United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

EPA

DIRECTIVE NUMBER: 9832.2

TITLE: COORDINATION OF EPA AND STATE ACTIONS IN COST RECOVERY

APPROVAL DATE: AUGUST 29, 1983

EFFECTIVE DATE: AUGUST 29, 1983

ORIGINATING OFFICE: OWPE

☒ **FINAL**

☐ **DRAFT**

STATUS:

REFERENCE (other documents):

OSWER OSWER OSWER
E DIRECTIVE DIRECTIVE DI

United States Environmental Protection Agency
Washington, DC 20460

EPA OSWER Directive Initiation Request

Interim Directive Number: 9832.2

Originator Information

Name of Contact Person	Mail Code	Telephone Number
Anthony Diecidue	WH-527	382-4841

Lead Office: ☐ OERR ☐ OSW ☐ OUST ☒ OWPE ☐ AA-OSWER

Approved for Review

Signature of Office Director: M. G. Kelly

Date: 5-30-86

Title

Coordination of EPA and State Actions in Cost Recovery

Summary of Directive

Outlines considerations for promoting Fed/State relations in their respective cost recovery efforts. Also provides Guidance on preparing conditions to cooperative agreements.

Key Words: coordination, cost recovery, promoting, efforts cooperative, State, guidance

Type of Directive *(Manual, Policy Directive, Announcement, etc.)*: Guidance

Status: ☐ Draft ☒ Final ☒ New ☐ Revision

Does this Directive Supersede Previous Directive(s)? ☐ Yes ☐ No Does It Supplement Previous Directive(s)? ☐ Yes ☒ N

If "Yes" to Either Question, What Directive *(number, title)*

Review Plan

☐ AA-OSWER ☐ OUST ☐ OECM ☒ Other *(Specify)*
☐ OERR ☐ OWPE ☐ OGC
☐ OSW ☐ Regions ☐ OPPE

This Request Meets OSWER Directives System Format

Signature of Lead Office Directives Officer: M. G. Kelly — Date: 5-30-86

Signature of OSWER Directives Officer — Date

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

AUG 29 1983

MEMORANDUM

SUBJECT: Coordination of EPA and State Actions in CERCLA Cost Recovery Negotiations and Litigation

FROM: Courtney Price
Special Counsel for Enforcement

Lee Thomas
Assistant Administrator for
Solid Waste and Emergency Response

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Director, Office of Intergovernmental Liaison

The clean-up of hazardous waste disposal sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) involves payment of monies from the Hazardous Substance Response Fund (the Fund) created by Section 211 of CERCLA to individual States or to contractors to finance clean-up activities. In many cases, the State in which the site is located will also contribute its own funds to the site clean-up 1/. EPA and the State may thereafter negotiate with or take judicial action for recovery of the amounts expended by them against the party or parties who

---

1/ Under CERCLA §104(c)(3), the State must pay or assure payment of 10 percent of the cost of remedial action and operations and maintenance at a site and at least 50 per cent of the cost of all response actions at a facility which was owned by the State or a subdivision at the time of disposal of hazardous substances.

Current Agency policy allows CERCLA funding of remedial investigation, feasibility study, and remedial design at privately owned sites without a State cost-share. Accordingly, any cost-share previously paid by the State (allowable State services, statutory credit or cash) for remedial investigations, feasibility studies, and remedial design at privately owned sites will be applied toward the State's share of the cost for remedial construction at the site, see May 13, 1983 Memorandum from Lee M. Thomas.

are legally responsible 2/. In those cases, the question arises whether the separate negotiations or judicial actions of EPA or the State to recover their respective funds might, in some way, prejudice the other's right to recoup its monies, and if so, what actions might be taken to avoid such prejudicial effect.

It may initially appear unreasonable to conceive that either EPA or a State could take action which would interfere with the other's right to recover monies expended for site clean-up. However, the following points should be considered:

- State as Agent - EPA will frequently transfer its share of clean-up funds to the State which will, in turn, spend it on the site under the cooperative agreement with EPA. The cooperative agreement contains numerous protocols, procedures, and other standards with which the State must comply to assure the quality of the site investigation and clean-up. Because of EPA's control over these matters, adverse parties may argue that the State is EPA's agent or representative for the expenditure of the funds. This misunderstanding might be asserted as a defense to recovery of remedial costs by a potentially responsible party.

2/ Further guidance on cost recovery procedures and responsible parties is contained in a forthcoming policy entitled, "Cost Recovery Actions under CERCLA."

- Collateral Estoppel - An adverse judgment by a court in an action by either EPA or a State on the issue of recovery of funds expended on the site might be held to collaterally estop the other governmental agency from successfully bringing a subsequent action against that same party 3/.
- Insolvency of Responsible Party(s) - A settlement or judgment by EPA or the State might exhaust the available resources of the responsible party(s), leaving the other governmental agency without possibility of a recovery.

Regardless of the merits of arguments which may be made on the foregoing considerations, in the interest of promoting Federal-State relations, there are certain rights and obligations which should be clearly defined at the outset of the relationship. The Regions, in cooperation with OERR, have recognized the benefits of identifying tnese interests by reflecting them in the cooperative agreements. Accordingly, this memorandum does not require the Regions to adopt any new procedures or change any existing cooperative agreements. Instead this document presents the rationale for drafting cooperative agreements in the manner prescribed by OERR.

3/ See United States v. I.T.T. Rayonier, Inc., 627 F.2d 996, (9th Cir., 1980).

THE COOPERATIVE AGREEMENT

1. Negation of Agency in Cooperative Agreement

The cooperative agreement should negate the principle that the State is an agent for EPA. This is important for both governmental agencies for a number of reasons. In the cooperative agreement, EPA will necessarily require that the State observe certain standards, procedures and protocols, such as in the taking of samples, their chain-of-custody, analysis protocols, and perhaps accounting procedures. The need to specify such procedures could be argued to constitute a right to control the actions of the State, an indicia of an agency relationship. Neither EPA nor the State should wish to encourage such an argument because of the potential exposure to tort liability as well as the possibility of complicating a cost-recovery effort. Therefore, the imputation of an agency relationship between EPA and the State should be negated by appropriate language in the cooperative agreement. Suggested language for such a provision appears in the Appendix to this memorandum.

2. Requirement for Notice of Settlement or Action

The cooperative agreement between EPA and the State should contain a provision that neither will initiate a cost recovery proceeding or enter into a settlement with the responsible party except after ample written notice in advance of the execution of a settlement agreement or the filing of a suit. The provision prevents rushing by EPA and the State to obtain a judgment against

or settlement with the responsible party, thereby gaining a position of preference with respect to the assets of the responsible party.

Inclusion of such a provision in the cooperative agreement is fair to both EPA and the State, in that neither may gain an unexpected advantage to the assets of the responsible party by separate negotiations of which the other may be unaware.

Such a provision also provides a means whereby each party to the cooperative agreement may take separate independent action to protect its interests, after having given the necessary notice, if there are reasons to not engage in joint EPA-State negotiations or file suits in coordination with each other against the responsible parties. Suggested language for such a provision appears in the Appendix to this memorandum, and provides for written notice not less than 30 days in advance of settlement or initiation of a cost recovery action.

3. Requirement for Cooperation and Coordination of Cost Recovery Efforts

The cooperative agreement should also provide that EPA and the State will cooperate with each other in efforts to recover their respective shares of the costs of response activities at the facility, and will coordinate their respective activities and resources in such efforts, including the filing and coordination of litigation for the recovery of costs and the use of evidence and witnesses in such suits. This provision is desirable because

cost recovery suits will involve considerable data, documents and witnesses from both EPA, the State and their contractors, and close coordination between EPA and the State will be very important to the efficient and effective resolution of those suits. Model language for this provision also appears in the Appendix.

4. Requirement That Judicial Action Be Taken in U.S. District Court

The cooperative agreement should also provide that any suit filed by either party to the agreement against any third party for recovery of response costs to which it may be entitled, shall be brought in the U.S. District Court for the judicial district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office (§113(b)). The purpose of this provision is to avoid fragmenting the efforts of EPA and the State between Federal court (in which EPA would bring a suit), and State court (in which the State could bring a cost recovery suit under any applicable State law. See the discussion of this point in the section entitled "Pending Cases", infra). Model language for this provision also appears in the Appendix.

NON-JUDICIAL SETTLEMENT

In the absence of an agency relationship between EPA and the State, there is little possibility that the State could enter into a separate agreement with the responsible party (as distinguished

from a Decree or Judgment) which could affect EPA's rights against the responsible party, other than to drain off that party's assets which might be available for payment of a cost-recovery claim. In the case of a responsible party with substantial assets, a separate settlement by the State or EPA may not present a serious problem to the other party. However, assuming EPA becomes aware of an impending settlement between the State and the responsible party(s) 4/, the Agency should, before the settlement is finalized, determine the probable extent of the responsible party's financial ability to satisfy EPA's claim in addition to payment of the settlement with the State 5/.

In most cases, the responsible party will probably wish to simultaneously settle its liability with both the State and EPA. Collective negotiation and settlement procedures involving the

---

4/ EPA should become aware of any impending settlement by the State with a responsible party assuming there is a provision in the cooperative agreement which requires the State to notify EPA in writing thirty days in advance of any proposed settlement, and the State complies with that agreement.

5/ A determination of the financial ability of a potentially responsible party can be made by the Financial Management Division of the Agency, or by use of a Financial Assessment System which has been developed by the Economic Analysis Division of the Office of Policy Analysis of EPA. This system will provide case-by-case, inexpensive and defensible estimates of ability-to-pay which will be useful for settlement consideration. This system requires a minimum of financial data which will usually be available from a Dun and Bradstreet report, a Moody's listing, or an audited financial statement. When that information is not available, the system will enable enforcement personnel to focus data requests to that information necessary to perform a minimum financial assessment. Any questions about this system and its uses should be directed to Kathy Summerlee, FTS 382-3077, or David Erickson, FTS 382-2764.

State, EPA, and the responsible parties should be encouraged to avoid misunderstandings and to resolve all issues at the same time. However, there will undoubtedly be circumstances under which the responsible party may believe that it would be advantageous to settle with one claimant (either EPA or the State) and not the other. It is those cases where the assets of the potentially responsible party would be substantially depleted by the settlement which could present significant problems for each claimant.

It should be recognized at the outset that, absent the proposed notice and coordination agreements discussed above, there is nothing to prevent the State or EPA from settling its claim in the absence and without the concurrence of the other. Where such a settlement would place either the State or EPA in a more advantageous position with regard to the assets of the responsible party, problems could arise which could affect intergovernmental relations. In those cases, the following options are available to EPA:

1. Should EPA determine that the State has independently entered into settlement negotiations with the responsible party, EPA should contact the appropriate State agency in an effort to establish a joint settlement effort and strategy. Simultaneously, EPA should notify the responsible party by letter (if that has not already been done as part of the Agency's cost recovery procedure), advising it of the Agency's claim, and that no other person or entity is authorized to negotiate for or

otherwise represent the Agency in respect to that claim. At the same time, the Agency should initiate an investigation into the financial resources of the responsible party to determine whether there will be sufficient assets remaining after the proposed State settlement to satisfy EPA's claim. That investigation can be carried out in the manner described in footnote 5.

2. If it is determined that the assets of the responsible party will likely be depleted or substantially impaired by a separate settlement with the State without provision being made for EPA's claim, and if efforts to establish a joint settlement effort with the State are not successful, then consideration should be given to EPA's applying to the appropriate U.S. District Court for the appointment of a receiver to operate or manage the assets of the responsible party for the benefit of all creditors of that party. This action, if taken in a timely manner, would prevent the responsible party from distributing its assets in a preferential manner.

However, the decision to attempt to forestall a State settlement with a responsible party should be made only after serious consideration of all factors involved, including:

- the amount of EPA's claim which might be prejudiced;
- the past relations between EPA and the State agency involved in the negotiations;
- the circumstances under which the State and the responsible party entered into the negotiations without the presence of EPA;

- the existence of any agreement between EPA and the State prohibiting such negotiations;
- and any other factors which might bear upon the decision.

While this action should be taken only as a last resort, the Agency's responsibility to preserve and restore the Fund may require such action. As in other such actions, a decision to seek the appointment of a receiver for the assets of a responsible party will require the concurrence of the Special Counsel to the Administrator for Enforcement.

PENDING CASES

There are a number of cases in which States have already initiated a suit against responsible parties, and EPA has contributed or intends to contribute a portion of the clean-up costs. In such cases, what is the proper forum and the best method in which to proceed?

In the absence of an agreement with EPA to the contrary, a State may, of course, proceed with an action in State court for cost recovery claims based upon any applicable State law 6/.

6/ CERCLA §107(i) provides: "Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any provision of State or Federal law, including common law, for damages, injury or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance."

States are also authorized to make claims under CERCLA for the cost of response activities which they incurred at a site. Section 107(a) of CERCLA, for example, provides for the liability of past and present owners and operators of a facility, generators, transporters and others for "all costs of removal or remedial action incurred by the United States or a State not inconsistent with the National Contingency Plan." Many other sections of CERCLA refer to the right of the States to recover for their own costs.

However, §113(b) of CERCLA provides:

> "... the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office."

We interpret this provision to mean that any claim made by EPA, the State or any other person for recovery of response costs, which is based upon the provisions of CERCLA, must be brought in the appropriate U.S. District Court, and may not be asserted on behalf of EPA by a State in a State court action 7/. Obviously, any claim asserted by EPA will be based upon CERCLA and will be in U.S. District Court. Likewise, if

---

7/ In addition to the restriction of §113(b), there are additional reasons why the State could not attempt collection of the Federal share of response costs. Under CERCLA §112(c)(3) and 28 USC §516, the U.S. Attorney General is required to represent EPA in these proceedings. This may not be delegated to the States, and therefore it is not possible to authorize the States to attempt collection of the Federal share of response costs in a State court proceeding, even should it be otherwise appropriate.

the State's claim against a third person for its share of the costs relies in whole or in part upon CERCLA, then it too must be brought in U.S. District Court. A State may, therefore, attempt recovery of its share of response costs in State court only under some law or theory other than CERCLA.

We also believe it highly important that EPA and the State attempt to coordinate their respective claims because:

- such actions will involve a substantial amount of technical data, documents and witnesses from both EPA and the State, and each party could derive the benefit of the other's evidence and witnesses;
- coordination would avoid the necessity of maintaining two separate proceedings which would duplicate much of the same effort and resources; and
- coordination of the claims would avoid the issue of collateral estoppel discussed earlier in this memorandum.

We believe the States will be receptive to joint or cooperative cost recovery actions with EPA for these reasons, and for the additional reason that the legal authority for the States to recover is probably much clearer under CERCLA than it may be under the laws of most States.

The following options, or some variance thereof, should therefore be followed in those cases where EPA provides CERCLA

funds under a cooperative agreement to a State which has a suit pending in State court against the responsible party:

Option I: EPA should require, as a condition of payment of the CERCLA funds to the State, that the State will, within a certain period of time (i.e., 30 days) after receipt of the funds, dismiss without prejudice all claims for recovery or reimbursement of any response costs at the site 8/ from any action then pending in State court. The provisions recommended earlier in this Memorandum for inclusion in all cooperative agreements should also be used 9/.

It is not necessary to require that a single suit for cost recovery be filed jointly by EPA and the State. It may be a more simple procedure, and avoid potential logistical problems, for each party to file its own suit separately, and then request

---

8/ Note that this does not necessarily require a complete dismissal of the pending State court action. This recognizes that there may be other claims of the State involved in the case, with which the State may wish to continue in the State court proceedings, and that the existence of counterclaims by the defendant on other issues may prevent the State from effecting a complete dismissal of the case. The important point is to eliminate all cost recovery claims from the State court proceedings. Of course, if those are the only claims involved in the State case, a complete dismissal of the case would be the desired result.

9/ The Attorney General of the State should agree to or concur in this provision of the cooperative agreement, since it affects pending litigation in which the Attorney General is representing the State. Such agreement or concurrence may be limited to the particular provision requiring dismissal of the case, and may be evidenced by an endorsement to the cooperative agreement or by separate letter signed by the Attorney General or his representative.

the U.S. District Court before which they are pending to consolidate proceedings on the suits pursuant to Rule 42 of the Federal Rules of Civil Procedure.

Note also that this option does not affirmatively require that the State refile its claim in Federal court, but only that if the claim is refiled, it will be in Federal court. The requirement for cooperation and coordination between EPA and the State will also apply to and encourage joint negotiations with the responsible parties before filing of a suit in Federal court, as well as to subsequent litigation in Federal court.

Option II: It is conceivable that a State may wish to continue to pursue its cost recovery claim in State court, or may not wish to coordinate its efforts with EPA. In such event, EPA should not, even if it could, attempt to require it to do otherwise. However, because collateral estoppel could be raised against EPA by the responsible party(s) in event of an unfavorable result in State court proceedings, EPA should, as a condition of payment of the CERCLA funds, require that the State, within a specified time, dismiss without prejudice or omit from any action then pending or which it may subsequently file in State court any claim for recovery of response costs which in the opinion of EPA, are or may be based upon CERCLA, or any law, regulation or authority other than that which may exist under the laws of that State 10/.

10/ See comment at footnote 9.

EPA should strongly urge the States with which it enters into cooperate agreements to accept Option I, since it will result in much greater effectiveness and cost-efficiency in recovery actions. Option II should be adopted only after all efforts to persuade the State have failed.

Note on Purpose and Use of this Memorandum

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys and other employees of the U.S. Environmental Protection Agency. They are not intended to nor do they constitute rule-making by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action at varience with the policies or procedures contained in this memorandum, or which are not in compliance with internal office procedures that may be adopted pursuant t these materials.

We recognize that this memorandum contains subject matter which relates to sensitive areas of the Federal-State relationship. Nothing contained herein is intended to imply bad faith or improper motive on the part of any State or agency thereof, and no such interpretation or construction of any provision herein should be made. This memorandum attempts to recognize that in the normal course of EPA-State relations, occasions arise in which the interests of EPA and the State may not be identical, and it is our intent to anticipate and

prepare for such occasions so that they can be approached in a rational, planned manner to minimize further potential impact on the relationship.

If you have any questions or problems concerning any matter contained herein, please call Russell B. Selman at FTS 426-7503.

Attachment

APPENDIX

Under CERCLA, both EPA and affected States can institute enforcement actions against and/or negotiations with parties responsible for priority waste sites. When this occurs, a settlement or legal action by either party could potentially impede or even negate the claims of the other for recovery of funds expended at the site. Obligations, rights, and procedures for litigation must be defined as early as possible in the working relationship between EPA and the State to avoid this eventuality. Therefore, provisions concerning cost recovery should be in the Cooperative Agreement application. Specific provisions that address different enforcement conditions are presented below. These provisions should be reviewed, discussed with the RSPO, and included in the application, as appropriate. Please refer to the text of the Memorandum for guidance on the use of these provisions.

1. Disclaimer of Agency Relationship

Nothing contained in this Agreement shall be construed to create, either expressly or by implicaation, the relationship of agency between EPA and the State. Any standards, procedures or protocols prescribed in this Agreement to be followed by the State during the performance of its obligations under this Agreement are for assurance of the quality of the final product of the actions contemplated by this Agreement, and do not constitute a right to control the actions of the State. EPA (including its employees and contractors) is not authorized to represent or act on behalf of the State in any matter relating to the subject matter of this Agreement, and the State (including its employees and contractors) is not authorized to represent or act on behalf of EPA in any matter related to the subject matter of this Agreement. Neither EPA nor the State shall be liable for the contracts, acts, errors or omissions of the agents, employees or contractors of the other party entered into, committed or performed with respect to or in the performance of this Agreement.

2. Notice of Intent to Settle or Initiate Proceedings

EPA and the State agree that, with respect to the claims that each may be entitled to assert against any third person (herein referred to as the "responsible party", whether one or more) for reimbursement of any services, materials, monies or other thing of value expended by EPA or the State for response activity at site described herein, neither EPA nor the State will enter into a settlement with or initiate a judicial or administrative proceeding against a responsible party for the

recovery of such sums except after having given notice in writing to the other party to this Agreement not less than thirty (30) days in advance of the date of the proposed settlement or commencement of the proposed judicial or administrative proceedings. Neither party to this Agreement shall attempt to negotiate for nor collect reimbursement of any response costs on behalf of the other party, and authority to do so is hereby expressly negated and denied.

3. Cooperation and Coordination in Cost Recovery Efforts

EPA and the State agree that they will cooperate and coordinate in efforts to recover their respective costs of response actions taken at the site described herein, including the negotiation of settlement and the filing and management of any judicial actions against potential third parties. This shall include coordination in the use of evidence and witnesses available to each in the preparation and presentation of any cost recovery action, excepting any documents or information which may be confidential under the provisions of any applicable State or Federal law or regulation.

4. Judicial Action in U.S. District Court

EPA and the State agree that judicial action taken by either party against a potentially responsible party pursuant to CERCLA for recovery of any sums expended in response actions at the site described herein shall be filed in the United States District Court for the judicial district in which the site described in this Agreement is located, or in such other judicial district of the United States District Courts as may be authorized by section 113 of CERCLA, and agreed to in writing by the parties of this Agreement.

5. Litigation Under CERCLA Sections 106 and 107

The award of this Agreement does not constitute a waiver of EPA's right to bring an action against any person or persons for liability under sections 106 or 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or any other statutory provision or common law.

6. Sharing Recovered Funds with EPA

Any recovery achieved by the State pursuant to settlement, judgment or consent decree or any action against any of the responsible parties will be shared with EPA in proportion to EPA's contribution to the site cleanup under CERCLA.

7. Dismissal By State of Pending Cost Recovery Action - Option I

The State does hereby agree that it will, not later than thirty (30) days after the date of this Agreement, cause to be dismissed, without prejudice to any subsequent refiling, any and all claims of the State (or any Agency thereof) in the case of "(State or Agency) v. (defendant), now pending in the (Circuit, Chancery, etc.) Court of _____, Docket No. _____, for recovery of any services, materials, monies or other thing of value expended or to be expended on the site described in this Agreement. Any subsequent refiling of said claims by the State or any agency thereof will be in accordance with the provisions of this Agreement.

(See comment at footnote 9 of Memorandum regarding State Attorney General concurrence with this provision.)

8. Dismissal By State of Pending Cost Recovery Action - Option II

The State does hereby agree that it will, not later than thirty (30) days after the date of this Agreement, cause to be dismissed, without prejudice to any subsequent refiling, any and all claims of the State (or any Agency thereof) in the case of "(State or Agency) v. (defendant), now pending in the Docket No. _____, for recovery of any services, materials, monies or other thing of value expended or to be expended on the site described in this Agreement which are based or rely, in whole or in part, upon the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Any subsequent refiling of said claims by the State will be in accordance with the provisions of this Agreement.

(See comment at footnote 9 of Memorandum regarding State Attorney General concurrence with this provision.)

9. Emergency Response Action

It may in the course of conducting the remedial activities covered by the Cooperative Agreement, become necessary to initiate emergency response actions at the site. The Cooperative Agreement application should contain a provision acknowledging this eventuality and dealing with the effect any such emergency actions will have upon the remedial project. The provision below, or its equivalent, may be used in the application for this purpose:

> Any emergency response activities conducted pursuant to the National Contingency Plan, 40 CFR section 300.65, shall not be restricted by the terms of this Agreement. EPA and the State may jointly suspend or modify the remedial activities in the SOW of this Agreement during and subsequent to necessary emergency response actions.