UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MEMORANDUM

SUBJECT: Update to "Guidance for Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully Under CERCLA Section 120(h)(3)"

FROM: Barry N. Breen
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TO: EPA Superfund Division Directors
EPA Regional Counsels

Purpose

This guidance provides updated recommendations to Environmental Protection Agency (EPA) Regional federal facility programs concerning the implementation of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 120(h)(3). Specifically, it addresses when EPA generally should evaluate a federal agency's demonstration that a remedial action is "operating properly and successfully" as a precondition to the deed transfer of federally-owned property, as required in section 120(h)(3).

This guidance updates EPA's interim final "Guidance for Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully Under CERCLA Section 120(h)(3)" ("1996 OPS guidance") with respect to when it is generally appropriate for Regions to review an operating properly and successfully determination ("OPS determination") for a real property transfer. The 1996 OPS guidance generally recommends that "the demonstration to the Administrator must be made for *all* [emphasis in original] federal deed transfers of real property that has been contaminated with hazardous substances which exceed the threshold requirements in the regulations at 40 CFR Part 373." Consistent with EPA's updated interpretation of section 120(h)(3), Regions generally should review the demonstration to the Administrator that a remedy is operating properly and successfully only at sites where the federal agency is implementing a CERCLA remedial action at a National Priority List (NPL) site and is seeking to transfer the property before the remedial objectives have been met.

Updated Applicability of the 1996 OPS Guidance

In establishing the requirement for an OPS determination in CERCLA section 120(h)(3)(B),[1] Congress used CERCLA terms of art, such as "remedial action" and "remedial design."[2] Consistent with CERCLA section 120(e), EPA oversees cleanup by other federal agencies at federally-owned NPL sites based on the terms of an interagency agreement, known as a Federal Facility Agreement. In these situations, EPA is in a position to determine whether the remedy selected and implemented under EPA's oversight is operating properly and successfully, and thus, whether it is appropriate for a transfer outside the federal government to occur. Consistent with the language in CERCLA, EPA believes that its role in the OPS review process is appropriate for parcels where final (not interim) remedial actions have been taken at NPL sites (not at non-NPL sites where EPA does not have lead oversight authority).

Except with respect to the types of sites where it is appropriate for an EPA Region to review an OPS demonstration (i.e., for remedial actions at NPL sites), the EPA Regions may continue to consider the recommendations regarding other aspects of the 1996 OPS guidance, which are not affected by this update (e.g., Definition, Purpose and Responsibilities, General Guidance, Approval Letter sections). Statements within the 1996 OPS guidance's Applicability section or other sections regarding OPS determinations for non-NPL sites or removal actions are superseded by this updated guidance.

Conclusion

This document provides guidance to the EPA Regional Offices on the exercise of EPA's authority under CERCLA section 120(h)(3) regarding OPS determinations for remedial actions at NPL sites. It also may help inform the public, state and local governments, and other federal agencies on how EPA intends to exercise its authority at federal facility NPL sites under its updated interpretation of section 120(h)(3).[3] This document does not, however, substitute for EPA's regulations, nor is it a regulation itself. It does not impose legally-binding requirements on EPA, states, or other federal agencies, and may not apply to a particular situation based upon the circumstances.

If you or your staff have questions about these updated recommendations, please have your staff contact Meghan Kelley of the Federal Facilities Restoration and Reuse Office (FFRRO) at 202-564-3226.

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[1] CERCLA section 120(h)(3)(B) states: "For purposes of subparagraphs (A)(II)(I) and (C)(iii), all remedial action has been taken if the construction and installation of an *approved remedial design* [emphasis added] has been completed, and the remedy has been demonstrated to the Administrator to be operating properly and successfully."

[2] These terms of art are defined in the National Contingency Plan at 40 CFR 300.5; *see also* 40 CFR 300.435.

[3] Generally, in instances where another federal agency requests EPA's technical assistance in reviewing the overall effectiveness of a cleanup action at non-NPL cleanup sites (e.g., corrective actions under a state RCRA program's oversight; non-NPL sites where EPA is not overseeing the cleanup), the Economy Act, 31 U.S.C. section 1535, may provide an appropriate funding mechanism to cover EPA's costs associated with providing that technical assistance for the review of a cleanup action's effectiveness.