

UPDATED GUIDE



Coordination of Federal Removal Actions with State Remedial Activities



Removal Action Focus Group



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Association of State and Territorial

ASTSWMO

Solid Waste Management Officials

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A. Introduction

In November 2001 the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Removal Action Focus Group (herein referenced as “the Focus Group”) developed this guide, which may be used by State Cleanup Managers and Environmental Protection Agency (EPA) Removal Managers to facilitate coordination of EPA Time Critical Removal Actions (TCRAs) with long-term State remedial responsibilities and project transition from federal to State agencies. Since that time, State programs have progressed, and the Focus Group, in consultation with EPA, determined that it would be appropriate to evaluate the current status of the relationship between the States and EPA during the transition of removal sites to State jurisdiction. Members of the Focus Group gathered information from the States about the topics listed in Attachment A. Forty States submitted information for this report, and summaries of all State responses are included by Region in Attachment B. Some of the primary topics for this update included: current status of the State/EPA relationship and any changes since 2001; the impact of the Brownfields law on the transition of removal sites to State remedial programs; property reuse considerations; and the role of other federal agencies (non-EPA). The guide was then updated to incorporate the new information. The Focus Group still strongly believes that with appropriate communication and coordination, it is possible to achieve federal removal objectives and provide for an orderly transition to a State remedial program for long-term response activities. For purposes of this document, “removal” refers to federal removal activities conducted under authority of the National Contingency Plan (NCP), and “remedial” activities refer to State cleanup activities conducted under State authorities.

This guide identifies and describes preparedness planning issues which should be addressed by EPA Removal Managers and State Remedial Managers in advance of, during, and subsequent to, time critical hazardous substance responses in order to achieve mutual acceptance of cleanup decisions and smoother transitions between time critical removal and long term remedial activities. The guide identifies elements to be addressed, depending upon State and Regional needs. Addressing elements in the guide may serve as a basis for a two-party agreement to facilitate a working relationship for removal–remedial coordination. It is noted that depending upon the situation, the removal–remedial transfer may occur in either direction.

Elements of this coordination guide may be implemented by the State and EPA Region in whatever manner is effective, consistent and efficient, including the use of site-specific agreements, State/Region program wide agreements, or by developing informal coordination procedures. Since time is often of the essence, several model and example site-specific agreements are included as Attachments C through J. The original guide was developed with the input of several EPA Regional Removal Managers and EPA Headquarters’ staff. ASTSWMO and EPA agreed during the development of this guide that communication and coordination are important to ensure the successful transition of a project from removal to long-term remedial action in a manner considerate of long-term hazardous response and cleanup requirements.

Finally, readers should view this document as a collected summary of State experiences in handling site transitions from removal action to remediation, and not consider it as ASTSWMO policy or position on the process. The intent of this document is to share the experiences and successes of State program managers with this process, so that the readers can select some of these practical solutions in addressing similar situations.

B. 2007 Research Highlights

- Overall, the responses received from States indicate that good communication between EPA and the State results in better coordination of removal actions. Written agreements and regular meetings between the State and EPA help facilitate good coordination and cooperation. Several States have entered in written agreements with EPA since 2001. Good relationships among the EPA on-scene coordinators (OSCs) and State staff are also important for ensuring a smooth transition to a State remedial program.
- The majority of States do not provide direct or a formal cost share for TCRAs. Some States provide some level of cost share or in-kind services to EPA during the removal action. The available resources and level of support varies among the States.
- States may have limited resources for post removal activities, particularly if there is no responsible party.. This includes tracking of Institutional Controls (ICs)/Post Removal Site Controls (PRSCs) at removal sites. (Note the EPA Removal Program refers to required actions at the end of a removal as PRSCs. These could include legal instruments, engineering controls and/or other maintenance activities that States commonly refer to as ICs. The terms ICs and PRSCs are used in conjunction with one another throughout this document.)
- States indicated that TCRAs are still an important component of addressing contaminated sites and expressed support for continued maintenance of federal funding provided by EPA. Due to limited State resources, States indicated that EPA funding is critical for timely responses to high-risk sites.
- Most TCRAs are conducted at non-NPL sites and the majority of sites transition to State programs for long term remedial activities.
- Most States work closely with EPA Removals Program from setting priorities to various forms of assistance during the planning and implementation of TCRAs. Most States meet regularly with EPA to review projects and priorities. A few States reported no or limited involvement with EPA's Removals Program.
- Though not common among all States, some States are reporting difficulties in working with other federal agencies that are performing removal actions on their

own properties using authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

- There were a wide range of responses with respect to information transmitted from EPA to the States as the site transitions from the completion of the removal action to long term remedial activities.
- The majority of States routinely provide ARARs to EPA in a timely manner.

C. EPA Statement of Objectives and Responsibilities

EPA's Removal Program is responsible, under federal law, for evaluating releases and threats of releases of hazardous substances and conducting removal response activities for sites that present an imminent or substantial danger to the public or the environment. In performing response actions, EPA must follow the requirements of the NCP, including the consideration of State Applicable or Relevant and Appropriate Requirements (ARARs) when appropriate for a specific action as described in Section L of this guide. To the extent practicable, removals should contribute to the efficient performance of any long-term remedial action with respect to the release.

D. State Statement of Objectives and Responsibilities

States may have statutory authority and responsibilities for the containment, cleanup, and safe disposal of hazardous substance contamination when it threatens public health or the environment. States may have removal and response authorities under State statutes and long-term remedial responsibility for sites which are not included on the National Priorities List (NPL), or may, under agreement with EPA, be responsible for addressing NPL sites within their State boundaries. States are responsible for identifying and providing ARARs to EPA in a timely manner.

E. Notification

Removal Actions are conducted either under the federal CERCLA or under State authority. Section 300.525 of the NCP requires consultation with the States, and Section 300.320(b)(3)(iv) requires notification of an action. The EPA's Regional Office should provide notification to the State point of contact identified in Section Q (below) for any removal actions they are conducting or overseeing within the State. Natural Resource Trustees should also be notified when appropriate. This notification should occur as early as possible in the planning process for a removal action and may be simultaneous with the commencement of activities for a removal action. Removal activities conducted under State authority are not routinely coordinated with the EPA Regional Office, however if the EPA Regional Office identifies specific types of State removal activities that EPA has an interest in, then the State should share information on these cases.

F. Communication with Potentially Responsible Parties (PRPs)

It is critical that the State and EPA work to ensure that any PRPs understand the intent of a removal action and that additional work may be required if the removal action does not attain State cleanup requirements. Typically, a removal action is an interim measure within the context of an overall final site remediation. If the removal action is not intended to attain State and federal cleanup standards, the PRP should be informed that additional work may be required. The intent of the removal action may impact a PRP's future liability for work remaining to be conducted. The PRPs should be informed that the removal is either:

1. An interim measure intended to stabilize the site or to mitigate conditions which present a hazard to human health or the environment and that additional remedial actions are necessary at the site.
2. An action that is intended to meet both federal and State remediation requirements for all affected media (a final remedial measure), and no additional remedial actions are anticipated for the site.

The State and EPA should coordinate to ensure PRPs understand all cleanup standards and urge them to address both State and federal requirements to the extent practicable, where a single comprehensive action will be more efficient. As an example, a comprehensive soil removal that complies with both EPA removal action levels and State standards should be significantly more cost effective and efficient than removing soil in two phases (the first phase as part of an EPA lead removal action and then remobilizing for a second phase to remove additional soil to meet State standards). A clear statement of the "remedial intent" for the removal action will also help avoid confusion between regulatory agencies when future site evaluations are made identifying the need for additional remedial work. The "remedial intent" of the removal action should be forwarded to State and local contact persons. The State can use this opportunity to inform the PRP of State cleanup criteria. When a PRP is identified, this document can be provided or may be discovered during routine file review by the PRP.

G. Site Access

In an emergency response situation, site access coordination should not be an issue if the property owner grants access. In other situations, site access issues can be coordinated between removal and remedial programs. As with most types of site access, voluntary entry is the most desired and easiest to accomplish. In situations where access is not voluntarily granted, efforts should be coordinated to gain site access and facilitate information gathering for EPA and the State.

H. Encourage Integrated Removal-Remedial Assessments

When appropriate, integrating removal and remedial assessments should be conducted to provide savings in time and resources to reach the long-term management objectives for the site. Further, the differences in removal and remedial site data objectives of each program present inherent challenges to successful integrated assessments. Some of the program differences that require reconciliation during an integrated assessment include: quality assurance/quality control efforts, post removal verification samples, horizontal and vertical extent of the release, hydrogeologic site data, and community relation issues.

Planning and coordination between State and EPA Removal and Remedial Managers are key elements in determining when an integrated assessment is appropriate, and are also crucial to reconciling the differences in each program's site data objectives. With proper planning and coordination in the site discovery stage, an integrated site evaluation process can satisfy the data requirements of the removal and remedial programs and gather the type of site information that will assist local, State and federal agencies in developing long-term site remedial and reuse options.

When these differences in States and federal program objectives are addressed with early planning, coordination and cooperation, the outcome is savings in time and resources. When the program differences are not addressed in the early stages, the outcome can be more costly in time and resources.

Therefore, prior to initiating an integrated assessment, State and federal removal and remedial managers should identify and commit to the planning, coordination and agreements needed to make the process effective. In addition to the process, managers should consider the site selected for an integrated assessment to be one in which an integrated assessment will expedite an early remedy and/or site reuse.

The results of the integrated assessment should serve as a basis for consultation between EPA Removal and Site Assessment Managers, and State Remedial Managers to determine what steps need to be taken and by whom.

A potentially important aspect of an integrated removal-remedial assessment is the consideration of PRSCs. This includes the operation and maintenance of engineering controls and the implementation and monitoring of institutional controls. Discussion of PRSCs and future property reuse scenarios should also take place early. (See Section N below for additional discussion of ICs/PRSCs and property reuse.)

I. Community Expectations and Understanding

The public may not be able to distinguish between State and federal lead agencies and activities at a site. Community involvement activities must be coordinated. These activities can include holding meetings and issuing press releases; responding to public inquiries; and maintaining local information repositories. State awareness of removal actions being planned and conducted by EPA will help State staff respond to inquiries by public stakeholders. It is necessary to determine whether there will be a single point of contact or if community involvement responsibilities for removal and remedial activities will be shared. The point of contact for each agency should be identified to the public.

Information about the objectives, expected outcomes, and limitations of each agency's activities must be accurately communicated and consistent. Each agency needs to know what the other agency will be communicating in advance. Agencies should be informed of any technical assistance or environmental justice grants that have or may be awarded and to whom they have been or may be awarded.

J. Liability Assurances

There is a broad array of tools (e.g., comfort letters, prospective purchaser agreements and various State mechanisms) that seek to encourage the cleanup and reuse of contaminated properties by providing assurance relative to environmental liability. Many of the mechanisms implemented by States and EPA often apply to remedial actions. In addition, EPA does have the ability to negotiate bona fide prospective purchaser (BFPP) agreements at removal action sites. An example of such a BFPP that was recently adopted at a site in Oregon is included as Attachment K. The State and EPA should keep each other informed of the use of these tools to ensure that prospective purchasers will have a clear understanding of all cleanup requirements that may apply to the property.

K. Brownfields Coordination

Contaminated properties, which meet removal criteria, and have redevelopment potential, may need to coordinate Brownfield and Removal Action activities. Coordination of these activities will provide a smooth transition from a federal removal program action to a State cleanup program that will place the property into a useful environmental condition. The ultimate goals are to: (1) eliminate the threat to human health and the environment, and (2) take steps to assist public or private parties in putting land back into productive use. In many instances a removal action will provide significant incentives for Brownfield redevelopment projects to move forward.

Section 211, Subtitle A, of the Brownfield Small Business Liability Relief and Brownfields Revitalization Act states "a facility that is the subject of a planned or ongoing removal action" is not eligible for Brownfield Funding. Brownfield funding

may still be a possible funding source providing that the removal action has been completed. In order to determine if the removal action has been completed, a final document should be sent to the State that marks the end of federal involvement. This document can be in the form of a final Pollution Report (POLREP), or other final action report. State involvement before and during the removal action will monitor the closeout of the removal action and provide a smooth transition of the site from a federal removal program into a State program for either additional assessment or cleanup activities (see Section O). For a summary of state responses to questions on transition to Brownfields or other State programs, refer to Attachment L.

L. Role of State Cleanup Criteria For Removal Decision-Making

The NCP allows for States to identify and provide any potential State ARARs in a timely manner to ensure that they are considered during the removal process. While CERCLA does not require that time critical removal actions meet State ARARs, it is in the best interest of both parties that State cleanup criteria be achieved if it results in site closure or facilitates cost effective, efficient, or more timely cleanup completions. It is critical that both agencies ensure that PRPs understand their role in performing additional work at the site if State cleanup criteria are not attained during the removal. State site cleanup requirements will vary, and depending upon circumstances, State Health Departments and Natural Resource Trustees should be consulted as they may have information that will help EPA establish cleanup requirements.

M. Milestone Briefings

The goal of having milestone briefings is to keep all of the agencies and parties informed about the status of the project and to allow for adjusting the project activities based on information developed after the project has started. If time is spent before the project begins, to identify the significant project milestones and what information needs to be presented in the briefings, then the amount of time spent on milestone briefings will be reduced. The format and frequency of the briefings (meetings, conference calls, memoranda, site visits, e-mails, etc.) should also be determined and may vary depending on the type of milestone and the scope of the project. Meeting minutes should be taken and distributed. POLREPS should be prepared and shared between agencies and other interested parties. (Note: In the near future, EPA may change the term “POLREPS” to Situation Reports, or “SITREPS”.)

N. Transition Plan

The transition plan should describe how and when control of the project should be transferred to a different agency (e.g., federal to State). Establishing the criteria for transitioning the project and developing a schedule for the transition before the project begins will help reduce project down time and mobilization/demobilization costs. The

transition plan will also document what the goals are for the different phases of the project.

Final and protective remedies can in many cases be achieved if long term site control responsibilities are defined and implemented. The NCP [300.415(l)] indicates that to the extent practicable, provision for PRSCs following a removal action is encouraged to be made prior to the initiation of the removal action. Such post-removal site control includes actions necessary to ensure the effectiveness and integrity of the removal action and may be conducted by the State or local government or potentially responsible parties. EPA's "Policy on Management of Post-Removal Site Control" (OSWER 9360.2-02) indicates that before starting EPA should inform States of any decision or recommendation concerning the use of institutional controls following removal actions. However, EPA is not required to have a State commitment for institutional controls prior to the initiation of Fund-financed removal activities.

The long-term maintenance and tracking of removal action sites is a key part of States' involvement. Because the EPA has short-term involvement at a removal action site, responsibilities for overseeing the establishment of ICs/PRSCs often fall on the State. Most often, these long-term activities take the form of placement of deed restrictions on the property and in many States that requires the participation or cooperation of the property owner. States must ensure that fences, signs, and surface cover materials are maintained, making certain that these activities continue into the future. States' ability to accomplish these tasks is highly dependant on the availability of staff time and funding. It is also affected by the nature of their relationships with EPA and OSCs and the existence of any site-specific agreements. If these issues are not addressed, then the reliability and protectiveness of the removal action may diminish over time.

It is important for States to consider long-term maintenance issues early in the removal action process. Early determination of whether or not a site may enter a State or federal remedial program for additional work after the removal action may help decide if long-term issues need to be addressed. If possible, site-specific agreements covering the roles and responsibilities of parties help avoid confusion at the end of removal action projects. States should consider methods to track the status of ICs/PRSCs at sites, such as through use of databases or dedicated staff. Some States are implementing annual site review programs to document ICs/PRSCs, sometimes including site visits to visually inspect site conditions.

At removal action sites, a greater emphasis is being given to long-term maintenance through authorities assigned to States by laws such as the Uniform Environmental Covenants Act. If these trends continue, more States may need to evaluate and implement procedures to manage ICs/PRSCs at sites transitioning from federal to State oversight. ICs/PRSCs can be particularly challenging when State laws prevent such instruments from being placed on a property deed without the property owner's consent. However, there should be some discussion with the State regarding EPA's intent to use ICs/PRSCs or engineering controls, etc., to include clear documentation of the extent of

the removal so that all stakeholders (including the public) are aware of any remaining contamination left at the site. It is also recommended that the language describing land use restrictions is written to be understood by potential purchasers, local Zoning and Construction Officials and other "non-technical" persons. For a summary of state responses to questions on the use of ICs/PRSCs, please refer to Attachment M.

Removal actions being conducted at locations that have a projected property reuse must consider this during the development of remedial goals by EPA and during the identification of State ARARs. If the removal action provides a protective remedy for the eventual land use this should be clearly stated during the documentation of removal completion. Additionally, if other activities are needed to reach a protective remedy decision, than those activities should be identified.

More frequently removal actions are conducted early in the remedial process and the reuse potential for the site is not clearly identified. For these cases it is important to discuss types of property reuse that would be consistent with the remedy and property reuse that would be unacceptable. These restrictions should be developed with consideration of the existing land use, impacted media, potential routes of exposure, and whether the remedial goals and ARARs anticipate restricted or unrestricted use of the site. For a summary of state responses to questions on the consideration of future reuse, please refer to Attachment N.

O. Removal Completion

The transfer of site information is a key requirement for demonstrating site contamination issues have been addressed or to facilitate an effective removal – remedial transition. Written documentation (e.g., letter, POLREP, final action report) should be sent to the State when the removal action is completed. Supporting documents should be attached as applicable. The documentation should address or include the following as applicable:

- whether removal criteria were met;
- confirmation sampling;
- notification of the parties and the public that the removal phase is completed;
- documentation of removal activities;
- responsibility for long term operation and maintenance, and post removal site control;
- any land use assumptions made when determining removal criteria;
- need for institutional controls; and,
- summary of any technical information and where all background documents are located.

P. PRP Search and Cost Recovery

State and federal resources may be coordinated to obtain and share information collected from PRP searches and reduce the duplication of effort. When PRPs are identified, the State and EPA may work cooperatively on a cost recovery agreement and the allocation of State and federal funds.

Q. Identify State and EPA Contacts

At a minimum, one main contact person should be identified from each agency. This person should serve as the primary point of contact for the project. The primary points of contact are responsible for identifying and informing any other project specific contacts. Other required contacts may be those with responsibility for technical, administrative, or legal issues. Contact information should include names, phone and fax numbers, and e-mail and mailing addresses of identified individuals. (See Attachment O for a list of State and Territorial Removal Action and Emergency Response Program Contacts.)

R. Conflict Resolution

Conflict resolution should be simple and easy to implement. The recommended progression is to have any disagreements resolved at the next supervisory level. This may be detailed using job titles rather than staff names.

S. Limitations

Nothing in any agreement should limit either party's legal authority to investigate and/or conduct appropriate response actions under State or federal law.

T. Recommendations for Improved Coordination

States and EPA have continued to improve the efficient and effective of the transition of projects from federal removal actions to long term remedial activities under State programs. Much of the improvement has been based on the coordination between the programs and the working relationships that have been developed between the State and EPA program managers, EPA OSCs and State project managers. Based on the research conducted for this project and the information provided by the States, the following recommendations are offered to improve coordination on federal removal action projects that transition to State programs for long term remedial activities.

- State staff should pursue written agreements and regular meetings between the State and EPA to help facilitate good coordination and a smooth transition of the removal site to a State remedial program.
- There should be periodic reviews in all instances where contamination is left in place. This type of "monitoring" review is to verify that the removal is still protective and ICs/PRSCs (where applicable) are put in place, and that the integrity of the removal action is maintained. If the removal action does not result in complete cleanup, the State should have a process for transitioning the site to a State remedial program. Recognizing that each State/Territory has their own program and procedures for tracking of ICs/PRSCs, there should be a minimum of activity (e.g., periodic reviews) at all removal sites so that in cases where the removal did not result in complete remediation, any remaining contamination is undisturbed and the integrity of the removal is maintained to protect human health and the environment.
- Early communication should occur among State, local and/or private parties that may have or be aware of plans for reuse of the property (removal site). Knowledge of the intended reuse can be helpful in determining the extent of the removal action and any future remedial action(s).
- Final removal/milestone documentation should be communicated in a non-technical way, so that the public is aware of what the cleanup action actually achieved and the existence of any residual contamination.
- State staff should develop good working relationships with EPA OSCs to facilitate an understanding of State regulatory requirements and program limitations.
- States request that EPA evaluate or enhance their interaction with other federal agencies when those agencies assume responsibility for conducting removal actions, so that coordination among those federal agencies and State programs more closely mirrors the EPA-State removal process. For a summary of state responses to questions on the interaction between States and other federal agencies, please refer to Attachment P.
- States value the ability of EPA to address high-risk sites, and therefore recommend that the federal removals program be continued in the future.

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It is important to note that this document does not establish any official opinions, positions, preferences, or recommendations by ASTSWMO or by any individual member of the Focus Group or their respective State or region.