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Guidance on Compensation for Property Loss in Removal Actions

Notice

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Preface

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) provides a national emergency and non-emergency blueprint for responding to the release of hazardous substances under the authority of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), the Clean Water Act (CWA), and the Oil Pollution Act of 1990 (OPA). Under the NCP, the U.S. Environmental Protection Agency (EPA) has primary responsibility for federal response to inland hazardous substance releases and for coordination of interagency support during a federal response. Specifically, Section 111(a) of CERCLA grants EPA the authority and discretion to use Superfund monies for "payment of any claim for necessary response costs [including compensation for property loss] incurred as a result of carrying out the [NCP] established under Section 311(c) of the Clean Water Act." In addition, the costs of compensating property items damaged or destroyed as part of a response action are allowable costs according to the Office of Solid Waste and Emergency Response Directive 9360.0-03B (the Superfund Removal Procedures Manual issued in February 1988) and, therefore, compensable under CERCLA.

Introduction

When hazardous substances are released into the environment, they can threaten natural resources and public property. In order to fulfill its mission to protect human health and the environment, the U S Environmental Protection Agency (EPA) in many cases will respond to these releases. Under CERCLA, On-Scene Coordinators (OSCs) act as EPA's representative during response actions. They organize all containment, removal, and disposal efforts and coordinate federal efforts with the local community.

Hazardous substance releases can also damage private property, and contaminated property can itself become a hazard. Property may sometimes be damaged in a response effort, or the OSC may determine that contaminated property may need to be disposed of to protect human health and the environment. In these circumstances, EPA may consider compensating private parties for such property.

Most losses suffered by private parties should be compensated by the party or parties responsible for contamination at the site, known as "potentially responsible parties" (PRPs). Insurance may also cover these losses. EPA recognizes, however, that circumstances may sometimes limit the access that private parties have to PRPs or insurance coverage. Therefore, EPA may elect to take on the responsibility of facilitating compensation for these losses, to the extent they are not otherwise covered.

Each response effort is unique, and as EPA's representative, the OSC, with assistance from the CO and the Office of General Counsel, should consider whether compensation to a private party is an appropriate part of any given response effort. In weighing this option, the OSC will consider EPA's paramount responsibility to protect human health and the environment and will ensure that this responsibility is carried out in keeping with the principles of environmental justice. EPA is committed to making every effort to ensure equal access to a safe and habitable environment for all.

If EPA elects to compensate for property loss due to a hazardous substance release or the resulting response effort, some circumstances may limit eligibility for compensation under Superfund. Superfund may not cover losses due to the negligence of contractors; the contractors themselves would be responsible for such losses. Also, individuals that have been found to be PRPs at a site are generally not eligible for compensation.

This guidance document outlines the general considerations and procedures for compensating private parties for the loss of property that has been destroyed or that has been contaminated and is a threat to human health and the environment. It applies to loss of property except in circumstances where the title of the property would have to be transferred to the federal government as part of the response action (see "Acquisition of Property" on the previous page). The OSC for a given response effort is responsible for the compensation steps and considerations outlined in this guidance.

Compensation Options

Most losses suffered by private parties should be compensated by PRPs or through insurance coverage. However, EPA may elect to take on the responsibility of facilitating compensation for these losses, to the extent they are not otherwise covered. At the discretion of the OSC, EPA may provide compensation through three methods: restoring property to its original condition; providing replacement property of similar value; and reimbursing owners in cash for the value of lost property. In circumstances where compensation is deemed appropriate, the OSC's primary concern is to provide the most efficient and cost-effective compensation available that ensures the health and welfare of the community and parties affected.

Many factors can influence the OSC's choice of compensation method. Some of them, such as cost or the wishes of the property owner, are fairly straightforward. Others can be more complex: for example, when several property owners are affected by a single response action, a single effort to compensate all of them may be the most equitable approach. The choice may also depend on such factors as the restoration experience of the cleanup contractors or federal agencies involved in the response and their availability to assist in a restoration effort. In the end, the OSC relies heavily on his or her own experience and judgment, in consultation with Regional staff and the affected property owner, to try to effect the most appropriate and efficient compensation plan.

A model site has been developed to help illustrate the considerations and procedures associated with each compensation method. The advantages, disadvantages, and specifics of each of the compensation methods is outlined below.

Restoration Considerations

The object of this compensation option is to restore property, as closely as possible, to its original condition. The Superfund Removal Procedures Manual (OSWER Directive 9360.0-03B) states that restoration should be the first option considered, using existing cleanup contracts or government agencies such as the U.S. Army Corps of Engineers (USACE) see "IAGs with USACE" on this page) or the Bureau of Reclamation. Restoration can also include a situation where property needs to be dismantled and removed during a response action, and then restored to its original position upon completion of the response. This is referred to as "saving and reinstalling" property. This method of compensation avoids some of the difficulties associated with replacement or reimbursement, such as the need for appraisals or possible disputes over the property provided as a replacement or the appropriate amount of cash for reimbursement.

Replacement Considerations

In some cases, the nature or extent of the contamination, or the type of property contaminated, makes restoration impossible. For instance, shrubs and trees damaged or destroyed during a response action may be impossible to restore. In other cases, contaminated articles may be significantly more expensive to clean than to replace. This can be especially true of contaminated items made of soft, permeable materials, such as sofas, carpeting, or mattresses.

In such situations, the OSC may elect to supply property owners with new property of similar value. Under this approach, the OSC should obtain the services of a vendor that supplies property of similar style and value for the contaminated property through existing clean-up contracts or the USACE, or by using a government credit card. The OSC tries to ensure that the replacement items are comparable to the items lost (see "Cost vs. Value" on the following page). The items are purchased through the cleanup contractor, USACE, or a government credit card, and the cost is billed to Superfund as part of the cost of the response action. A Miscellaneous Obligor Document (MOD) can also be completed by the OSC to purchase property for replacement purposes. The OSC should evaluate which approach will most efficiently and cost effectively address the circumstances at hand. There are certain circumstances that would render this option the least expensive and most efficient.

Reimbursement Considerations

If the property is too damaged or contaminated to restore and is not replaceable, the OSC may consider a cash settlement for the value of the property. This is usually considered a last-resort option, for several reasons. One reason is that the result is the furthest from restoring the property to its pre-response condition. Another is that this approach requires more paperwork and administrative involvement than the other two options, making it a longer process. Some items, however, such as artwork or antique furnishings, have value because they are unique and therefore cannot be replaced. If such items become contaminated or damaged beyond repair, reimbursement may be the only acceptable alternative.

EPA usually keeps the amount of cash reimbursement to a minimum by combining this compensation method with restoration or replacement of property whenever possible. If the property owner and the OSC cannot reach an agreement over the amount of the reimbursement, the dispute can be referred to the contracting officer or to higher Regional management. The OSC

should continue to call on EPA resources to help resolve any lingering dispute, but if all avenues within the Agency have been exhausted, the OSC should inform the property owner in writing of three alternatives:

- Making a claim against property insurance;
 - Filing a tort claim (civil action) against the PRPs responsible for the site, or
 - Filing a tort claim under Superfund
-

Compensation Procedures

This section explains in some detail the steps taken to secure compensation. The particulars given here are strictly guidelines. The circumstances at a site often create complex response situations that cannot be easily categorized. Moreover, some compensation plans will combine aspects of all three compensation methods to arrive at an appropriate settlement. In the end, the OSC will rely heavily on his or her own experience and judgment, in consultation with Regional staff and the property owner(s), to arrive at the most appropriate and most efficient compensation plan.

Documentation

As the OSC arrives at the site of a release, he or she should document the condition of the site. The written documentation, which becomes part of the Administrative Record for the site, fulfills four purposes:

- Documents the need for a removal action
- Identifies the removal decisions proposed
- Details the rationale behind removal decisions
- Documents the removal actions taken

The OSC can also use photographs or videotape to supplement the written record. As the OSC makes decisions about response efforts, he or she should also record the condition of any property that potentially could be damaged during response activities. This record is used as a baseline to determine appropriate compensation after the response is complete.

Consultation

In all functions that he or she performs (including determining compensation), the OSC may consult various sources, including Regional personnel, the owners of property affected, and other concerned members of the community.

Regional Personnel

Regional personnel that the OSC may consult include the Office of Regional Counsel, the Regional Decision Team (RDT) assigned to the site, and the Contracting Officer (CO). With them, the OSC may discuss technical and legal aspects of the response. The RDT plays a role in making removal decisions once sufficient assessment information about the site has been gathered.

The OSC may also discuss procedural options with Regional personnel. Cleanup contractors or government agencies (such as USACE) that perform response activities at the site may also perform compensation activities, such as cleaning or disposing of contaminated property or providing replacement property. The CO manages all contract and subcontract issues for the

response activities, and, therefore, may be able to clarify any contract options that could be used to implement a compensation plan. The CO can also help to implement the options an OSC elects to use.

Community Relations

Because the success of a response activity relies to a large extent on cooperation from the affected community, it is important that the community be fully informed about the response and compensation processes. EPA assigns a Community Relations Coordinator (CRC) or spokesperson to each response action. This representative creates or designs a Community Relations Plan to ensure, among other things, that there is an acceptable forum for affected citizens to communicate their concerns and needs to EPA personnel. The OSC should use the forum designated in the plan to discuss the response options and the possible resulting damage with the community and to ensure that community concerns are taken into account. He or she should also discuss compensation options with affected parties, explaining the compensation process.

The OSC should attempt to come to an agreement with the affected parties on an appropriate compensation plan, including the value of the property lost and the compensation method(s) to be used. In consultation with Regional legal staff, the OSC should draw up a prepared agreement that documents the compensation plan and the value of any damaged property. (A sample agreement form can be found in Appendix A.) The agreement will include a statement that the property owners understand that, upon executing the agreement, they are not entitled to any further compensation for the same damage. This clause is in accordance with CERCLA Section 114(b), which states that property owners who receive compensation under CERCLA for damages associated with a response action cannot receive any further compensation for the same damages under any other state or federal law. The agreement is supported by documentation in the OSC's action memo or amended action memo.

The agreement is placed in the site file, and other supporting documentation becomes part of the Administrative Record.

Completion

Once an agreement is made with the owners of the affected property to restore, replace, or reimburse the damaged property, the compensation procedure is completed in one of the following ways.

Restoration

If the compensation plan entails restoring the property, the OSC may direct the cleanup contractor, USACE, or the Bureau of Reclamation to perform the restoration. After it has been cleaned or restored, the property is reinspected. If the OSC determines that the property is still contaminated, he or she should proceed with another form of compensation.

Replacement

The OSC should direct the cleanup contractor or USACE to dispose of any items determined by the OSC to be too contaminated to be cleaned/restored. These items must be disposed of as hazardous waste. To replace items that are disposed of, the OSC consults with Regional personnel to identify other agencies that could assist in the process and to determine where suitable replacement items may be purchased. The OSC may obtain the services of an independent appraiser, through existing cleanup contracts or USACE, to estimate the value of all property targeted for disposal.

The OSC should then meet with the property owners, listing the items targeted for disposal and their estimated replacement value. When the OSC and the property owners come to an agreement on specific replacement items, the OSC, after consultation with the CO, should direct the cleanup contractor or USACE to purchase these items.

For large-scale replacement activities, such as those dealing with several property owners, the OSC should obtain the services of a vendor that supplies property of similar style and value to the contaminated property through existing cleanup contracts or the USACE. The property owner can then select the replacement property, which will be purchased through the cleanup contractors or USACE.

The vendor(s) will deliver the replacement property to the property owners and bill EPA through the cleanup contractor or USACE. The cost of the replacement items becomes part of the cost of the response action.

Reimbursement

The OSC should use the cleanup contractor or USACE to dispose of any items he or she determines to be too contaminated to be restored. To determine the replacement value of such property, the OSC may direct the cleanup contractor or USACE to obtain the services of a certified appraiser. After the value has been appraised, and an agreement has been reached with the property owners, cash payments from Superfund to property owners must be implemented directly through an OSC, rather than through a cleanup contractor or USACE. The OSC must complete a "Miscellaneous Obligor Document" (EPA Form 2550-10) (see Appendix B) and submit it to the Financial Management Office of Regional Accounting. The Certifying Officer approves and signs the payment schedule and transmits it to the U.S. Treasury for processing after the OSC ensures that the contaminated property is removed and disposed of properly. The Treasury then issues a check to the property owner.

APPENDIX A: SAMPLE AGREEMENT FORM



United States
Environmental Protection Agency
Washington, DC 20460

MISCELLANEOUS OBLIGATION DOCUMENT

1. OBLIGATION(S) FOR THE MONTH/PERIOD OF _____, 19 _____

2. PURPOSE:

3.

- ☐ AN ORIGINAL OBLIGATION
- ☐ AN INCREASE TO A PREVIOUS OBLIGATION
- ☐ A DECREASE TO A PREVIOUS OBLIGATION
- ☐ CANCELLATION OF A PREVIOUS OBLIGATION

4. Financial and Accounting Data

	DCN (Max 6)	Budget/FYs (Max 4)	Appropriation Code (Max 6)	Budget Org/Code (Max 7)	Program Element (Max 8)	Object Class (Max 4)
1						
2						
3						

	Amount (Dollars)	(Cents)	Site/Project (Max 8)	Cost Org/Code (Max 7)
1				
2				
3				

5. Certification

Certification of Funds Availability (Funds Certifying Official)

SIGNATURE

DATE

PHONE

PREPARED BY: _____
(SIGNATURE)

APPROVED BY: _____
(SIGNATURE)

APPENDIX B: MISCELLANEOUS OBLIGATION DOCUMENT

APPENDIX C: REFERENCES

"EPNs Final Indemnification Guidelines" (February 1994).

An overview of EPA's indemnification policies.

EPA/OSWER "Superfund Removal Procedures-Action Memorandum Guidance" (December 1990), EPA/54OP-90/004

A detailed analysis of the purpose and production of action memoranda for removal actions.

OSWER Publication 9200 5-105, "Understanding Oil Spills and Oil Spill Response" (October 1993), PB93-963409

An overview of EPA's oil spill response program and procedures.

OSWER Publication 9242 2-01B, "Emergency Response Cleanup Services Contracts (ERCS) User's Manual," (October 1987), PB90-191966.

A summary of EPA's ERCS contractor conventions and guidelines.

OSWER Publication 9355 5-14 FS, "EPA/USACE Payment Process-Direct Cite/Revised Reimbursement Methods" (May 1990)

Procedures for paying the U.S. Army Corps of Engineers for Superfund-related activities.

OSWER Publication 9360 0-03B, "Superfund Removal Procedures Manual" (February 1988)
A total overview of EPA's removal procedures and responsibilities.

OSWER Publication 9360 0-25, "An Overview of the Emergency Response Program" (April 1992), PB92-963404

An overview of EPA's program for emergency response to releases of oil and hazardous substances

OSWER Publication 9360 3-05 "Superfund Removal Procedures-Public Participation Guidance for On-Scene Coordinators Community Relations and the Administrative Record" July 1992), PB92.963416

An overview and explanation of EPA community relations activities during removal actions.

OSWER Publication 9360 3-06 "Superfund Removal Procedures-Removal Enforcement Guidance for On-Scene Coordinators" (April 1992), PB92-963409

Superfund removal guidance for On-Scene Coordinators.

OSWER Publication 9360 6-09 "Superfund Emergency Response Actions" (October 1992), PB540-R-92-020

A summary of federally funded removals completed up to 1991, including a state-by-state

overview.

OSWER Publication 9834 6, "Policy Towards Owners of Residential Property at Superfund Sites" (July 1991), PB91-205476

EPA's policy with regard to residential property owners at Superfund sites.

"RAC Users' Guide-Final Draft" (January 1995)

Guidance for purchasing and managing equipment under response action contracts.

"Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 "

Legislation that applies to federal agencies involved in the acquisition of private property for federal use.

APPENDIX D: ACRONYMS

CERCLA	Comprehensive Environmental Response, Compensation and Liability Act of 1980
CO	Contracting Officer
USACE	United States Army Corps of Engineers
CRC	Community Relations Coordinator
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
IAG	Interagency Agreement
NCP	National Contingency Plan
NRT	National Response Team
OPA	Oil Pollution Act of 1990
ORC	Office of Regional Counsel
OSC	On-Scene Coordinator
OSWER	Office of Solid Waste and Emergency Response
PCBs	Polychlorinated Biphenyls
PRP	Potentially Responsible Party
RDT	Regional Decision Team
SARA	Superfund Amendments and Reauthorization Act of 1986