

SUPERFUND DESIGN and CONSTRUCTION Update

From: Hazardous Site Control Division
To: EPA Regional Offices

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RECENT CHANGES TO THE LAND DISPOSAL RESTRICTIONS AND EFFECTS ON SUPERFUND RESPONSE ACTIONS

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On August 17, 1988, the Office of Solid Waste promulgated new Land Disposal Restrictions (LDRs) to further implement the requirements of Section 3004 of the Hazardous and Solid Waste Amendments of 1984 (HSWA) on disposal of hazardous wastes. Section 3004 generally prohibits land disposal of hazardous wastes, unless the waste or its residue has been treated to the level or by a method developed under Section 3004(m).

Under the Superfund Amendments and Reauthorization Act (SARA), Superfund response actions must comply with all regulations that are "applicable or relevant and appropriate restrictions" (ARAR) for a particular site. Depending on the nature of the response action and the type of contamination at a Superfund site, the Land Disposal Restrictions may be ARAR. For further information on whether LDRs are ARAR at a site refer to the front page of *Superfund Design and Construction Update*, June 1988, Vol. 2, No. 3.

The recent regulations establish treatment standards for the "first third" of the list of Scheduled Wastes under Section 3004(g). Standards for the "second third" and "third third" of the Scheduled Wastes are due in June 1989 and May 1990, respectively. Treatment standards were promulgated for certain solvents and dioxin-containing wastes under Section 3004(d) on November 7, 1986, and for the California-list wastes under Section 3004(e) on July 8, 1987. The standards represent treatment by the "best demonstrated available technology" (BDAT) for the respective waste categories.

The August 1988 regulations also change some of the effective dates for the Land Disposal Restrictions,

particularly for contaminated soil and debris that contain RCRA hazardous wastes. Sections 3004(d) and (e) exempt contaminated soil and debris from the land disposal prohibitions until November 8, 1988. However, in August, the Office of Solid Waste granted a two-year national capacity variance (until November 8, 1990) for soil and debris contaminated with solvents and dioxins and with the California-list wastes. This extension was based on an analysis of the treatment capacity available for contaminated soil and debris. In addition, a national capacity variance (until August 8, 1990) has been granted for soil and debris contaminated with "first-third" wastes for which the treatment standards are based on incineration.

There are several important items to note about the August regulations:

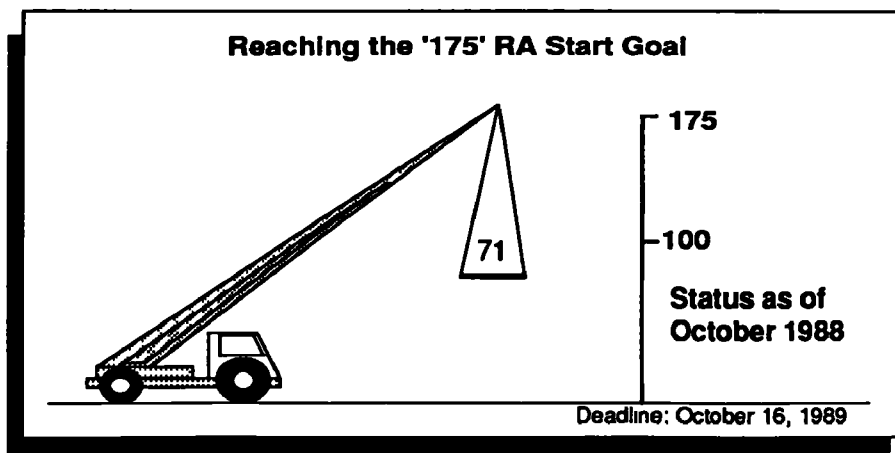
- the extension until November 1990 applies only to soil and debris contaminated with certain solvents or dioxin-containing wastes from Superfund and RCRA actions.
- the August 1990 extension applies to all soil and debris contaminated with "first-third" waste for

which treatment standards are based on incineration and to some "first-third" wastes that are not soil and debris.

- the August 1990 extension does not apply to soil and debris contaminated with "first-third" wastes for which treatment standards are based on technologies other than incineration (e.g., solidification).

When LDRs are ARAR, Superfund actions involving land disposal of restricted hazardous wastes may occur only after treatment to BDAT treatment standards, by receiving a treatability variance, or through a successful no-migration petition.

The Site Policy and Guidance Branch is developing guidance materials for determining when Land Disposal Restrictions apply to a particular Superfund site, including how to obtain a treatability variance for soil or debris. Each Region has identified at least one workgroup member to assist the development of the guidance for both remedial and removal issues. Contact your Regional Coordinator or Carolyn K. Offutt (FTS-8-475-9760) for further information."



DIFFERING SITE CONDITIONS (PART II)

J. Kent Holland, Jr.
Wickwire, Gavin & Gibbs, P.C.

The last issue of Design & Construction Update briefly described Type I and Type II differing site conditions under which a contractor may be entitled to an equitable adjustment in the contract price. In this issue, three items will be discussed that may affect claims under Superfund contracts. These items are: exculpatory clauses, variation in estimated quantity, and notice requirements. Owners and contractors should be familiar with these items.

EXCULPATORY CLAUSES

In general, exculpatory language serves to free a specified party from blame. However, when an owner uses broad exculpatory clauses attempting to deny liability for express or implied representations of site conditions, the differing site condition clause generally overrides such language. Types of clauses that are typically overridden include:

1. clauses denying responsibility for the accuracy of subsurface data furnished and stating that bidders are required to satisfy themselves as to the character, quantity, and quality of the subsurface materials,
2. clauses stating that the owner does not guarantee data accurately depict subsurface conditions and stating that bidders must perform their own investigations as they deem necessary; and
3. clauses stating that the owner will not provide data and that the contractor is expected to make his own determination of subsurface conditions.

Clauses like the above have been a factor in numerous contractor claims and should

not be used in an attempt to circumvent the differing site conditions clause.

VARIATION IN ESTIMATED QUANTITY

On Superfund construction contracts, items of work based on estimated quantities may be priced by unit rather than by lump sum. This relieves the contractor of much of the risk of inaccurate quantity estimates. Generally the contract will include a clause providing for adjustment of the unit prices if the actual quantities vary significantly from the estimates. In addition, the contractor may be entitled to a price adjustment under the differing site conditions clause if the quantity variation occurred because of a differing condition. This is because not only the numbered units may change but the method of doing the work may change as well. For example, different equipment may be required to dig a trench deeper than originally planned.

NOTICE REQUIREMENTS

Before continuing work at a site where a changed condition has been discovered, the contractor is required to give prompt written notice of the condition to the contracting officer. This allows the owner to investigate the condition and exercise a degree of control over the effort involved in addressing the problem. No particular format is required for the notice, provided that it adequately informs the owner of the nature of the changed condition. Written notice is generally given. Oral notice may be acceptable when it is given to the contracting officer or an authorized representative of the contracting officer. However, the contractor has the burden of proving that the oral notice was actually given and it is consequently advisable to promptly confirm an oral notice with a written notice.

If a contractor does not give notice before disturbing a site condition, but the owner has received actual or constructive notice of the changed condition and has not been prejudiced (harm) by the failure of the contractor to provide independent notice, the notice requirement shall be waived and the contractor may recover its costs. The owner can deny relief to the contractor only if it can prove that the contractor's failure to provide independent notice prejudiced the owner.

After a contractor encounters a differing site condition, gives notice to the contracting officer, and receives necessary instructions, the contractor must diligently proceed with performance pending resolution of any claim for equitable adjustment. Failure to do so could result in a termination for default.

CONCLUSION

On a Superfund project, the owner should be familiar with the rules applicable to differing site condition claims. Familiarity with the rules enables the owner to promptly review the condition, determine whether it is a legitimate differing site condition (either Type I or Type II), and advise the contractor how to proceed. Moreover, public policy strongly supports compensating contractors for differing site conditions, and owners should be wary of thinking they can use exculpatory language to shift investigation requirements and risks to the contractor. When the owner agrees that the condition qualifies as a differing site condition, equitable adjustment should be processed as soon as possible. While awaiting the equitable adjustment, the contractor should proceed with the work as directed by the owner in order to avoid being terminated for default. ■

ARCS/AWARD UPDATE (FY 1988)

The Alternative Remedial Contracts Strategy (ARCS) was implemented late in 1986 to provide regionally managed contracts. Firms awarded ARCS contracts are listed below, according to the region in which the award occurred.

Region I	Region III	Region V	Regions VI, VII, VIII
NUS (9/16/88)	NUS (12/31/87)	CH2M HILL (2/1/88)	CH2M HILL (9/13/88)
Arthur D. Little (9/30/88)	E&E (5/6/88)	Black and Veatch (3/1/88)	Jacobs Engineering (9/30/88)
Region II	CH2M HILL (6/3/88)	Williams and Works (3/31/88)	
Ebasco (9/7/88)	Tetratech (6/22/88)	PRC (4/28/88)	
ICF (9/30/88)	Black and Veatch (6/29/88)	E&E (5/6/88)	
		Weston (6/1/88)	
		Donohue (6/29/88)	

Cost proposals are currently being reviewed for Regions IV, IX, and X. Cost negotiations are ongoing in Regions I, II, VI, VII, and VIII. This list will be updated in future issues to show new contract awards.

LANG PROPERTY SITE BID TABULATION

The Lang Property is a 40-acre site located in Burlington County, New Jersey. Approximately 1,500 drums of chemical waste apparently were dumped at the site prior to June 1975. The area where disposal took place covers approximately 2 acres. A wide range of organic and inorganic (metals) chemicals has been identified in the surface soil, subsurface soil, and groundwater.

The work consists of removing debris from the site (including tanker trucks, vehicles and equipment, metal parts, and tires), excavating approximately 8,600 cubic yards of contaminated soil, backfilling with clean soil, compacting, regrading, adding top soil, and seeding.

Sealed bids were solicited by U. S. Army Corps of Engineers on May 2, 1988. Six bids were received and opened on June 7, 1988. Upon evaluation, the contract was awarded to Severson Environmental Services, Inc., Niagara Falls, NY, the lowest responsive and responsible bidder.

LANG PROPERTY SITE, BURLINGTON CITY, NEW JERSEY

	Government Estimate	Waste Conversion Colmar, PA	ACES, Inc King of Prussia, PA	ENSO Environmental Services, Inc Edison, NJ	Severson Environmental Services, Inc Niagara Falls, NY	Chemical Waste Management Newark, NJ	Rollins Environmental Services, Inc Wilmington, DE
Temporary Facilities	\$ 45,600	\$ 47,800	\$ 191,900	\$ 349,460	\$ 200,000	\$ 137,593	\$ 426,970
Health and Safety	69,800	39,600	96,100	63,710	150,000	181,807	316,270
Material and Labor	244,668	209,456	223,357	314,959	223,431	448,412	352,181
Site Preparation	160,100	60,362	112,360	129,576	505,000	170,563	521,345
Waste Handling and Disposal	3,006,806	1,887,000	1,860,255	2,259,648	1,908,582	2,637,484	2,378,226
Material Handling	473,776	57,190	205,245	69,041	168,537	143,945	183,581
Move/Demove	44,200	362,972	196,067	158,656	350,000	79,316	412,936
Analytical Sampling	80,500	45,200	60,950	135,856	101,000	188,008	89,251
Total	\$4,125,450	\$2,709,580	\$2,946,234	\$3,480,906	\$3,606,550	\$3,987,128	\$4,680,760

METALTEC/AEROSYSTEM BID TABULATION

The Metaltec/Aerosystem Site is an active hazardous waste site approximately 16 acres in size located in Sussex County, New Jersey. A metal plating facility was located at the site and residual metal wastes, solvents, and organic chemical contaminants have been identified in subsurface soils and groundwater.

The work consists primarily of excavating and disposing of approximately 4,700 cubic yards of contaminated soil, and treatment or disposal of approximately 20 55-gallon drums containing residuals from the RI/FS. In addition, the project includes transporting drummed solids, outerwear, and contaminated soil to an approved offsite facility and subsequent disposal. The groundwater col-

lected during dewatering activities will be treated at an onsite facility.

Sealed bids were solicited on May 2, 1988. Five bids were received and opened on June 7, 1988. Upon evaluation, the contract was awarded to Severson Environmental Services, Inc., Niagara Falls, NY, the lowest responsive and responsible bidder.

METALTEC/AEROSYSTEM SITE, SUSSEX COUNTY, NEW JERSEY

	Government Estimate	Waste Conversion Colmar, PA	ENSO Environmental Services, Inc Amherst, NY	Severson Environmental Services, Inc Niagara Falls, NY	Metcalf & Eddy, Inc Somerville, NJ	Rollins Environmental Services, Inc Wilmington, DE
General Conditions	\$ 347,214	\$ 413,300	\$ 324,800	\$ 200,000	\$ 612,750	\$1,136,000
Temporary Facilities	75,208	61,000	134,600	235,000	300,000	113,000
Health and Safety	603,877	33,600	79,800	200,000	50,000	331,000
Site Preparation	85,683	76,446	139,389	297,230	248,780	240,373
Waste Handling	2,265,315	1,711,834	1,859,866	2,331,232	3,123,810	5,358,060
Site Restoration	113,424	105,056	203,345	113,625	156,660	339,600
Total	\$3,490,721	\$2,401,236	\$2,741,801	\$3,377,087	\$4,492,000	\$7,518,033

STATES' ABILITY TO COST-SHARE

As part of EPA's ongoing efforts to track progress toward meeting the 175 remedial action (RA) starts mandated by the Superfund Amendments and Reauthorization Act (SARA), EPA has conducted a "desktop" analysis of the 114 fund-financed candidate RA sites in order to determine whether states will be able to meet their cost-share responsibilities at these sites. SARA requires the state to share 10 percent (or 50 percent if state-operated) of the costs of the RA. The fund-financed candidate sites are located in 33 states and the OERR analysis indicates that fully one-

third of the 33 states may be unable to meet their cost-share requirements, thereby jeopardizing the Agency's ability to meet the 175 mandate.

The analysis was based upon survey data provided by the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) published in June 1988 [State Funding Mechanisms for Cleanup of Non-NPL and NPL Hazardous Waste Sites]. The ASTSWMO survey provided information on the balances of state funds as of January 1, 1988. The state

fund balance was then compared against the estimated state cost-share requirements derived from the projected RA cost estimates in the Records of Decision.

In an August 10, 1988 memorandum to all Regional Administrators from Assistant Administrator J. Winston Porter, the Regional Offices were encouraged to bring this "desktop" analysis to the attention of states within their regions. For further information, contact Cathy O'Connell, State and Local Coordination Branch (FTS-8-382-2350)."

SCHEDULED TRAINING

Hazardous Materials Incident Response (FTS 8-684-7537)

November 14-18, 1988	Cincinnati, OH
November 14-18, 1988	Edison, NJ
November 28-December 2, 1988	Cincinnati, OH
November 28-December 2, 1988	Edison, NJ
December 12-16, 1988	Cincinnati, OH
December 12-16, 1988	Edison, NJ
January 9-13, 1989	Cincinnati, OH
January 9-13, 1989	Edison, NJ
January 23-27, 1989	Cincinnati, OH
January 23-27, 1989	Edison, NJ

Advanced Treatment Technology Seminar (FTS 8-257-2216)

November 14-18, 1988	Region IV
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Air Surveillance for Hazardous Materials

November 14-18, 1988	Region IV
January 9-13, 1989	Region IX

Hazardous Materials Treatment Technologies

November 29-December 2, 1988	Region III
January 24-27, 1989	Region IV

Introduction to Groundwater Investigations

January 10-12, 1989	Region IV
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Environmental Risk Assessment

December 6-9, 1988	Region IX
January 31-February 3, 1989	Region V

Personnel Protection & Safety

November 28-December 2, 1988	Region V
December 5-9, 1988	Region V
January 9-13, 1989	Region X
January 23-27, 1989	Region IV

Sampling for Hazardous Materials (FTS 8-255-2270)

December 13-15, 1988	Region VI
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If no FTS number is listed for the course you want, contact your Regional Superfund Training Coordinator

ABOUT THE UPDATE

For comments, ideas, submissions, or questions about Update, please contact Karen Locke at FTS 8-382-7997 or commercially at (202) 382-7997. For copies, contact EPA's Public Information Center at FTS 8-382-2080 or commercially at (202) 382-2080. This issue of Update is the first one published since June 1988, due to a lapse in support contract availability because of recompetition of the contract.