




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


JUL 17 2009

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Statement of Capacity Assurance in State Superfund Agreements

FROM: James E. Woolford, Director 
Office of Superfund Remediation & Technology Innovation (OSRTI)

Matt Hale, Director 
Office of Resource Conservation and Recovery (ORCR)

TO: Superfund National Policy Managers, Regions 1-10

Purpose

Before EPA can provide a Superfund remedial action in a state, section 104(c) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires that state to provide EPA with certain assurances. Under section 104(c)(9), the state in which the release occurs must provide assurances that adequate capacity exists for the management of all hazardous wastes that are reasonably expected to be generated within the state during the 20 year period following the date of such contract or cooperative agreement. This memorandum provides information and recommendations regarding such adequate capacity assurances.

Background

In accordance with CERCLA section 104(c)(9), the state in which a release occurs must enter into a cooperative agreement or Superfund State Contract (SSC) with EPA which assures that the state has adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the state for the 20 year period following the date of the contract or cooperative agreement. The state can meet this obligation by having hazardous waste treatment or disposal facilities within the state, or outside the state in accordance with an interstate agreement or regional agreement or authority; those facilities also must be in compliance with subtitle C of the Solid Waste Disposal Act.

Congress did not require one particular form of interstate agreement, but contemplated that states would address the problems attendant upon exporting such wastes through these agreements. Consistent with CERCLA and the National Contingency Plan (NCP), a remedial action cannot be provided by EPA unless this assurance is given (see 40 CFR §300.510(e)(1)). EPA determines whether the state's assurances are adequate. In order to support the determination that the state's assurances are adequate, the requirements of CERCLA section 104(c)(9)(B) and (D), namely that there be an interstate agreement for waste exports and that the treatment and disposal facilities be in compliance with RCRA Subtitle C, must be addressed. In making this determination, contracts between the generators and treatment/disposal facilities may serve as interstate agreements.

On January 15, 1997, EPA published a *Federal Register* notice citing the results of the national Capacity Assurance Plan (CAP) report¹, which examined the national capacity for the management of different types of hazardous waste through the year 2013. In that *Federal Register* notice, the Agency made the determination required under CERCLA section 104 (c)(9) that there exists adequate national capacity. The *Federal Register* notice further stated:

“The Agency will continue to collect and evaluate additional data to ensure that the requirements of CERCLA 104(c)(9) are satisfied. At this time, the Agency does not anticipate the need to conduct another CAP for the next few years.”

This memorandum provides information and recommendations for evaluating state capacity assurances (i.e., states certifying that there is adequate capacity for a 20 year period) when signing a cooperative agreement or SSC.

Adequate National Capacity

Since the 1997 *Federal Register* notice, EPA's Office of Resource Conservation and Recovery (ORCR) has continued to monitor national capacity assurance information and concludes that there exists adequate national capacity in all CAP management categories through December 31, 2034. This conclusion is based upon the following information:

- Prices for the treatment and disposal of hazardous waste have essentially remained stagnant, indicating that there is not a capacity shortfall.²
- The Biennial Report³ information does not show significant changes to the generation or management of hazardous waste that would be expected from a shortfall of capacity.

¹ National Capacity Assessment Report: Capacity Planning Pursuant to CERCLA section 104(c)(9); EPA530-R-95-016; NTIS PB95-20672 (http://www.epa.gov/osw/hazard/tsd/capacity/cap_rpt.pdf).

² For example, see <http://www.etc.org/costsurvey8.cfm> for pricing information.

³ See <http://www.epa.gov/osw/inforesources/data/biennialreport/index.htm>.

- Information from RCRA permits indicates that there is no national shortfall in capacity.
- Evidence of increased efforts and company policies that promote waste minimization, source reduction, and recycling activities that reduce the generation of hazardous wastes. For example, waste minimization associated with the increasing membership in EPA's National Partnership for Environmental Priorities (NPEP) program reports over 10 million pounds eliminated or recycled.

This information, combined with the findings of the 1996 National Capacity Assessment Report, indicates that there remains adequate national capacity in all CAP management categories through December 31, 2034. States may refer to this memorandum and the above data sources as a basis for assuring adequate hazardous waste management capacity in their cooperative agreements or SSCs. Available information from the past 20 years indicates that compliance status has not constrained capacity to create a shortfall and we do not have any information to suggest compliance status would constrain capacity for the next 20 years. If significant capacity shortfalls appear because of compliance status, we request notification as soon as possible.

If at any time a state or region has reason to believe that there is a shortage of any specific type of capacity that would justify a closer review, please contact James Berlow, Director of the Permits, Implementation and Information Division in ORCR.

For general questions on this requirement under CERCLA, please contact Larry Zaragoza in OSRTI at 703-603-8867. For questions on additional RCRA information that could be used to support the 20-year capacity assurance, please contact Laura L. Lopez in ORCR at 703-308-8482.

cc: Mathy Stanislaus, OSWER
 Barry Breen, OSWER
 Renee Wynn, OPM
 Debbie Dietrich, OEM
 John E. Reeder, FFRRO
 OSRTI Managers
 Dave Kling, FFEO
 Earl Salo, OGC
 Lauren Willis, OGC
 Charles Openchowski, OGC
 RCRA Policy Managers
 Superfund Branch Chiefs, Region 1-10
 Debbie Bishop, Superfund Lead Region Coordinator, Region 7
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