the State to perform the described remedial action with State funds for a credit.**
- **Cost Summary Index** that lists each cost category:
 - Examples: payroll, travel, contracts, etc. with a total for each category and a grand total at the bottom.
- **Summary for each category of costs with line details:**
 - For payroll: employee name, hours per pay period and costs, then total for each employee.
 - For travel: employee name and trip.
- **Source Documents:**
 - For payroll: document supporting hours charged by pay period, signed or time entered by employee and approved by supervisor.
 - For travel: authorization, voucher and receipts, payment.
- **Documents that support the remedial action completed for the costs documented:**
 - Examples: progress reports, contract scope of work, etc.
 - Description of the specific functions/work performed.
- **Certification** (signed by the State's fiscal manager or financial director) that the credit amount claimed has not been previously reimbursed or been used for matching purposes under any other federal program or grant.
- **Other documents as appropriate** to support the authorized State credit.

When drafting the initial SSC, it is essential that States insist on the addition of language stating that credits can be used to reduce the State's cost share toward a remedial action. The 2015

Model Provisions include updated language to help make this easier. The details on what exactly will be approved can be added later in an amendment.

As with credit, it is important that States contact their EPA region to learn which EPA staff member should receive and review these packages. Also, States should obtain and keep written confirmation when credit packages are submitted, since they will be needed during financial reconciliation.

5.3 In-kind or Services

“In-kind” or “services” are the value of a non-cash contribution to meet a State’s cost sharing requirements. Such contributions “may consist of charges for real property and equipment or the value of goods and services directly benefitting the CERCLA-funded project” (40 CFR § 35.6015(a)). The State will not have a bill to base the value on, but rather will need to estimate the value of the service or equipment. This category includes third-party donations, laboratory services, and equipment usage.

When drafting the initial SSC it is essential that States insist on the addition of language that says in-kind services are available to reduce the State’s cost share toward a RA. The 2015 Model Provisions include updated language on in-kind services. The details on what exactly will be approved can be added later in an amendment.

As with cash and credit, States should know the correct person at EPA to send the application’s cost documentation packages. As always, follow up with the EPA and get written confirmation of all “in-kind” packages submitted, since they will be needed during financial reconciliation.

5.3.1 Examples of In-kind Services

Goods or services provided by a State or political subdivision of the State in support of a CERCLA remedy could qualify as in-kind contributions and used to offset the State’s required 10% cost share of the remedy. Examples of goods and services that might qualify as in-kind contributions include a variety of things:

- Raw materials such as rock, clay, etc., used in liners or covers;
- Property provided by the State or political subdivision to support the remedy for the construction of needed facilities;
- Water rights owned by a State agency or political subdivision used for the extraction of groundwater or diversion of surface water to manage a contaminant plume;
- Monitoring and analytical services provided (and not paid for by the fund as part of the remedy); and even

- The value/cost of publicly owned treatment works (POTW) treatment and discharge of contaminated water that is part of the remedy.

States should look for opportunities for in-kind contributions early in the remedy evaluation and selection process in order to propose and incorporate those potential in-kind services as part of the remedy implementation. Partnerships with local governments for services such as POTW treatment and discharge of contaminated groundwater could (potentially) significantly reduce a State's remedial action cost share. Having local universities provide investigative or analytical services is another option that could potentially qualify as in-kind contributions.

Two examples of in-kind contributions that were successfully identified and accepted as a State's cost share include the following from Colorado (for the Central City/Clear Creek Superfund site):

- (1) The value of land purchased by the Colorado Department of Transportation to widen a road, with sufficient right-of-way to allow construction of critical remedy components such as a water treatment plant, piping, etc. The value of the land purchased for the right-of-way was allowed as an in-kind to offset the State's cost share.
- (2) Materials excavated during the road construction were also suitable for use in the capping of mine waste piles. These raw materials have value that was documented by Colorado resulting in EPA approval as an in-kind contribution credit against the State's remedial action cost share.

5.4 Special Account Funds

If EPA is using special account money to fund the cleanup, no cost share or assurances are required, but it is recommended that an SSC is put into place if it is uncertain that the special account funding can cover the full cost of cleanup. An example of this would be if EPA and the State entered into a cash settlement with the responsible party and recovered a set amount of money to go towards the cleanup. In this case, the SSC should address what will happen if or when the special account money is exhausted. These details should be added to the section that discusses payment terms and the cost estimate for the work. The SSC should also lay out the roles and responsibilities of both parties when federal and State funds are needed.

5.5 Overpayments

Overpayment or "overmatch" using cash gives the State the option to ask for the money to be returned, or the State may ask that overmatch be applied towards cost share at another site. If the State would like the money returned, they would need to send a request letter to their EPA region. This is typically accomplished after the final financial reconciliation has been performed on the SSC.

Excess credit earned at one site may be used to meet the cost share at another site. It is important to note that excess credit cannot be reimbursed to the State in the form of a cash reimbursement. Overmatch through “in-kind” cannot be transferred to another site and cannot be reimbursed. Since credits are transferable, they may be a better option in some cases.

Under CFR 35.6285(d), States may direct EPA to return the excess funds or use the overmatch at one site to meet the cost share obligations at another site. Movement of overmatch to another SSC must be documented through two amendments: one for the overmatched site and one for the site receiving the overmatch. Transfer of overmatch is typically accomplished after a financial reconciliation has been performed by EPA on the SSC.

6.0 Invoicing

6.1 Documentation

In order for States to process payment, proper documentation is required to meet each State’s specific requirements. States should work with their region to ensure that they provide proper and sufficient financial backup documentation. When entering into an SSC, each State should clearly specify the level of detail needed for the State to provide payment to the EPA, especially if there are State statutory requirements indicating how invoices can be paid. In addition, the State should also consider establishing a timeframe for EPA to provide the backup documentation and state that the required SSC timeframe does not begin until the State is satisfied with the invoice documentation. When reviewing cost documentation, ensure that the costs identified are all remedial action costs that are subject to State cost share. Follow up with EPA if any costs are not easily identifiable.

6.2 Timeframes

During ASTSWMO’s review of SSCs throughout the United States, the team found most SSCs have a specified timeframe for invoices. The timeframes are usually specified for when EPA should be sending invoices and when the States should proceed with payment. It is more common to have SSCs specifically identify the period when States should make payment, but less common to identify when EPA should invoice the States. Consistency is likely to be found regarding the period when the State required to make payment to the EPA.

In the case where the SSCs identify when the States must make payments, documents might specify “within sixty (60) days after receipt by the State following execution of this contract” (Commonwealth of Virginia). Another example is from the State of Washington where the SSC specifies that the State must receive invoices from the EPA by April 1st and has until September 30th to make payment, which is almost a six-month net pay. In other contracts, the SSCs provide language that specifies a certain percentage of the costs be paid only after a milestone is completed. For example, the State of West Virginia has an SSC that specifies the State must pay

1% annually over the long-term remedial action term for a period of 10 years. Another example is the Commonwealth of Pennsylvania, where an executed SSC states that three percent of the total amount must be paid to the EPA after the completion of a milestone.

Another concern with SSC timeframes is looking at the amortization of costs throughout the lifecycle of the project. Certain States, such as New Jersey and Massachusetts, set up payment plans with the EPA that allow them to pay a certain dollar amount over a set number of years. This allows States to have some certainty of the annual amount they owe the EPA for budgeting purposes. In addition, this method reduces the amount that States may have to pay during the height of the remedial process. While States exercise their rights to amend the terms of payment to meet their individual financial needs, each SSC must clearly identify how invoices will be paid, in agreement with the federal government.

6.3 Budget Shortfall Concerns

Unlike the federal government, most States have a constitutional amendment that requires the State legislature to pass a balanced budget each year. Each State, based upon its current financial situation must make the difficult decision on what financial obligations it may or may not fund prior to each fiscal year. SSCs are required to be entered into before EPA expends funds to perform a remedial action. Therefore, the State must not only commit that they will fund 10% of remedial costs, but must also agree to fund the O&M of any long-term remedial action after a specified time frame. In some cases, this could be specifically defined, for example, 10 years. Due to the long periods between execution of the SSC and when the remedy goes into the O&M phase, the State's financial situation may have changed dramatically.

In addition to this uncertainty, the cost to perform the remedial action may have also increased dramatically due to unforeseen environmental conditions on the site. In certain historically executed SSCs, the States have put provisions in place that specify the State will fund the terms of the SSCs only if the funds are allocated by their legislative bodies. States have also gone a step further by adding specific language in a few SSCs that caps their financial responsibility at 100% of the budgeted amount. This prevents the State from having to seek additional funding sources from their legislators if EPA has cost overruns on the remedial actions. Periodic financial reviews described in the 2015 Model Provisions should help States and regions stay in touch about financial-related issues.

7.0 Transition to Operation and Maintenance

For groundwater and surface water restoration remedies, EPA continues to fund the remedy as a remedial action for up to ten years; this period is referred to as LTRA. Therefore, if the remedial action described in the SSC includes a ground or surface water restoration component, the SSC should clearly describe whether or not a LTRA is part of the remedy. If the LTRA is part of the

remedy, it is considered remedial action, and the State must share in the cost of the LTRA for a period of up to 10 years, or until cleanup levels are achieved, whichever comes first. EPA's fact sheet, *Transfer of Long-term Response Action (LTRA) Projects to States* (July 2003), provides guidance regarding the transfer process for LTRA sites.

Therefore, for groundwater and surface water restoration remedies, the LTRA should commence following the O&F determination, and the O&M period should commence following the completion of the LTRA. The State cost share ends with the completion of the LTRA, with O&M becoming the sole financial responsibility of the State. As a result, it is important that the groundwater and surface water remedial action objectives be defined clearly in the ROD and referenced in the SSC. Per the June 9, 2006, "*Policy on Recalculating the Long-Term Response Action (LTRA) Ten-Year Time Period*," in rare site-specific circumstances, EPA can request a recalculation of the LTRA time period.

It must be noted that all of the above is true only for groundwater and surface water restoration with the goal of return these resources to their beneficial use (i.e. drinking water). This is an important distinction since for other remedies, including groundwater and surface water containment action; O&M begins when the remedy is determined to be O&F. There is no LTRA period for such remedies.

In summary:

- States pay 10% (but sometimes 50% if they are a responsible party) of costs for the Remedial Action (RA) covered by the SSC.
- Long-Term Response Actions (LTRA) continue in RA once a remedy is determined to be O&F for groundwater and surface water restoration remedies for up to 10 years, until the remedy moves into the O&M phase.
- For containment/source control remedies, O&M begins when the remedy is determined to be O&F.
- States provide documentation to EPA of expenditures of certain costs toward the 10% cost share, and pays EPA any additional funds to achieve the 10% cost share.
- Once EPA transfers a remedy to a State for O&M, the State is required to pay all of the O&M costs.

7.1 Importance of Remedy Optimization before O&M Start

In many States, the larger, traditional CERCLA-type facilities or landfills have been or are being addressed. The remaining small-to-moderately sized remedies now moving through the system often have no PRPs, or have PRPs with an inability (or a relatively low ability) to pay. States may

increasingly look to the NPL to address these smaller, often orphaned sites that are most likely to be Fund-lead. At issue are the significant and growing concerns over the financial burden that States face within the next 10 to 20 years as these Fund-lead sites mature and increase in number.

EPA has implemented a remedy optimization program that can be leveraged throughout the remedial process to help ensure more effective and efficient remedies. For example, for groundwater or surface water restoration remedies, EPA Remedial Project Manager's (RPM) are encouraged to conduct remedy optimization activities early in the 10-year LTRA period. States should work with their assigned RPMs to ensure that this does happen to the greatest extent possible.

In addition, EPA has also released the *Groundwater Remedy Completion Strategy (GRCS)* guidance which encourages the development of a strategy for groundwater remedies to evaluate remedy performance and make decisions to help facilitate achievement of RAOs and associated cleanup levels. The guidance recommends that components of a remedy completion strategy be considered during the development of RODS, during RD/RA activities, and during the execution of O&M. While the GRCS document is well-written and should prove to be a valuable tool going forward, there are still a number of concerns and questions that could potentially be addressed in the LTRA or O&M sections of an SSC. Some examples of such issues that could potentially be negotiated through an SSC or SSC SOW amendment are:

1. Agreed upon plans to leverage remedy optimization and completion strategy concepts.
2. For sites where remedy optimization, five-year reviews, or other activities are conducted late in the LTRA process, and where significant remedy changes are necessary, steps to help the State ensure that proposed remedial changes are implemented and working well, before O&M is transferred to the State.
3. Some recourse for the States if the RO and/or GRCS tools are employed by EPA at the tail end of the LTRA period, or not employed at all, leaving the State to implement the recommendations, or make significant remedy revisions, during O&M.

Table 7-1. State Preparatory Tasks for Any RA Transfer

1. Ensure full understanding of the technical, performance, and O&M requirements
2. Knowledge transfer between U.S. EPA and the State
3. Appropriate training
4. Arrangements for property access
5. Updated O&M cost estimates
6. Administrative arrangements
(e.g., funding, internal staffing, contracts for external services)
7. Acquisition of project documents
(e.g., current as-builts, O&M Plan, O&M Manual, design documents, RA reports, monitoring results, site inspection reports, warranties, monitoring plan, sampling plans, performance evaluation plan)
8. Obtain or transfer permits and interagency agreements
9. Description of all required institutional controls (usually in O&M Plan or ICIAP)

7.2 Be Prepared for Remedy Transfer to State Operation and Maintenance Responsibility

Transfer preparations mark the State's transition from providing support to EPA, to its new role as the operator responsible for ongoing remedy O&M. Good preparation for transition ensures smooth transfer of remedy O&M from EPA to the State. This shift in responsibility requires both a change in mindset as well as different skill sets (e.g., contract management, budgeting, scheduling). Although some States keep the same project management team before and after transfer, other States transition the project to teams who specialize in O&M. For many sites, States may need to hire outside contractors to provide technical support or perform O&M.

The EPA and State Project Managers (SPM's) should establish an effective relationship that allows them to work as partners to ensure a smooth transfer process. This requires consistent communication, such as a standing meeting time to discuss transfer-related items. It is important to acknowledge the different perspectives that State and EPA Project Managers have at the time of transfer. During this time, EPA is winding down its involvement, whereas the State is ramping up its efforts. Likewise, EPA's expenditures are waning, while the State's costs are increasing. Collectively, the goal should be to have the remedy transfer in the best condition possible to minimize the items pending at transfer, and to ensure that the State has what it needs to operate the RA as intended.

The level of effort needed to accept transfer of an RA will depend on the project size, the type of O&M activities involved, and the administrative complexity. For example, preparations for accepting transfer of a remedy that requires periodic site inspections and cap maintenance will be much less intensive than accepting transfer of a remedy with an active groundwater pump-and-treat system. Some tasks are similar for any project transfer. Transfer preparations for projects with active remedies are much more involved, and may take multiple years. EPA's July 2003 Transfer of Long-Term Response Action (LTRA) Projects to States factsheet includes a checklist of considerations that can be followed over the life of a project to minimize LTRA transfer issues. The SPM may want to expand this LTRA checklist into a project-specific master schedule that captures the various tasks leading up to transfer and that the SPM updates throughout the transfer preparations. This master schedule can be an effective tool for ensuring that State and EPA project managers understand what each party will provide, their respective responsibilities, and the project timelines. Compiling a project-specific schedule also helps identify critical path items and issues associated with the transfer. If issues are identified, it is prudent to have them resolved at least six months prior to transfer so that the State's project team can focus on ensuring continuous operations after the transfer.

At the time of transfer, EPA and the State may choose to enter into a transfer agreement that documents the details of the transfer of Fund-lead LTRA responsibilities to State-lead O&M. Although the transfer agreement is not an enforceable document, its purpose is to effect an orderly transfer of responsibilities.

8.0 Institutional Controls

Each State has different IC regulations, statutes, and guidance. Because of the variations in the way each State files and maintains institutional controls, it is important to add a discussion of the role of ICs at a site to relevant sections of the SSC. These sections may be included in the SOW, the Project Schedule, and as part of the CERCLA assurances. ICs should also be discussed in the O&M Plan, or the ICIAP.

ICs in the SOW or ICIAP should be as specific to the site as possible, including: a) listing State statutes and rules; b) discussing how the ICs will be implemented at the site; and c) describing what instruments, objectives, responsible entities, estimated costs, and performance standards may be used at the site. Check EPA's ICIAP 2012 guidance for a complete list of recommended components of an ICIAP. The Project Schedule should include milestones for implementing the ICs. If the State will need information or documentation from EPA to place the ICs, this stipulation should also be listed in the SSC SOW.

It is recommended that IC language be added to the O&M CERCLA assurance section of the SSC if institutional controls must remain in effect after the RA is completed, and if ICs are used to help ensure the long-term requirements for O&M (CFR 35.6820).

9.0 Amendments

40 CFR 35.6805(k)(1) requires formal amendments be made to the SSC when alterations to CERCLA-funded activities impact the State's assurances required by the NCP and CERCLA as amended. Formal amendments are required for cost increases that would result in an increase of the State's cost share. Cost increases paid out of Special Account funds may not require a formal amendment since State match is not required on Special Account funds. Some States interpret this to mean that they do not owe any additional match—either through cash, credit or in-kind—for any costs not approved in a formal amendment.

Formal amendments may also be required when significant deviations from the approved SOW occur. Significant deviations may include changes to the schedule of work to be completed at the site due to such issues as contractor negotiations or availability or unforeseen site conditions. Significant deviations resulting in schedule changes may also occur due to inadequate or incomplete delineation of contamination during the RI/FS, or design changes to address recently discovered issues. Deviation of the remedy from the approved ROD would also require a formal amendment to revise the SOW. A very significant ROD amendment could result in an entire SSC to be vacated and a new SSC be negotiated.

Important issues that the SPM should consider when negotiating an SSC (to minimize the need for formal amendments to the SSC) would include ensuring the RI/FS is adequate to completely define the contamination. The SPM should also work closely with the EPA RPM to create a detailed SOW that clearly defines the scope of work to be completed and eliminates scope creep. The SPM should closely follow an SSC amendment through both the State and the federal concurrence process to ensure that it does not get lost or delayed unnecessarily. Once approved, the formal amendment should be attached to the original SSC and the entire document distributed to all parties involved.

10.0 Reconciliation

40 CFR 35.6805(k) states that the SSC shall remain in effect until a final reconciliation of all response costs ensures that both EPA and the State have satisfied the cost share provision in Section 104 of CERCLA, as amended. This final reconciliation includes a financial settlement of all change orders, claims, matches, and reimbursements. If the reconciliation determines that a change to the statement of work resulting in a change to the State's obligations has occurred, then the State and EPA should begin the process of seeking a formal amendment to the SSC. If the reconciliation determines that the State has overpaid the required match, either through

cash payments or credits, the State may direct EPA to return the cash overpayment or apply the cash or credit overpayment to another site.

The reconciliation process may be completed at any time during the life of the SSC to verify the work completed and the financial commitment of the State. The State should verify that the EPA has received and applied all of the match payments. The State should also verify that all approved credits and in-kinds have been applied. If there is a discrepancy on the approval of credits and in-kinds, the State should work with the EPA RPM to determine the reason the match was not approved and work to revise the submission to gain approval. States should consider completing interim reconciliations to keep track of the financial side of the project and ensure that no surprises are waiting for the State when the bill comes due. Interim reconciliations will also increase coordination between the SPM and the RPM and allow for amending the SSC as changes occur.

During the reconciliation process, the State may want to request copies of all contractor/subcontractor invoices to support EPA invoices and vouchers. When reviewing financial documents, the State may want to verify that the contractor/subcontractor invoices are for the correct operable unit. The State may also want to verify the use of any Special Account money by the EPA at the site.

11.0 Considerations for Managing SSCs

This section provides suggestions for best practices when managing SSCs.

11.1 Project Management

The SPM must be an active participant with access to all pertinent information that relates to the SSC and its amendments, which includes relevant documents and financial information.

- **Have ready-access to and familiarity with key documents (SSCs, all amendments, relevant correspondence):** The SPM should be familiar with the State’s responsibilities listed in the SSC, as well as EPA’s. The SPM should also be familiar with the selected remedy and the documents regarding the selected remedy.
- **Understand project costs:** The SPM should be familiar with the financial arrangement stated in the SSC. The SPM should have a plan for budgeting when costs come in and payments go out (e.g., “the same amount for the next five years paid annually on September 30.”). This plan is critical if matching funds are involved. SPM should also make sure that the remedy is complete and/or operational and functional before the State takes over O&M.
- **Establish internal administrative requirements:** The SPM is responsible for knowing what is required of the State in the SSC and how to handle situations that could arise and change the SSC.

- **Funding (projections, arrangements):** Each State should determine a feasible way to provide funding through the SSC. Some may use matching funds as a down payment or choose to be invoiced annually. Contingency plans could also be developed in the event that projects run longer than expected or costs more than expected.
- **SSC/amendment execution:** Each State should consistently execute their SSCs and amendments to avoid confusion.
- **Invoice review (including backup documentation):** In Provision 21 of the 2015 SSC model provisions, it states that at the State's request, and to the extent allowed by federal law, EPA shall make available to the State any information in its possession concerning the Site. This includes contractor compliance reports and financial transactions. Invoice review is important to make sure the product that is promised is delivered.

11.2 Recordkeeping

It is critical to keep good financial records regarding the costs involved in the SSC. It is important for the SPM to know where they are in the process and to make sure the costs and payments match up. Establishing payment schedules might be a good way to help with this.

- **Match documentation:** It is important to have clear documentation of matching funds. Document what matches are made and exactly how much is matched from other funds.
 - **Written plan:** This plan should track all incoming and outgoing funds in a way that is easy to understand.
 - **Tracking matching funds (expended, remaining):** Matching funds should be tracked to determine what is being spent as well as what is left to spend.
- **Reconciliation/audits:** The PM should conduct internal audits to determine if any financial discrepancies exist.
- **State match credit:** Keep documentation of agreements from EPA on what is approved to be used as credit; keep copies of all credit packages submitted to EPA; and keep copies of all approval letters from EPA on each credit package. These records will be needed during final reconciliation.
- **In-kind services:** Each State should ask for approval of in-kind services before they are assumed to be acceptable and get the agreement in writing from EPA beforehand. Keep copies of all in-kind services agreements from EPA, the packages submitted to EPA and the approval letters from EPA on each in-kind service package. These records will be needed during final reconciliation.

11.3 Collaboration with EPA

The State and EPA should work to maintain a good working relationship and partnership. This will make management of SSCs easier and keep the lines of communication open.

- **Consistent communication:** The State should always be consistent when giving and asking for information to EPA.
- **Drafting amendments:** The State and EPA should work together to draft amendments to the SSC to ensure that all parties agree and are on the same page. These amendments should be consistent with the original SSC.
- **Updating scope of work and cost estimates:** The State and EPA should work together to determine if the scope of work and cost estimates have changed or need to change.
- **Tracking expenditures:** The State and EPA should make sure that their costs match up together so that errors do not occur. They should be consistent in how they track them to make the process easier.
- **Changes in EPA guidance or policy:** EPA should notify the State of any changes in their policy or guidance that could affect activities at the site or the SSC.

12.0 Conclusion

SSC's are critical because EPA cannot expend funds without State match assurance. They also provide the States with the strongest leverage to get their needs met. States should use the model SSC provisions and work with EPA to modify when appropriate to meet their State's unique needs and special conditions of each site. States should make it a priority to maintain excellent records of SSC documents, SOW's, invoices, payments, credit or in-kind services documentation, and amendments. This documentation will be essential during the SSC's final financial reconciliation.

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⁵ This guidance will be superseded when the Guidance for Management of Remedies in Post Construction is issued in FY2016.

⁶ This guidance will be superseded when the Guidance for Management of Remedies in Post Construction is issued in FY2016.

⁷ This guidance will be superseded when the Guidance for Management of Remedies in Post Construction is issued in FY2016.