SIGNED MAY 3, 1995

**MEMORANDUM**

SUBJECT: Transmittal of the "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Directive 9375.6-11)

FROM: Stephen D. Luftig, Acting Director
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PURPOSE

This memorandum transmits the Environmental Protection Agency's "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions."

BACKGROUND

Based on the Environmental Protection Agency's (EPA) June 23, 1993, "Superfund Administrative Improvements Final Report" (OSWER Directive 9200.0-14-2), EPA established an initiative to "Enhance State Role." To implement this initiative, EPA established a work group in August 1993 to develop the deferral guidance, and has worked with several States to pilot the deferral concept at selected sites prior to issuing final guidance. The work group includes representatives from all EPA Regions, as well as representatives from several Headquarters Offices. Additionally, several States, participating in the

deferral pilot effort as co-implementors of the deferral program, have offered their input to the work group.

The guidance also includes an appendix, presented in a "question and answer" format, that responds to several questions that arose during development of the guidance. A second appendix provides instructions regarding the use of CERCLIS and other codes to allow for the tracking of deferral activities and cooperative agreements.

## DISCUSSION

### Components

The deferral guidance provides a framework for Regions, States, and Federally-recognized Tribes to determine the most appropriate, effective, and efficient means to address more sites more quickly than EPA otherwise would address them. The Agency also recognizes that several States already have fully developed cleanup programs in place, while others are continuing to strengthen their capabilities. Therefore, EPA expects to implement the guidance in a flexible manner to account for differing capabilities of participating States and Tribes. As a result of site-specific circumstances or differing but equally effective State or Tribal program practices, Regions may choose to act at variance from certain provisions of the guidance. Under the deferral program:

- Deferral may be implemented on either an area-wide or site-specific basis;
- Response actions will be conducted under State or Tribal authority;
- Viable and cooperative PRPs will agree to pay for and conduct response actions--Superfund Trust funds generally will not be made available for conducting response actions;
- Response actions must be protective of human health and the environment and meet State or Tribal and Federal applicable requirements;
- A site may not be deferred if the affected community has significant, valid objections;
- The level of EPA oversight of States and Tribes will be negotiated with the Region; and

- Once a deferral response is complete, EPA will remove the site from CERCLIS and will not consider the site for the NPL unless the Agency receives new information of a release or potential release that poses a significant threat to human health or the environment.

Changes Based On Comments

In March 1994, a draft guidance was circulated to Regions and Headquarters Offices for concurrence. Based on comments received as well as subsequent work group efforts, several substantive changes were made to the guidance. A final draft of the guidance was distributed to the States in February 1995, and a number of additional changes have been made based on new insights contributed by States and Regions.

- The guidance conforms with the Agency's recognition that pilot projects currently underway are at various stages in the listing process;

- Regions should notify Headquarters before deferring a site for which an HRS package has been initiated (notification before deferring any site is not required);

- States and Tribes should inform affected communities of a proposed deferral 30 days prior to requesting deferral from the Region, seek community affirmation for the deferral, and document their interactions with communities;

- Regions and States or Tribes should agree to a six month timeframe (with an extension of up to a year) to conduct PRP negotiations and should agree to schedules for conducting response actions at each site;

- States may use removal resources at deferred sites where PRPs become recalcitrant or bankrupt.

- Deferral sites at which cleanups are successfully completed will be removed from CERCLIS.

Main Work Group Issues

The changes to the guidance do not reflect work group consensus; they represent a compromise among different views that works to maintain the balance between program flexibility and accountability. Work group members raised concerns about several aspects of the guidance, the most significant of which are discussed below.

- **Comment:** The deferral option should be available for final NPL sites as well as non-NPL sites.

  **Response:** The purpose of the deferral program is to address sites more quickly than would otherwise be addressed--sites for which an HRS package has been initiated have already entered the response process. Under the deferral program, EPA encourages PRPs to settle earlier to avoid NPL listing, which results in more sites being addressed more quickly. Final NPL sites must be addressed under the Agency's deletion policy.

- **Comment:** EPA oversight and reporting requirements may discourage the participation of States and Tribes who already have strong cleanup programs and would find these requirements unnecessary.

  **Response:** The deferral guidance is meant to be flexible to accommodate a wide range of oversight and reporting conditions, and still provide a minimal level of information to maintain accountability. For most States, the negotiated level of EPA oversight will provide incentive to PRPs to be cooperative as well as give the PRPs some comfort that EPA has confidence in State responses.

- **Comment:** States and Tribes will not have an interest in the deferral program without having access to Superfund resources to conduct response actions; thus such resources should be made available.

  **Response:** A fundamental expectation of the deferral program is that viable and cooperative PRPs will pay for and conduct response actions. Sites that require the use of Superfund resources to conduct response actions are not appropriate candidates for this program. However, at deferral sites where PRPs become recalcitrant or bankrupt, removal cooperative agreements may be awarded, as appropriate, to conclude a response action.

- **Comment:** Although community involvement should be an important factor in deciding to initiate and implement deferrals, this factor may become an overriding determinant and impede implementation of the program.

  **Response:** EPA is working continually to strengthen its commitment to inform and involve the public in decisions regarding hazardous waste cleanup. Response actions will not be effective, efficient, or fair if community interests are not represented. EPA's intention to encourage public involvement is in no way lessened at sites that are deferred

to States. If an affected community expresses significant, valid objections to deferral or the deferral process at any site, EPA will take appropriate action, including rejecting a deferral proposal or terminating a deferral that is underway.

Through these and numerous additional comments, work group members and others have suggested that specific components of the guidance are overly-prescriptive. However, while this guidance presents EPA's view of the national program, we reemphasize our intent that a flexible approach be taken in implementing the deferral program. Consequently, although the Agency has declined to make certain changes recommended by Regions and States, we recognize the Regions' need to vary from the guidance, as the occasion warrants, in order to best serve the public and the environment.

## ACTION

The deferral program is an excellent administrative mechanism to enable States and Tribes, under their own laws, to respond at sites that EPA would otherwise not soon address. Under this program, the Agency anticipates that responses may be quick and efficient, yet still protective of the environment and of communities' rights to participate in the decision-making process. PRPs who are willing to do cleanups also will benefit from reduced response costs and fewer layers of government oversight. I encourage you to support and assist the States and Tribes in your Regions to take opportunities to enter into deferral agreements with EPA. Furthermore, Regional Decision Teams and other Regional assessment teams should work together with States and Tribes to identify these opportunities as part of the site prioritization process, rather than wait until after site assessment has commenced.

If you would like further information regarding implementation of the deferral program, contact Steve Caldwell, Acting Chief of the Site Assessment Branch, Hazardous Site Evaluation Division (703-603-8850), or Murray Newton, Chief of the State and Local Coordination Branch, Hazardous Site Control Division (703-603-8840).

Attachment

OSWER Directive 9375.6-11
EPA/540/F-95/002
PB95-963223

# GUIDANCE ON DEFERRAL OF NPL LISTING DETERMINATIONS WHILE STATES OVERSEE RESPONSE ACTIONS

Office of Emergency and Remedial Response
U.S. Environmental Protection Agency
Washington, D.C. 20460

The policies set forth in this directive are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this directive, or to act at variance with the directive, on the basis of an analysis of specific circumstances. The Agency also reserves the right to change this directive at any time without public notice.

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# GUIDANCE ON DEFERRAL OF NPL LISTING DETERMINATIONS WHILE STATES OVERSEE RESPONSE ACTIONS

## PURPOSE

This directive provides guidance on the Environmental Protection Agency's (EPA) Superfund State and Tribal deferral program, under which EPA may defer consideration of certain sites for listing on the National Priorities List (NPL), while interested States, Territories, Commonwealths, or Federally-recognized Indian Tribes compel and oversee response actions conducted and funded by potentially responsible parties (PRPs). Once the necessary response actions at a site are completed successfully, the site will be removed from the Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS), and EPA will have no further interest in considering the site for listing on the NPL, unless it receives new information of a release or potential release that poses a significant threat to human health or the environment.

## INTRODUCTION

The "Superfund Administrative Improvements, Final Report" of June 23, 1993 (OSWER Directive 9200.0-14-2), identified numerous initiatives to improve the Agency's implementation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended. The deferral program, developed under the initiative to "Enhance State Role," was intended to "encourage qualified, interested States to address, under State laws, the large number of sites now in EPA's listing queue, thereby accelerating cleanup, minimizing the risk of duplicative State/Federal efforts, and offering PRPs a measure of confidence that only one agency will address the site." Although the primary goal of the deferral program is to accelerate the rate of response actions by encouraging a greater State or Tribal role, the priority for increasing this rate must be balanced with two other crucial Agency priorities: 1) maintaining protective cleanup levels at sites, and 2) ensuring that the public's right to participate in the decision-making process is well supported.

This directive is divided into sections that address: criteria that a State, Territory, Commonwealth, or Federally-recognized Indian Tribe (hereafter the term "State" also includes Territories, Commonwealths, and Tribes) should meet to participate in the program; criteria for determining which sites are eligible for deferral; procedural requirements; and provisions for site cleanup levels to be achieved at deferred sites, oversight, financial assistance, community participation, and response action completion or termination. Although these provisions establish a

framework for a national deferral program, EPA recognizes that State cleanup programs have differing capabilities and methods of implementation. To best accommodate these differences and achieve response actions most quickly and effectively, the Agency expects to implement the provisions of the guidance in a flexible manner. Regional implementation of this guidance may vary based on site-specific circumstances or the established capabilities and practices of a State program.

This guidance also includes two appendices. Appendix A responds to several questions that arose during development of the guidance and is presented in a "question and answer" format. Appendix B provides specific instructions regarding the use of CERCLIS and other codes to allow for the tracking of deferral activities and cooperative agreements. Throughout this guidance and its appendices, the terms "State deferral" and "deferring to a State" are defined as EPA's deferring consideration of a site for NPL listing in favor of State action.

## IMPLEMENTATION

### 1. Criteria for a State Deferral Program

A State may participate in the deferral program on an area-wide or site-specific basis. Under the area-wide program, the State and Region will agree to certain generic procedural and other requirements (e.g., roles and responsibilities, cleanup levels, public participation), and address site-specific concerns (e.g., site eligibility and selection requirements, response schedules, EPA oversight) through separate documentation. Under the site-specific approach, the State and Region will negotiate separate terms and conditions for the deferral of individual sites (see below). A State hazardous waste management or remedial program should meet the following general criteria regarding statutory and administrative authority and program capability to participate in the area-wide deferral program.[1]

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[1] **State-Funded Response.** Alternatively, the State may propose to conduct the response actions at a deferred site using its own funds. In these cases, the State additionally will need to demonstrate that it has the technical capability and sufficient resources to conduct and complete the response. If the State desires to use CERCLA section 107 authority, rather than its own authorities, to recover response action costs, the costs incurred, in order to be recoverable, must not be inconsistent with National Oil and Hazardous Substances Pollution Contingency Plan (NCP) requirements.

a. **Statutory, Regulatory, or Administrative Provisions.** The State program should have statutory, regulatory, or administrative provisions which ensure that remedies at deferred sites are protective of human health and the environment. The program also should have the statutory authority and administrative provisions to pursue all necessary enforcement actions at a site, ranging from mechanisms to identify viable liable parties, to authority to compel PRPs to conduct "CERCLA-protective cleanups" (as defined in Section III). The evaluation of these provisions and authorities is not limited to comparing the State's law to CERCLA, but may consider, when relevant, the State's past and current ability to select protective remedies, and to enter into and enforce consent agreements or orders with PRPs.

b. **Program Capability.** The State program should have sufficient capabilities, resources, and expertise to ensure that a CERCLA-protective cleanup is conducted as well as coordinate with EPA, other interested agencies, and the public on the various phases of implementation. Estimates of the State's capability may consider any significant past response actions the State has undertaken through the Federal Superfund program or its own program, the effectiveness of the State's program to achieve a protective cleanup, and the State's projected workload. The State should have the following capabilities.

i. **Resources.** The State should have adequate, capable staff, funds, and other resources to conduct enforcement actions, including PRP searches, negotiations with PRPs, monitoring, oversight, and litigation.

ii. **Monitoring and Oversight.** The State should have the capability to maintain adequate supervision of response actions, including, but not limited to: assuring and controlling the quality of data sampling and analysis, risk characterizations or assessments, and design and implementation of remedies; monitoring project progress; and communicating with EPA program managers.

iii. **Community Participation.** The State should be able to involve affected communities in a manner that fosters appropriate community participation (as described in Section VII) in decisions regarding response actions at deferred sites.

To establish a clear understanding between the State and EPA that the State has the authority and capability to participate in an area-wide deferral program, the State program director and Regional Superfund program director should enter into a generic deferral Memorandum of Agreement certifying these criteria are met. As reasonable and appropriate, the Region may require the State to provide specific information to confirm EPA's basis for entering into the deferral agreement. Upon request, the Region should provide the basis for any decision declining to defer to the State.

If a State is interested in deferral and does not meet all of the criteria for establishing an area-wide deferral program, the Region and State may, at the Region's discretion, enter into site-specific deferral agreements, provided that site eligibility criteria are met. For example, a site at which the State enters into an enforceable agreement with a PRP to conduct a CERCLA-protective cleanup, even though the State does not have the statutory authority to compel response actions, may be appropriate for deferral. The Region may determine, as needed, that closer oversight and the application of other conditions are necessary to ensure a successful response action.

## 2. Sites Eligible for Deferral

Under the area-wide approach, the Region and State should mutually determine, generally based on an annual submission of deferral site candidates proposed by the State, which sites should be deferred. The Region and State should determine the eligibility of sites for deferral using the following criteria.

a. **State Interest.** The State must express interest in having the site deferred to it. The State and EPA also should agree that the State will address the deferred site sooner than, and at least as quickly as, EPA would expect to respond. (See Appendix A.)

b. **CERCLIS Listing.** The site proposed for deferral must be included in the CERCLIS inventory.

c. **NPL Caliber.** The deferred site should be "NPL caliber" as defined in the October 12, 1993, OSWER Directive, "Additional Guidance on 'Worst Sites' and 'NPL Caliber Sites' to Assist in SACM Implementation" (OSWER Directive 9320.2-07A) or the December 1992 fact sheet "Assessing Sites Under SACM--Interim Guidance" (OSWER Directive 9203.1-05I, Vol. 1, No. 4). Sites that are less than NPL caliber are generally not of Federal interest and the deferral program requirements

need not apply at these sites. However, such sites may be deferred, should a State desire this option.

d. **Viable and Cooperative PRPs.** Under the deferral program, viable and cooperative PRPs generally must be available to conduct the response actions at a deferred site. The PRPs at a deferred site should be willing to enter into an enforceable agreement with the State to conduct all response actions (including providing for operation and maintenance) at the site and repay any State and Fund-financed response costs related to the deferral. Except under limited circumstances (i.e., where PRPs become recalcitrant or bankrupt, as described in Section VI), a State should not be using Superfund resources to conduct response actions at deferred sites. If the State is a PRP at the site, the Region should consider carefully the implications of deferring the site before making a decision. At sites where no viable PRPs exist, or where a State is willing to agree to settle for less than the full cost of the response action, the State must demonstrate that it has adequate resources of its own or viable agreements with other parties (e.g., prospective purchasers) to pay the necessary costs for the response action. (See Appendix A.)

e. **Timing.** Generally, a site is eligible for deferral until a State or contractor has been tasked to develop a site-specific Hazard Ranking System (HRS) package for it. If, however, the Region or State has already issued a task or work assignment to develop the package, the Region should defer the site only where the State provides a compelling argument why the listing process should be halted. In such cases, the Region should consider carefully the history of the State's involvement at the site and community acceptance of the deferral in making the determination whether to defer the site. In rare instances, sites proposed for the NPL, or sites for which an HRS package has been submitted to Headquarters, may be eligible for deferral. Sites on the final NPL are not eligible deferral candidates, though the Region may, through a cooperative agreement, assign to the State the lead for response at such sites. The Region should consult with the Office of Emergency and Remedial Response before deferring any site for which an HRS package has been initiated. (See Appendix A.)

f. **Community Acceptance.** Community acceptance of a deferral to the State is an important site eligibility criterion, and the State should work to gain and

maintain community acceptance of the site's deferral to the State. The State should take appropriate steps to inform the affected community and other affected parties (e.g., communities downstream from the site, PRPs, Natural Resource Trustees) of the proposed deferral 30 days prior to requesting that the Region defer the site and should seek affirmation from the community of its proposal. As appropriate, the State also should explain to the community and other parties any differences between a response under the deferral program and a response conducted under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), including, but not limited to, any differences in cleanup levels and public involvement. Additionally, the State should document all of its interactions with the community and inform the Region of possible opposition to the deferral.

If, at any time before a site is deferred to the State, the Region, after consulting with the State, determines that the community or other parties have significant, valid objections to the deferral that cannot be resolved, the Region should not defer the site. If, at any time after a site is deferred to the State, the Region determines that the community or other parties have significant, valid, unresolvable objections to the deferral, the Region should terminate the deferral status of the site (described in Section VIII). The Region should provide appropriate explanation to the community and other parties of decisions that do not favor the community's or other parties' objections. (See Appendix A.)

g. **Sites Involving Tribal Lands.** A site on or involving land or other resources under Tribal jurisdiction may be deferred to a Federally-recognized Tribe if the appropriate criteria are met. EPA will not defer such a site to a State unless the affected Tribe(s) agrees to the deferral through a three-party agreement with the State and the Region.

h. **Federal Facilities.** Consistent with EPA's current listing policy for Federal facilities, such sites are ineligible for deferral from NPL listing.

i. **Complicating Factors.** The Region, in consultation with the State, should consider factors which may present significant obstacles to successful response actions at the proposed deferral site. Such factors include, but are not limited to: complexity and degree of the environmental threat posed by the

contamination; site history; current or anticipated Fund-financed activity; the PRPs involved at the site; and environmental justice and other community concerns.

3. Cleanup Levels

Section 121(b)(1) of CERCLA sets general standards for remedial actions carried out under CERCLA section 104 or secured under CERCLA section 106. These standards have been elaborated further in the NCP. Under section 300.430(f), a remedy conducted pursuant to the NCP must be protective of human health and the environment and must comply with applicable or relevant and appropriate requirements. Under the deferral program, although the State will oversee the response action at an NPL caliber site using its own authorities, the quality of the response action conducted still should be substantially similar to a response required under CERCLA, i.e., it should be a "CERCLA-protective cleanup." The following criteria define a CERCLA-protective cleanup.

a. **Protectiveness.** A CERCLA-protective cleanup at a deferred site should be protective of human health and the environment as defined generally by a $10^{-4}$ to $10^{-6}$ risk range and a hazard index of 1 or less. Generally, the State also should consider giving preference to solutions that will be reliable over the long term.

b. **Standards.** The remedy selected at a deferred site must comply with all applicable Federal and State requirements. Additionally, the State should generally select a remedy which provides a level of protectiveness comparable to relevant and appropriate Federal requirements for the site. (See Appendix A.)

4. Procedural Requirements

Procedural requirements for the deferral program should not be burdensome. Once the State and Region agree on which sites to defer to the State, the Regional Superfund program director should identify to the State program director in writing which sites EPA is deferring to the State. The Region also should indicate in CERCLIS that a site has been deferred to allow for appropriate tracking. (See Appendix B.)

The State and the Region should also agree to clarify mutual expectations for State-EPA interaction and each party's responsibilities at deferred sites. As mentioned in Section I, such expectations may be incorporated into a generic deferral memorandum, with documentation regarding site-specific information

being added to the agreement or provided separately as appropriate. Minimally, the State and Region should agree to the following provisions in either an area-wide or a site-specific agreement.

a. **Roles and Responsibilities.** The Region and State should agree on the relationship between, and the roles and responsibilities of, EPA and the State for all phases of the response action at deferred sites. At a minimum, the agreement should address the degree to which EPA will provide oversight, document review (including review of the selected remedy), and technical or financial assistance.

b. **Schedule for Performance.** The State and Region should agree to a timeframe for commencing and conducting actions, including negotiating settlements with PRPs for each site. State negotiations with PRPs generally should be completed within six months of initiation, although the Region may allow the State up to six additional months to conclude its negotiations, as appropriate. All schedules should identify major milestones by which EPA can track reasonable progress at each deferred site.

c. **Documentation.** The State should agree to make available risk assessment data, remedy selection decision documentation, and supporting analyses for each site to allow for adequate public involvement and EPA oversight.

d. **Cleanup Level.** The State should agree to provide for a CERCLA-protective cleanup (as described in Section III) at each deferred site.

e. **Community Participation.** The State should agree to involve affected communities in decisions regarding the response action (as described in Section VII) at each deferred site.

f. **Natural Resource Trustees.** The State should agree to notify promptly the appropriate State and Federal trustees for natural resources of discharges or releases that are injuring or may injure natural resources related to a deferred site. The State also should include the trustees, as appropriate, in negotiations with PRPs.

5. EPA Oversight of States

At all deferred sites, the State has responsibility, with minimal EPA involvement, to provide for a timely and CERCLA-protective cleanup and to support the public's right of participation in the decision-making process. The Region should work with the State to determine the appropriate level of oversight that the Region should exercise at each site. The Region may choose to conduct more or less oversight of the State at any particular site, depending on the State's experience, the complexity of the site, or other factors. The Region also should consider its assessment of the progress being made at deferred sites during any consideration of new proposals for sites to defer. Finally, the Region and State should consider incorporating the following practices, as appropriate, in any agreement between the Region and State regarding oversight.

a. **Review Deferral Program Criteria.** As needed, the Region should reconfirm the status of the State's authority and program capability to ensure the continuing success of response actions at current and anticipated deferral sites.

b. **Report on State-EPA Agreement Conditions.** The State should report to the Region at least annually on whether the conditions agreed upon in the State-EPA agreements are being met. The State also should report to the Region at least semi-annually any difficulties it is having meeting agreement conditions at any deferred sites, including negotiating settlements with PRPs.

c. **Annual Review.** The Region should meet at least annually with the State to discuss the State's progress at deferred sites, which should include a review of reports submitted by the State, performance schedules, attainment of milestones in site-specific agreements, data quality assurance and control, cooperativeness of the PRPs, cost recovery of site-specific funds awarded to the State under cooperative agreements with EPA, and participation of the affected community. Any State deferral events that are tracked in CERCLIS should be coded appropriately. (See Appendix B.)

## 6. Financial Assistance to States

As noted above, the State is responsible for acquiring the resources to conduct all response actions at deferred sites under the deferral program. A fundamental expectation of the deferral program is that viable PRPs will reach settlements with the State to respond at deferred sites; except as described in this Section, the deferral program generally does not anticipate that Fund resources will be used to conduct response actions at deferred sites.[2] Consequently, PRPs or some other non-Federal source should provide the resources for site-specific activity, including enforcement and PRP oversight.

In some cases, the State may need resources to conduct certain activities, or supplement or strengthen its deferral program. As described below, the Region may enter into cooperative agreements with the State to provide funding to the State for certain purposes. Generally, the State should agree to seek to recover site-specific funds awarded to it, either from the PRP through an enforceable agreement or from another identified source. The State and Region also should agree in advance on how to allocate recovered costs. If the Region intends to provide deferral funds to the State, the Region should identify its resource needs for the deferral program in its annual budget development process.

a. **Core Program and Site-Specific Response Funding.** The Region may award to the State non-site-specific resources under a Core Program Cooperative Agreement to develop or enhance its overall deferral program implementation capability. The Region may also award funds to the State to conduct enforcement and oversight/administrative-related activities through a deferral site-specific enforcement or support agency cooperative agreement or provide deferral site-specific funding for site assessment where an assessment has not been conducted or completed. In the event that PRPs at a deferred site become uncooperative or bankrupt, the Region may, as appropriate, enter into a cooperative agreement with the State for non-time-critical removal or preremedial activity until settlements with PRPs are reached, the response action is completed, or until the deferral status of the site is terminated. (See Appendix A.)

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[2] If a site's deferral status is terminated, Fund resources also may be available for use, in accordance with appropriate regulations and policy.

b. **Subpart O Requirements.** A State receiving funds through a cooperative agreement must meet all applicable requirements of 40 CFR Part 35, Subpart O. The terms of the cooperative agreement will be subject to all appropriate Regional oversight. Cooperative agreement awards for deferred sites should use the sub-object class number 41.90 and use appropriate activity codes. (See Appendix B.)

## 7. Community Participation

Effective community involvement is a crucial aspect of response actions at NPL sites and is no less important for response actions at deferred sites. As described above, the State should assure that it will involve the affected community in the decision-making process at a deferred site and that the affected community does not have significant, valid objections to deferring the site to the State. The following conditions also should be met at a deferred site.

a. **Comparability with the NCP.** The Region should be confident that the principles of public involvement embodied in the NCP are maintained at deferred sites. The State must ensure that the impact of its efforts to involve the public, especially during the remedy selection and response action completion phases, will be substantially similar to the intended effect of implementing the procedures required by the NCP. (See Appendix A.)

b. **Information Assistance for Communities.** EPA does not have the authority to award Technical Assistance Grants at sites that are not on or proposed to the NPL. However, at each NPL caliber site that EPA defers to the State, the affected community should be able to acquire assistance to interpret information with regard to the nature of the hazard, investigations and studies conducted, and implementation decisions at the site. As appropriate, the State should provide resources or direct assistance to the affected community at the site for these purposes. If funds are necessary to provide assistance to the community, the State should seek such funding from the PRPs at the site if the State cannot provide funding itself.

## 8. Completion of State Response Action

a. **Certification and Confirmation.** Once the State considers the response action at a deferred site to be complete, the State should certify to the Region and the affected community that it has successfully completed its response and achieved its intended cleanup levels. As part of the certification, the State should submit to the Region response action completion documentation substantially similar to that described in the June 1992 OSWER Directive "Remedial Action Report; Documentation for Operable Unit Completion" (OSWER Directive 9355.0-39FS).

Upon receiving the State's certification, the Region should confirm in writing that the site response has been completed. Alternatively, within 90 days after receipt of the certification, the Region may initiate a deferral completion inquiry to validate the certification. As part of the inquiry, the Region should work with the State to address any deficiencies hindering the confirmation and agree to a timeframe for completion of the inquiry. Upon completing the inquiry, the Region should either confirm completion of the response or terminate the deferral status of the site (described below). If the Region does not confirm the response completion, terminate the deferral, or initiate an inquiry within 90 days of its receipt of the State certification, the status of the site will be recorded in CERCLIS as a deferral completion. (See Appendix B.) Once the response at the site is recorded as complete, the site will be removed from CERCLIS and will not be evaluated further for NPL listing or another response unless EPA receives new information of a release or potential release at the site that poses a significant threat to human health or the environment.

b. **Termination of Site Deferral Status.** Pending 30 days notice to the State, the Region should terminate the deferral status of the site, if, at any time during or upon completion of a response action, the Region determines that the response is not CERCLA-protective, is unreasonably delayed or inappropriate, or does not adequately address the affected community's concerns. The Region also should terminate the deferral if significant PRPs breach their agreements with the State and the State is unable to enforce compliance or provide other sources of funding to complete the response action. In addition, the Region may terminate the deferral and implement emergency or time-critical response action without 30 days notice to the State if the Region determines such action is necessary. The

State may also choose at any time, after 30 days notice, to terminate the deferral for any reason

Upon terminating the deferral status of the site, the Region should immediately consider taking any necessary response actions and should initiate consideration of the site for NPL listing. The Region and State should coordinate efforts to notify the community and PRPs of the termination of the deferral. These actions will assure the public that EPA will continue to respond at a site where response actions have begun and will encourage PRPs to forge and fulfill successful agreements with the State. At the Region's request, the State should provide to the Region all information in its possession regarding the site for which the deferral status has been terminated.

APPENDIX A Question and Answer Supplement

# Question and Answer Supplement to the Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions

## PURPOSE

This appendix supplements the "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Directive 9375.6-11). This appendix provides responses to significant questions that arose during development of the guidance and is presented in a "question and answer" format.

## BACKGROUND

Following the June 23, 1993, "Superfund Administrative Improvements, Final Report," the Environmental Protection Agency (EPA) established a work group to develop the Superfund State deferral guidance. This guidance intends to enable Regions and States to determine the most appropriate, effective, and efficient means to address more sites more quickly than the sites otherwise would be addressed. As the guidance was drafted, work group members and others raised numerous implementation questions. While many questions have been resolved in the final guidance, this appendix provides clarifying responses to remaining significant questions. The questions are not divided by category, but roughly follow the outline of the guidance. Throughout this document, the term "State" also includes Territories, Commonwealths, and Federally-recognized Indian Tribes.

## QUESTIONS AND ANSWERS

9.How will EPA determine whether a State can address a site "sooner than, and at least as quickly as," EPA?

The deferral program is intended to enable States to conduct responses at sites where EPA would not otherwise respond in the near future. Deferral should not indefinitely postpone commencement of site response nor prolong the expected duration of a response; hence, the guidance states that a State should agree to address deferred sites sooner than EPA would expect to commence responding, and at least as quickly as EPA would expect to implement its response. This objective assures that deferred sites will be addressed and not merely be shifted from the Federal queue to a State queue. If a Region already has developed a schedule for

conducting response activity at a site, this schedule may serve as a basis for setting expectations for the State's response. Site-specific response schedules, including PRP-negotiation timeframes, should be incorporated into deferral agreements established between the State and the Region.

10.What particular factors should the Region consider before deferring a site at which the State is a potentially responsible party (PRP)?

Although a State may be best able to conduct a response at a site at which it is a significant PRP, the Region and the State need to consider carefully the potential for conflict of interest, or the appearance of conflict of interest. Any such appearance could diminish the credibility of the State program with the public and could thus threaten its effectiveness. Close coordination with the affected community at such a site will be critical to ensure that the public does not perceive any conflict of interest and agrees that a State response is most appropriate.

11.What factors constitute a "compelling argument" to defer a site for which an Hazard Ranking System (HRS) package has been developed?

Although a site will generally be ineligible for deferral after a State or contractor has been tasked to prepare an HRS package, the Region may defer such a site if the State provides a compelling argument why the listing process should be halted. The Region ultimately will determine whether the State proposal is viable, but any proposal to defer such a site should be documented and contain the following information: an explanation of the benefit of the deferral; an enforceable agreement with the PRPs (or other non-Fund sources); a time table providing for a response at least as timely as that proposed by EPA; and assurances that all costs of the response, including preparation of the HRS package, will be borne by the PRPs (or other non-Fund sources).

12.When and how should a State inform the community of a proposed deferral? Who should be informed?

Under the deferral program, a State must demonstrate, on a State-wide basis or on a site-specific basis, that it has the capability to fully involve affected communities in decisions regarding response actions at sites both before and after the sites have been deferred. Furthermore, a State should notify the affected community 30 days prior to requesting the Region

to defer a site and should seek the community's affirmation of a deferral proposal.

However, the January 1992 EPA directive, "Community Relations in Superfund: A Handbook" (OERR Directive 9230.0-03C), recognizes "there can be no universal approach for community relations" and that the "issues of importance to the public, the level of concern, the history of public involvement, and the social structure of the community will vary from site to site." Thus, although the deferral guidance offers some provisions to ensure that communities at deferral sites are adequately involved, the guidance does not prescribe a particular means that a State must use to achieve this end. Rather, the State will generally have the discretion and the responsibility to determine the most appropriate means to identify, notify, and continue to involve communities affected at deferral sites.

13.How will the Region determine what are significant, valid community objections that would deny or terminate a deferral?

Characterizing community concern at a deferred site often will be a difficult process. Different and changing levels of community awareness, interest, or comprehension; differences in the capabilities of various community members to make themselves heard or wield political influence; even attempts to precisely define the affected community at a site will preclude decision-making based on quantitative analysis. Full community unanimity is rare; and in virtually every community, dissenting opinions will persist. Therefore, while community acceptance is a critical aspect of the deferral program, community consensus is not required for deferral.

The State and the Region must rely on their best professional judgment to determine the composition of the affected community and who represents it, the validity of the concerns that the community expresses, the opportunity to accommodate community concerns, and the potential impact of proceeding without community consensus. However, when considering who represents the affected community, the State and Region should take particular care to be cognizant of populations that may be downwind or downstream of the site, as well as be aware of environmental justice issues that may have bearing at the site. If community objections that the Region determines to be significant and valid cannot be resolved between the community, State, and EPA, the Region should reject or terminate the deferral. Also, to assure that community concerns are addressed fairly, the State, with

EPA involvement as necessary, should document the response to the community's objections.

14.How might environmental justice considerations affect response action at a deferred site?

Because sites that are deferred should receive attention more quickly than they otherwise would, effective deferral responses may provide a useful mechanism for resolving some environmental justice concerns. At sites where environmental justice is an issue, a State must show extra sensitivity to the special needs of the community by tailoring its outreach efforts to the community as well as facilitating access to, and enabling interpretation of, information. Establishing a positive rapport with the community at a deferral or any other site should result in wider acceptance of a proposed response.

Additionally, because the Agency is committed to addressing environmental justice issues in all its programs, the State should expect the Region to be especially interested in sites associated with environmental justice concerns. The Region should consider playing a greater role in communicating with the community during consideration of such a site for deferral, review State interaction with the community during the response, and coordinate with the State to respond directly to concerns raised by the community.

15.What must a State do to ensure that the impact of its community involvement program is "substantially similar" to the intended effect of implementing the procedures required by the National Oil and Hazardous Substances Pollution Contingency Plan (NCP)?

The 1992 OERR Directive "Community Relations in Superfund: A Handbook" (Directive 9230.0-03C) identifies three overall objectives, or principles, upon which the implementation of the Superfund community relations program is founded. These principles are:

- Provide the public the opportunity to express comments on and provide input to technical decisions;
- Inform the public of planned or ongoing actions; and
- Identify and resolve conflicts

These principles, though not identified specifically in the NCP, encompass the community involvement procedures which the NCP describes. While State adherence to the specific

procedures of the NCP is not required for the deferral program, a State community relations program should embrace similar principles and be able to demonstrate its ability to implement such principles at deferred sites.

16.Are mixed-ownership (Federal/non-Federal sites eligible candidates for deferral?

Federal facilities currently are not eligible for the deferral program. Sites of mixed Federal and non-Federal ownership, however, may be eligible deferral candidates depending on site-specific circumstances. The Region should consult with the Office of Emergency and Remedial Response in making this determination.

17.Must a risk assessment be performed at every deferred site? May a State allow PRPs to perform risk assessments?

As appropriate to the circumstances at each deferred site, the State should characterize the nature of, and threat posed by,the hazardous substances and materials at the site and should gather data necessary to support the analysis and design of potential response actions. In some instances, the State may prefer to have a PRP conduct this characterization In either case, the State should have demonstrated its ability to conduct or oversee risk characterizations or assessments in accordance with the capability criteria identified in Section I of the guidance.

18.Will EPA assist States in identifying applicable or relevant and appropriate requirements at deferred sites?

Upon request from the State, the Region should provide assistance to the State in interpreting CERCLA requirements, including identification of Federal applicable requirements and Federal relevant and appropriate requirements. The State retains the responsibility and discretion to identify and implement State applicable or relevant and appropriate requirements at a deferred site, including those that are more stringent than Federal standards.

19.Can deferred sites be exempted from obtaining permits for activities conducted on-site?

The Agency has determined that CERCLA does not authorize permit exemptions for response actions carried out under the deferral program. CERCLA section 121(e) exempts on-site remedial action, which is selected and carried out in compliance with CERCLA section 121, from Federal, State, and local permit requirements. Deferral response actions,

however, will be conducted under State authority, and therefore cannot use the exemption provision.

20.Can Federal funds pay for State-lead removal actions?

Under the deferral program, PRPs are generally expected to conduct all appropriate responses at deferred sites. The Region should not defer sites at which the State anticipates using Fund resources to conduct removal activities. However, should PRPs at a deferral site become recalcitrant or bankrupt, the State may receive a removal cooperative agreement, provided "a planning period of more than six months is available" (40 CFR 35.6205), and pursuant to other 40 CFR Part 35, Subpart O, requirements.

21.Must States document expenditures of Federal funds at deferred sites?

Any funds that a State receives through a cooperative agreement with EPA are subject to all applicable requirements identified in 40 CFR Part 35, Subpart O. For site-specific expenditures incurred by a State under a cooperative agreement, including any site assessment activity or HRS scoring that takes place after a site is deferred, the State is required to track expenses by site, activity, and operable unit, as applicable, according to object class. Non-site-specific funds awarded to a State through a Core Program cooperative agreement also are subject to the applicable requirements in 40 CFR Part 35, Subpart O, but are not expected to be recovered by the State.

22.Under what conditions would site assessment activities be performed at a deferred site?

At many sites that will be deferred, a site assessment will have already taken place, the results of which will indicate that a site is NPL caliber. In some cases, however, a Region may agree to defer a site that the State and Region suspect is NPL caliber even though a site assessment has not been completed. At such sites, the Region and State may determine that completing a site assessment is appropriate. Generally, however, the PRPs at a deferred site should agree to pay for the site assessment if one has not already been conducted. (See also Question 16.)

23.Who will recover the costs of site-specific cooperative agreements that EPA awards to States under the deferral program? What will happen to recovered funds?

Because the value of cooperative agreements at deferred sites typically will be very low, EPA will generally not expect to attempt to recover these costs. However, any site-specific cooperative agreement for deferral into which the Region enters with the State should stipulate that the State will seek to recover from the PRPs recoverable costs incurred under the cooperative agreement. Regions also should make clear to States that EPA does not expect to award funding indefinitely to States under the deferral program; rather the Agency expects that sums recovered by the States will be used to build the State capability to fully implement deferral programs without EPA funding in the future.

24. Would a response action be considered complete if waste had been removed off-site, but a complete cleanup had not been conducted?

Response actions at deferred sites should be CERCLA-protective, as described in Section III of the guidance. If a response action does not meet this criterion, the Region should terminate the deferral, immediately consider taking necessary response actions, and initiate consideration of the site for NPL listing.

EPA expects that partial cleanup of an NPL caliber site would not reduce the site's HRS score below the threshold for eligibility for NPL listing. However, if the Region believes that a partial response could preclude a deferred site's eligibility for NPL listing where a site assessment had not been completed, the Region should have a site assessment conducted before any deferral response is undertaken. At a terminated deferral site, where a site inspection was not commenced prior to the response action, the Region should refer to the September 1993 OERR Publication "The Revised Hazard Ranking System: Evaluating Sites After Waste Removals" (OERR Directive 9345.1-03FS) to evaluate the site's eligibility for NPL listing.

REVISED VERSION AS OF 8/15/95

APPENDIX B: Instructions on Financial Tracking

# Instructions on CERCLIS/WasteLAN and GICS/IFMS Financial Tracking for the Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions

## PURPOSE

This appendix provides instructions on how to use information management systems to track site progress and financial management information for NPL caliber sites that have been deferred to States under the "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Directive 9375.6-11).

## BACKGROUND

The Superfund State deferral guidance provides direction to Regions for implementing the State deferral program and includes criteria for establishing State capabilities, selecting sites, and entering into agreements with States to compel and implement PRP response actions. The guidance requires minimal EPA oversight and provides Regions and States flexibility to negotiate agreements that reflect State- and site-specific circumstances. The Agency nevertheless will be expected to be able to demonstrate the deferral program's accomplishments and to ensure EPA and State accountability. Consequently, Regions need to report certain information into CERCLIS/WasteLAN. Regions may also wish to take advantage of CERCLIS/WasteLAN to conduct their own tracking of progress at sites.

Also, to ensure that information regarding awards to States for site- or non-site-specific deferral activity, Regions need to use appropriate sub-object class codes in awarding cooperative agreements and track these obligations in CERCLIS or CERHelp, as appropriate.

## IMPLEMENTATION

New CERCLIS lead, event, qualifier, and sub-event definitions to enable tracking of key information regarding deferred sites will be included in the FY95 Superfund Program Management Manual and the CERCLIS data element dictionary.

In addition, a new sub-object class code (41.90) has been established to track resources awarded to States under site-specific deferral cooperative agreements. The attached Office of the Comptroller Policy Announcement No. 94-07 describes this code

New LEAD SD (C2117 and C1707): STATE DEFERRAL

Definition: LEAD SD is a PRP- or State-financed response action at an NPL caliber or proposed NPL site overseen or conducted by the State pursuant to a deferral agreement with the Region, as described in OSWER Directive 9375.6-11. With limited exceptions, Fund-financing for deferral response actions will not be available.

The LEAD SD will be used in conjunction with the new STATE DEFERRAL EVENT (C2101 = SD) and associated qualifiers and subevents (see below) to track start and completion dates of responses at deferred sites. Other response or enforcement accomplishments and/or reports may be tracked using the LEAD SD (C2117 or C1707) and current CERCLIS response event or enforcement activity codes, as appropriate, at the Region's discretion.

New EVENT SL (C2101): STATE DEFERRAL

Definition: EVENT SL indicates that the Region has entered into an agreement with a State to defer from listing on the NPL an NPL caliber or proposed NPL site, while the State uses its own authority to compel and oversee PRP response or implements a response using its own resources. This event is located in the 00 operable unit.

The SL START DATE (C2140) is the signature date of the document sent from the Regional Superfund program director to the State program director that defers the site to the State under the terms established in the deferral guidance. For sites that were deferred under the deferral pilot program (prior to the issuance of the guidance), the SD START DATE will be the date that EPA Headquarters formally confirmed the pilot status of these sites.

The SL COMPLETION DATE (C2141 is:

- The signature date of the formal Regional document that either confirms that the deferral has been completed successfully or terminates the status of the deferral. Qualifiers (see below) must be used to indicate whether

the deferral has been successfully completed (C2103 = S) or has been terminated (C2103 = T).

**OR**

- The date 90 days after the date EPA receives State certification that the deferral has been completed (see SC SUBEVENT below), if the Region neither formally confirms the deferral completion nor initiates a deferral inquiry (see SE SUBEVENT below) within 90 days of receiving the State certification. The qualifier indicating that the deferral has been successfully completed (C2103 = S) must be used (see below).

If, upon agreement with the State, the Region formally confirms the State's certification after the 90 day period, the SL COMPLETION DATE may be updated to reflect the date of the formal confirmation. Figure 1 provides a flowchart for determining the SL completion date.

**New QUALIFIERS (C2103 = S or T) FOR EVENT = SL**

Definition: QUALIFIER C2103 = S signifies that the Region either has confirmed formally that the State deferral has been completed successfully or that the Region has not responded within 90 days of receipt of the State's certification that it has completed the deferral successfully. Sites at which a deferral has been successfully completed are eligible for removal from CERCLIS, pursuant to Agency policy for removing sites from CERCLIS.

Definition: QUALIFIER C2103 = T signifies that the Region has terminated the status of the deferral. This qualifier is used when the Region terminates the deferral during the course of the response or in conjunction with a deferral inquiry (see SUBEVENT SE below) conducted at the completion of the response that results in termination of the deferral.

**New SUBEVENT SM (C3101): State Completion Certification**

Definition: SUBEVENT SM is the date the Region receives the State's submission of response action completion documentation certifying that it has completed successfully its selected remedy at the site and has achieved its intended cleanup levels. Within 90 days of receipt of the documentation, the Region must confirm successful completion of the deferral formally (SM COMPLETION DATE) or initiate an inquiry to confirm the certification (see SUBEVENT SQ below). If an inquiry is not initiated within 90 days of the SUBEVENT SM date and the Region has not confirmed the

deferral completion formally, the EVENT SL COMPLETION DATE will be the date 90 days after the SUBEVENT SM date.

**New SUBEVENT SQ (C3101): State Deferral Inquiry**

Definition: SUBEVENT SQ is the date that the Region initiates a deferral inquiry to confirm the State's certification that it has completed its selected remedy successfully. The inquiry must be initiated within 90 days of EPA's receipt of the State's certification that the remedy has been completed (SUBEVENT SM) or the SL COMPLETION DATE will be the date 90 days after the SUBEVENT SM date. Once the Region completes a deferral inquiry (which may be after the 90 day period), the Region must issue a document which either confirms successful completion of the deferral or terminates the deferral status of the site. The SL COMPLETION DATE is the signature date of this document, and the appropriate qualifiers (C2103 = S or C2103 = T) must be used.

**Financial Tracking in CERCLIS/CERHELP**

Cooperative agreements may be awarded to States to assist implementation of the deferral program on a site- or non-site-specific basis. Site-specific cooperative agreements should be tracked under the C2101 = SL event, and non-site-specific (Core Program) cooperative agreements should be tracked in CERHELP under C304 BA-TYPE = CG.

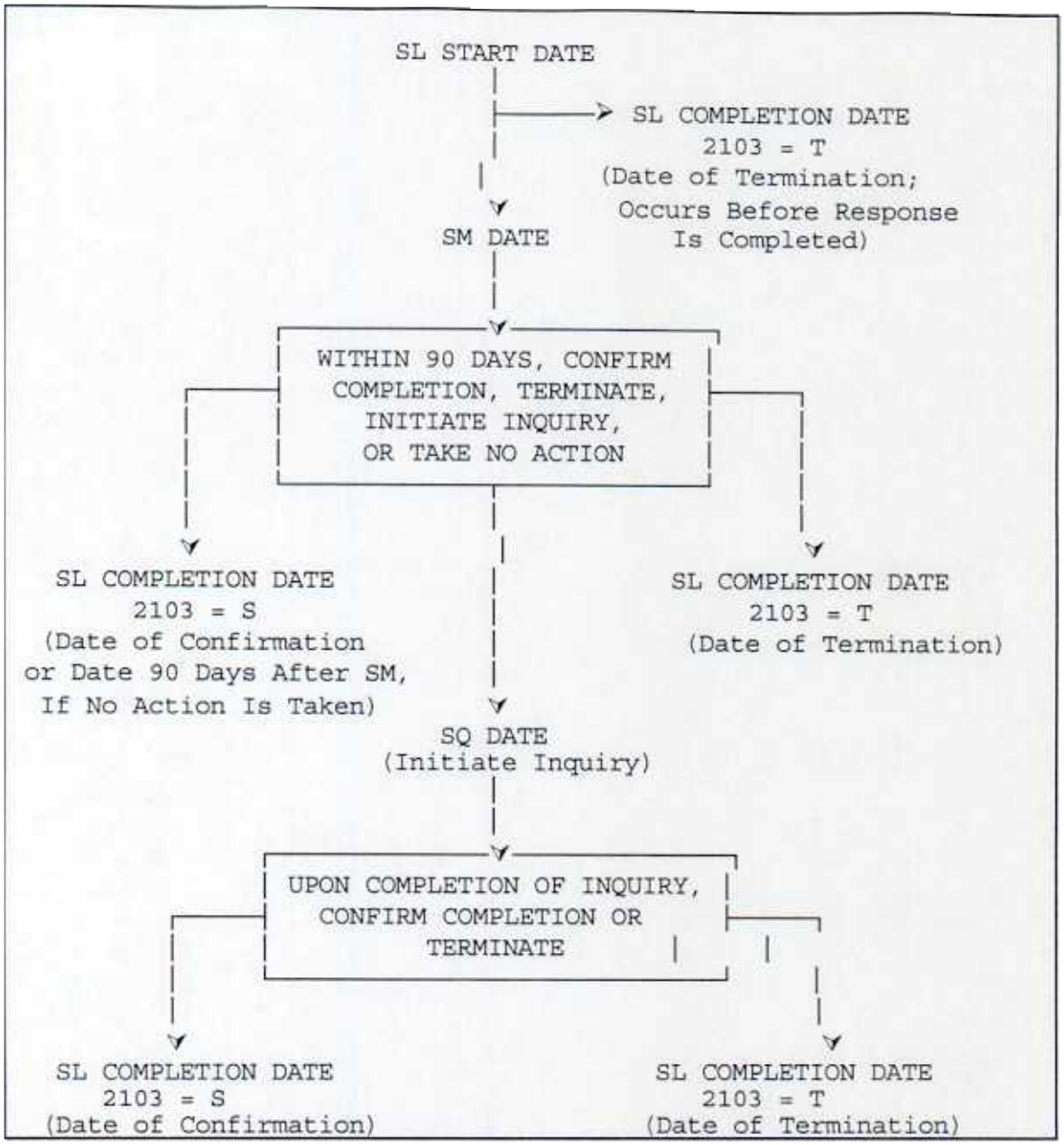


**Figure 1: Flowchart for Determining SL Completion Date**

APPENDIX C: Policy Announcement No 94-07

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

(Signed) June 08, 1994
OFFICE OF THE COMPTROLLER
POLICY ANNOUNCEMENT NO. 94-07

MEMORANDUM

SUBJECT: New Sub-object Class Code for Deferral Program Cooperative Agreements

FROM: Kathryn S. Schmoll
Comptroller (3301)

TO: Assistant Regional Administrators
Management Division Directors
Regional Comptrollers
Senior Budget Officers
Financial Management Officers

PURPOSE

This Policy Announcement (P.A.) establishes a new sub-object class code for deferral program cooperative agreements.

POLICY

The new sub-object class code to be used for the deferral program cooperative agreements is described below:

41.90 Deferral Program Cooperative Agreements. Awards to States, Territories, Commonwealths, or Indian Tribes to conduct site-specific activities at National Priority List (NPL) caliber sites which have been deferred from NPL listing consideration while recipients compel and oversee Potentially Responsible Party (PRP) response actions. May not be used to conduct or support Fund-financed remedial action at a deferred site. Awards are subject to 40 CFR Part 35, Subpart O. [Assistance program code "V" (CFDA number 66.802)]

EFFECTIVE DATE

This new sub-object class code is available for immediate use It will be included in the next revision of Resources

Management Directives System 2590, Part IV, Object Class Codes.

FOR ADDITIONAL INFORMATION

Should you have any questions on this P.A., please contact Charles Young of the Superfund Accounting Branch on 202-260-6890.

cc: David J. O'Connor
David Osterman
Elizabeth Craig
FMD Branch Chiefs