



Department of Energy
Washington, DC 20585
October 23, 1997

Docket Clerk
U.S. Environmental Protection Agency
Superfund Docket (MC5202G)
401 M Street, S.W.
Washington, DC 20460

Docket Number SFMOA

Dear Madame or Sir:

Re: 62 FR 47495-47506, "Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs"

On September 9, 1997 the U.S. EPA published a notice of availability of final draft guidance for developing Superfund MOA language concerning State voluntary cleanup programs. The notice discusses the proposed procedure for selecting and implementing sites for State voluntary cleanup programs through Memoranda of Agreement. This notice requests comments on both the draft guidance and the site designation/screening process in order to assist in the development and implementation of protective, feasible, and responsive State voluntary cleanup programs.

The Department of Energy (DOE) appreciates the opportunity to comment on the EPA guidance for the development of MOA's and the designation of sites for of State voluntary cleanup programs. The strategy of EPA to encourage voluntary cleanup efforts is desirable and commendable. In an era of shrinking government resources, this approach offers the potential to encourage private parties to provide increased cleanup and protection of public health by reducing risks posed by certain hazardous material sites more quickly than the government might be able to. The clarification of EPA and State roles proposed in this guidance may encourage redevelopment of brownfields and low-risk sites as private parties experience reduced fears about potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

DOE believes EPA's approach is generally appropriate in terms of its protectiveness of human health and the environment. The Department further believes it may be possible to encourage additional voluntary cleanup and redevelopment efforts at low-priority sites than the proposed approach might achieve without sacrificing protectiveness.

DOE is concerned that the level of investigation required for site designation as lower priority in some instances may be sufficiently resource intensive as to discourage private parties from undertaking the investigations required to qualify for voluntary cleanup. In the absence of a

significant volume of pre-existing knowledge, the screening process detailed in the *Federal Register* notice appears to require highly-complex and detailed investigations for lower priority sites. As a result, investigation costs may limit the number of private parties willing to participate in State voluntary cleanup programs. In the enclosed comments, DOE proposes an alternative screening process for sites designated for State voluntary cleanup programs that should achieve EPA's protectiveness objectives without discouraging private party participation.

DOE is also concerned about the level of Federal involvement in State voluntary cleanup programs. While DOE recognizes the need for a delicate balancing act between assuring protection of public health and the environment vs. providing disincentives to voluntary cleanup by too much Federal involvement, the current proposal may not provide optimal balance. DOE recognizes EPA's need for potential involvement to revisit a voluntary cleanup decision to ensure protection of public health and the environment but believes EPA should specify and limit more clearly the circumstances under which Federal involvement would occur.

The enclosed comments are divided into three sections: general, response to EPA-posed questions, and specific. The general comments address the broad comments introduced in this letter. The second section provides response to the seven questions EPA poses on page 47496 of the *Federal Register* notice. The specific comments address concerns not related to the EPA-posed questions. Each of these is preceded by a reference to the section of the *Federal Register* notice to which it applies. If you have any questions regarding the enclosure please contact Jerry Coalgate of my staff at 202-586-6075 or email jerry.coalgate@hq.doe.gov.

Raymond F. Pelletier
Director
Office of Environmental Policy and Assistance

Enclosure



UNITED STATES DEPARTMENT OF ENERGY

**COMMENTS ON NOTICE OF AVAILABILITY OF FINAL DRAFT GUIDANCE
FOR DEVELOPING SUPERFUND MEMORANDA OF AGREEMENT (MOA)
LANGUAGE CONCERNING STATE VOLUNTARY CLEANUP PROGRAMS**

**U.S. ENVIRONMENTAL PROTECTION AGENCY
FEDERAL REGISTER NOTICE (62 FR 47495-47506; September 9, 1997)**

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FEDERAL REGISTER NOTICE (62 FR 47495-47506; September 9, 1997)**

This document provides U.S. Department of Energy (DOE) comments on the U.S. Environmental Protection Agency (EPA) *Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs*, which appeared in the Federal Register on September 9, 1997. The document discusses DOE comments in three categories: general comments on the final draft guidance, response to questions posed in the Federal Register notice, and specific comments on particular provisions of the final draft guidance.

GENERAL COMMENTS

On September 9, 1997, the Environmental Protection Agency (EPA) published the *Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs*. The notice discusses the proposed procedure for selecting and implementing sites for State voluntary cleanup programs through Memoranda of Agreement. This notice requests comments on both the draft guidance and the site designation / screening process in order to assist in the development and implementation of protective, feasible, and responsive State voluntary cleanup programs.

The Department of Energy (DOE) appreciates the opportunity to comment on the EPA guidance for the development of MOA's and the designation of sites for of State voluntary cleanup programs. DOE has fostered a strong partnership with EPA in the remediation of contaminated sites and looks to continue this relationship through such actions as assistance in the development of Superfund presumptive remedies (e.g., the presumptive remedy for metals in soils currently under preparation) and review of and comment on guidance such as the current Final Draft Guidance for Developing Superfund MOA Language Concerning State Voluntary Cleanup Programs.

The strategy of EPA to encourage voluntary cleanup efforts is desirable and commendable. In an era of shrinking government resources, this approach offers the potential to encourage private parties to provide increased cleanup and protection of public health by reducing risks posed by certain hazardous material sites more quickly than the government might be able to. Through the establishment of Memoranda of Agreements and Site voluntary cleanup programs, EPA is continuing to foster an environment of promoting private party participation in the remediation of hazardous material contaminated sites. In addition, the clarification of EPA and State roles

proposed in this guidance may encourage redevelopment of brownfields and low-risk sites as private parties experience reduced fears about potential liability under CERCLA.

As will be discussed in greater detail in response to the list of questions EPA posed in the Federal Register notice, EPA's approach is generally appropriate in terms of its protectiveness of human health, welfare, and the environment. The Department further believes it may be possible to encourage more voluntary cleanup and redevelopment at lower priority sites than the proposed approach might achieve without sacrificing protectiveness.

DOE is concerned that in some instances the level of investigation required for designation of a site as lower priority may be sufficiently resource intensive as to discourage private parties from undertaking the investigations required to qualify for voluntary cleanup. In the absence of a significant volume of pre-existing knowledge, the screening process detailed in the Federal Register notice appears to require highly-complex and detailed investigations for lower priority sites. In particular, it is possible for a lower priority, lower risk site to go through four phases of the screening process (Phase I, Expanded Phase I, Limited Sampling, and Extensive Sampling) before the site determination is complete. This multi-phased screening process may pose a large financial burden on private parties seeking to conduct voluntary cleanup programs. As a result, investigation costs may limit the number of private parties willing to participate in State voluntary cleanup programs.

In response to historical criticism that the Superfund program in its earlier stages was focusing too much attention on time-consuming investigation prior to initiating cleanup, EPA developed the Superfund Acceleration Cleanup Model (SACM) to streamline the remedial planning, investigation, and remediation process. The EPA's approach in this instance was highly appropriate and, in fact, DOE has adapted SACM into its own Principles of Environmental Restoration. The Department believes it may be possible to further incorporate the concepts of SACM and the DOE Principles into the State voluntary cleanup program guidance. In response to Question 7 (see below), DOE proposes an alternative screening process for sites designated for State voluntary cleanup programs that may more closely fit the SACM approach.

DOE is also concerned about the level of Federal involvement in State voluntary cleanup programs. While DOE recognizes the need for a delicate balancing act between assuring protection of public health and the environment vs. providing disincentives to voluntary cleanup by too much Federal involvement, the current proposal may not provide optimal balance. The draft final guidance discusses potential Federal involvement in two areas: (1) taking CERCLA response actions in imminent and substantial endangerment situations or exercising cost recovery at the request of the State or in instances where protectiveness is in question and (2) improper designation of Tier II sites. DOE recognizes EPA's need for potential involvement in the first situation but believes EPA should specify more clearly the circumstances under which Federal involvement would occur.

With respect to EPA's position regarding questioning Tier I/II decisions, DOE recommends that EPA reconsider its position. If EPA learns that a site thought to be Tier II subsequently has Tier I properties, EPA might not need to intervene unless there is reason to believe the proposed voluntary cleanup actions at the site would not be protective. DOE elaborates on these general comments in the response to questions posed in the Federal Register notice below.

RESPONSE TO QUESTIONS POSED IN FEDERAL REGISTER NOTICE

The EPA notice requests answers to seven questions, one related to the draft guidance and six related to the site designation and screening process. DOE wishes to provide comments on these questions below.

1. Page 47496, Column 2. Does the final draft guidance represent an appropriate balance among assuring protective site cleanups; the appropriate level of State, Federal, and community involvement at voluntary cleanup sites; and encouraging cleanup and redevelopment of these sites, particularly in the following areas?

In general, the EPA has achieved an acceptable balance among protectiveness, appropriate level of State, Federal, and community involvement, and incentives for voluntary cleanup. To a certain extent, these various objectives can compete with one another and DOE recognizes the challenges EPA faces in attempting to strike the most appropriate balance. While the proposed balance is acceptable, it may not be optimal. It may be possible to increase voluntary cleanup incentives, maintain community involvement, and not compromise protectiveness significantly. Furthermore, the level of Federal involvement should be re-evaluated as discussed below. Responses to each of the Question 1 subparts follow.

a. Universe of sites eligible for inclusion within scope of MOA [Page 47497, Section III.A., Column 2].

The principles outlined in this policy may apply to all sites, except as specified below: 1. Those sites designated as Higher Risk (or Tier I) sites... 2. Those sites proposed for or listed on the National Priorities List (NPL)... 3. Those sites for which an order or other enforcement action is issued or entered under CERCLA or sections 30008(h), 3013(a), or 7003(a) of RCRA, and is still in effect... 4. Those sites undergoing RCRA corrective action pursuant to RCRA sections 3004(u), 3004(v), or 3008(h) are not eligible for inclusion within the scope of an MOA. [Page 47497, Section III, Column 2].

The selection of sites for inclusion in voluntary cleanup programs reflects EPA's policy of encouraging voluntary cleanups while assuring protective cleanup activities. By defining criteria for designating sites into a lower risk category, EPA provides for delegation of voluntary cleanup oversight to the State. DOE agrees that lower risk sites should form the universe of sites for voluntary cleanup. This universe of sites presumably includes lower

risk hazardous waste generator sites, hazardous materials/waste treatment, storage, and disposal facilities, and sites of historical hazardous material spills or releases. It may be possible to define lower risk in a more presumptive, less resource-intensive manner. DOE suggests an alternative screening mechanism in response to Question 7 below that may increase the universe of sites eligible for inclusion within the scope of the MOA without changing EPA's basic concept of focusing on lower risk sites as targets for State voluntary cleanup programs.

As long as EPA maintains the protectiveness criteria in the final draft guidance, it may not be necessary for private parties to expend significant resources proving a site is lower risk. If, for example, a site is not in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) and a private party volunteers to clean the site up in a protective manner, it appears to DOE that EPA should not create resource-intensive disincentives. In this manner sites that may pose public health or environmental threats but are not even on EPA's "radar screen" can have those threats lessened. Alternatively, if there is private party interest but the presence of resource-intensive hurdles result in the private party choosing not to act, the threats at the site would not be lessened by EPA because EPA has no plans at all to respond to sites not listed in CERCLIS.

b. Criteria for evaluating State voluntary cleanup programs [Page 47499, Section III.F., Column 1].

In general, EPA's criteria for evaluating State programs are the correct ones. These are briefly addressed below.

Community Involvement [62 FR 47499, Section III.F.1., Column 2]. The state voluntary cleanup program should provide opportunities for meaningful community involvement that are responsive to the risk posed by the site contamination and the level of public interest.

The guidance requires State voluntary cleanup programs to have public involvement activities to ensure that the public is both informed of and, if interested, involved in planning for response actions. Community involvement is essential to the site cleanup process, whether under a State voluntary cleanup program or the traditional Superfund process. A good community involvement process will enhance the likelihood of public acceptance of voluntary remedies. While some may view the procedure for public notification of voluntary cleanup as a disincentive for the volunteering party to become involved, the sharing of information will be vital to decisions made by the community during the redevelopment process. Additionally, the community has a reasonable right to be informed about government-sponsored programs affecting their community. DOE has found that forming decision-making teams with key stakeholders and regulators can actually streamline the remediation process.

Protectiveness [Page 47499, Section III.F.2., Column 3]. A State voluntary cleanup program should ensure that voluntary response actions are protective of human health, welfare, and the environment. Reasonably anticipated future land uses should be considered in establishing protective contaminant concentrations. All voluntary response actions must comply with any Federal, State, or local laws that apply to that site.

The guidance requires State voluntary cleanup programs to ensure that voluntary response actions are protective of human health, welfare, and the environment and lists six mechanisms to determine protectiveness such as applicable and/or relevant and appropriate requirements from other Federal environmental statutes. DOE believes that the protectiveness criterion provides an equivalent level of protection of public health, welfare, and the environment as the traditional Superfund program. This level of protectiveness is appropriate. DOE is concerned, however, that some of the mechanisms listed to measure protectiveness, particularly activities such as detailed risk assessments, may give the impression that voluntary cleanup actions require the same level of effort prescribed for National Priorities List (NPL) sites. One potential remedy for this perception could be for EPA to suggest that actions conducted at voluntary cleanup sites employ an aggressive application of its SACM approach (as embodied in DOE's Principles of Environmental Restoration) for streamlining investigations and remediation of low-priority sites.

Furthermore, the guidance is unclear as to whether EPA will accept the results of risk-based approaches developed by the States and/or private parties. These approaches should be acceptable if they meet EPA's protectiveness criterion. As mentioned in the previous paragraph, if States, private parties, and key, interested stakeholders form core decision-making teams (as suggested in DOE's Principles of Environmental Restoration), the likelihood of reaching consensus without wasted efforts increases.

Response Selection [Page 47499, Section III.F.2A., Column 3]. Response actions should be conducted cost-effectively, consistent with projected future land use at the site. All response actions must comply with all Federal, State, and local laws that apply to the site. Long-term reliability should also be a goal when selecting response actions.

According to the final draft guidance, response selection should occur in a manner that results in cost-effective responses with long-term reliability consistent with projected future uses at the site. The guidance also requires that response actions comply with all applicable Federal, State, and local laws. This criterion appears to be reasonable and appropriate.

Resources/Technical Assistance [62 FR 47500, Section III.F.3., Column 1]. The State should demonstrate that its voluntary cleanup program has adequate resources, including financial, legal, and technical, to ensure voluntary response actions are conducted in an appropriate and timely manner, and that meaningful outreach efforts are made to the affected community.

The guidance also requires States to demonstrate that their voluntary cleanup programs have adequate financial, legal, and technical resources to assure voluntary actions are conducted in a timely and appropriate manner. In addition, the guidance requires State agencies to make technical assistance and streamlined procedures available to ensure expeditious response. DOE agrees with this resources/technical assistance criterion.

Certification of Response Action Completion [62 FR 47500, Section III.F.4., Column 1]. A State voluntary cleanup program should provide adequate mechanisms for the written approval of response action plans and a certification or similar documentation indicating that the response actions are complete.

According to the guidance, State voluntary cleanup programs should provide adequate mechanisms for written approval of response actions and certification (or similar documentation) indicating that response actions are complete. Certification of response action completion is an important criterion for a State voluntary cleanup program.

Oversight Authorities [62 FR 47500, Section III.F.5., Column 1]. A State voluntary cleanup program should provide adequate oversight to ensure that voluntary response actions, including site assessments/characterizations, are conducted in such a manner to assure protection of human health, welfare, and the environment.

The guidance requires State voluntary programs to have appropriate oversight authorities to ensure that the full range of voluntary actions, including assessments and site investigations are conducted in a protective manner. In cases where States are overseeing nonpermanent remedies, this criterion must be met by requiring that the State receive progress reports on site conditions or by reserving the State's right to conduct site inspections. DOE agrees that this criterion is a necessary one for an effective State voluntary action program.

Enforcement Authorities [62 FR 47500, Section III.F.6.]. The State Voluntary cleanup program should show the capability, through enforcement or other State authorities, of ensuring completion of response actions if the volunteering party(ies) conducting the response action fail(s) or refuse(s) to complete the necessary response activities, including operation and maintenance or long-term monitoring activities.

The guidance requires State voluntary cleanup programs to show the capability, through enforcement or other State authorities, of ensuring completion of response actions if the

volunteering party(ies) conducting the action fail(s) or refuse(s) to complete the necessary activities. DOE also believes that such enforcement authorities are an important component of a State voluntary cleanup program.

c. Level of Federal involvement (including provision of technical or financial assistance), if any, in State voluntary cleanup programs [Page 47496, Column 2].

EPA recognizes that most State voluntary cleanup programs are intended to be self-implementing...However, EPA recognizes that States may need financial assistance to help establish new State voluntary cleanup programs and to help enhance existing State voluntary cleanup programs...The Region may provide Fund money to States for development and enhancement of voluntary cleanup programs through core program cooperative agreements. [Page 47500, Section IV., Column 2, 3].

DOE agrees that in principle State voluntary programs should be self-sustaining but that in certain circumstances such as establishing new State voluntary cleanup programs it may be appropriate for technical and financial assistance to be provided by EPA. DOE supports this provision of the guidance as drafted.

d. Level of Federal involvement, if any, in specific sites being addressed under State voluntary cleanup programs [Page 47496, Column 2].

For sites being investigated or cleaned up consistent with the practices and procedures of a State voluntary cleanup program that meets the criteria discussed in this guidance, EPA will not exercise its cost recovery authority unless: (a) the Administrator determines that a release or threat of a release may present an imminent and substantial endangerment...[Page 47498, Section III.D., Column 2,3]. Or, If the EPA subsequently determines that a site was improperly classified as "Tier II", the provisions of Section III.D...will not apply. [Page 47502, Section V., Column 1].

The guidance discusses two situations where EPA could become involved in voluntary cleanups under State programs: (1) EPA determines it is necessary to conduct a response due to an imminent and substantial endangerment, a State request, or a failure to provide a protective response [62 FR 47502, Section III.D.] and (2) EPA determines that a site was improperly categorized as Tier II [62 FR 47502]. DOE recognizes the potential dilemma EPA faces in this area. On one hand, EPA needs to ensure that protective cleanups occur and DOE supports that need. On the other hand, volunteer cleanup parties, including possibly DOE, do not wish to undertake such cleanups if they believe that EPA may step in at the “whim” the Agency. DOE suggests EPA develop more specific criteria defining when Federal intervention is likely to occur, especially where Federal response action and/or cost recovery is involved.

With respect to EPA involvement to question a Tier I/II decision, DOE recommends that EPA reconsider its position. If EPA learns that a site thought to be Tier II subsequently has Tier I properties, EPA might consult the State to determine if the proposed cleanup will be protective. If the cleanup plan is protective, perhaps there is no need to intervene. By following this approach, protective cleanups would still occur, more cleanups than EPA has resources to manage would occur, and no apparent harm would occur. If EPA feels the need to preserve the right to intervene and stop voluntary cleanups at sites incorrectly designated as Tier II, perhaps EPA could indicate that the Agency has no plans for active oversight of tiering decisions but that if information becomes available to EPA that would suggest the possibility of an incorrect designation, EPA could then look into the matter.

DOE has a related concern in the area of Federal involvement related to RCRA permitting requirements. As discussed above, DOE is concerned that volunteering cleanup parties find the idea of having a Federal regulator intervene after a voluntary cleanup has been initiated to “revisit” the cleanup decision to be a very significant disincentive to voluntary cleanup. While DOE recognizes EPA’s statutory responsibilities under RCRA, the voluntary cleanup program guidance should make a provision to minimize the prospect of a RCRA permitting revisit of a voluntary cleanup decision. In almost all instances the type of potential releases and releases to be addressed as voluntary cleanup actions would be of sufficiently low risk so as not to be addressed under RCRA corrective actions. DOE also believes the guidance should state this view. In the presumably rare instances where RCRA corrective actions could be applicable to voluntary cleanup sites, DOE suggests the approach described in the following paragraph.

In cases where voluntary cleanup sites may fall under the purview of the RCRA corrective action program and the State is authorized to implement this portion of RCRA, the MOA should describe a process to ensure that the voluntary cleanup plan satisfies the substantive provisions of the RCRA corrective action program and provide written documentation to the RCRA permittee that the cleanup plan meets the substantive provisions of the RCRA corrective action program at the time of voluntary cleanup initiation. In cases where voluntary cleanup sites may fall under the purview of the RCRA corrective action program and EPA is authorized to implement this portion of RCRA, the MOA should describe a process whereby EPA and the State review the voluntary cleanup plan to ensure RCRA compliance prior to initiation of cleanup and to provide the volunteering cleanup party with some written documentation that the cleanup plan will comply with the substantive provisions of the RCRA corrective action program. The objective of this approach is to avoid revisiting the cleanup after the fact during the RCRA permitting process.

e. Methods for determining the protectiveness of voluntary cleanups at lower risk sites [Page 47496, Column 2].

Ways to determine protectiveness may include, but are not limited to, (a) Background contaminant concentrations, (b) site-specific risk assessments based on U.S. EPA Risk Assessment Guidance for Superfund...[Page 47499, Section III.F., Column 3].

See DOE comments under Section 1.b. above.

f. Role of the community in voluntary cleanups [Page 47496, Column 2].

The State voluntary cleanup program should provide opportunities for meaningful community involvement that are responsive to the risk posed by the site contamination and the level of public interest. [Page 47499, Section III. F., Column 2].

See DOE comments under Section 1.b. above.

2. Page 47496, Column 2. What type and amount of information is needed at each stage in the decision process to reach a Tier I or Tier II decision?

The Federal Superfund Program will generally classify a site as Tier I if a release from that site has caused, or is likely to cause, human exposure to the release or contamination of a sensitive environment, and the release can be addressed under CERCLA authorities, and cleanup of the release has not generally deferred to another Federal cleanup program...Tier II sites are those that would be unlikely to warrant Federal remedial actions (i.e., those that do not meet the definition of Tier I sites). [Page 47502, Section V., Column 2,3].

The guidance describes a process that can be used by any party (i.e., site owners, State agencies, etc.) to decide whether a site should be classified as Tier I or Tier II for determining status under the MOA...EPA believes that in most instances, private parties can use the following definitions and screening process to make accurate determinations [Page 47502, Section V., Column 1].

In general, the Tier I/II process may require more information that is necessary to reach a decision. After 17 years of Superfund implementation and relatively resource-intensive State efforts to identify high risk sites, the probability of their being large numbers of undiscovered high risk sites appears low. A more presumptive mechanism for determining high vs. low risk and therefore eligibility for voluntary cleanup may be appropriate. DOE suggests such a mechanism in our response to Question 7 below.

3. Page 47496, Column 3. Are the screening steps in the best logical sequence?

The five major steps in making a Tier I/Tier II determination include: (1) Exclusions, (2) Phase I, (3) Extended Phase I, (4) Limited Sampling, and (5) Extended Sampling. Each step in the process involves gathering sufficient information about a site and/or its environs to determine whether the site should be classified as Tier II or continue on to the next step for additional information. [Page 47501, Section V., Column 2,3].

The sequence of screening steps proposed in the Federal Register notice appears to follow a logical sequence. In general, each step requires an increasing level of effort and should not be undertaken if the previous step will yield enough information to make a determination. Nevertheless, there may be a less resource-intensive alternative. This suggested alternative is described in our answer to Question 7 below.

4. Page 47496, Column 3. If there are nearby populations or sensitive environments, how could EPA ensure that private parties would evaluate them to account for changes in land use in the near or long-term?

A State voluntary cleanup program should ensure that the voluntary response actions are protective of human health, welfare, and the environment. [Page 47499, Section III. F.2., Column 3].

According to the draft final guidance, “State voluntary cleanup programs should ensure that voluntary response actions are protective of human health, welfare, and the environment. Reasonably anticipated future land uses should be considered in establishing protective contaminant concentrations. All voluntary response actions must comply with any Federal, State or local laws that apply to the site.” [62 FR 47499, Section III.F.2.] The guidance also provides a series of mechanisms to determine protectiveness. Presumably, if EPA is satisfied that State voluntary cleanup programs can meet the protectiveness criterion, then the State should be ensuring appropriate evaluation of nearby populations and sensitive environments in its implementation of its voluntary cleanup program. If EPA has concerns about a State’s ability to perform this part of the program, those concerns should be addressed during the negotiation of the MOA for the voluntary cleanup program.

5. Page 47496, Column 3. What information tools (e.g., software) are currently available to the public that would allow them to collect the requested information?

DOE is unclear about the intent of this question and the following question. We assume that by the “public” EPA is referring to those parties who are interested in undertaking voluntary cleanup actions. It appears from the guidance that such parties would gather the information necessary to make a tiering decision rather than the general public or potentially concerned members of the community. The following paragraphs discuss information tools available to the public for the various phases of the Tier I/II screening process.

Exclusions [62 FR 47503, Section V., Column 1].

The first step in determining whether a site is Tier I or Tier II involves determining whether the site is eligible for cleanup under CERCLA authorities or if the site is being adequately addressed under another Federal statute such as the Resource Conservation and Act (RCRA). Sites that are ineligible for CERCLA response or are being addressed under another Federal statutes instead of CERCLA should receive a Tier II designation. [Page 47503, Section V., Column 1].

The first step in the screening process—exclusions—involves determining whether the site is eligible for cleanup under CERCLA authorities or if the site is being addressed under another Federal statute such as RCRA. Sites that are ineligible under CERCLA or are being addressed under another Federal statute instead of CERCLA should receive a Tier II designation.

It appears from the guidance that consulting State and/or Federal contacts to gather necessary information about exclusions is the main information tool to be employed for this phase of the screening process.

Phase I [Page 47503, Section V., Column 3] and Expanded Phase I [Page 47504, Section V., Column 1].

The Phase I step within this process is quite similar to the methods prescribed by ASTM Standard Practice E 1527....The Phase I step in this process consists of a review of records and related environmental reports pertaining to the site and a site visit to observe site conditions. [Page 47503, Section V., Column 3]. If the Phase I indicates a reasonable expectation that hazardous substances are present at the site, the next step in the process involves gathering environs data to determine what could be impacted by a release from the site. Therefore, the purpose of the Expanded Phase step is to identify and verify the existence and locations of nearby people (or pathways of human exposure, e.g., water intakes and wells) and sensitive environments that might be threatened by a release from the site. [Page 47504, Section V., Column 1].

The second step in the screening involves conducting a Phase I environmental site assessment in a manner similar to that as prescribed by American Society for Testing and Materials (ASTM) Standard Practice E 1527, although it is limited to hazardous substances as defined by CERCLA. The expanded Phase I is the third step in the screening process. It involves gathering data to identify and verify the existence and locations of nearby people and sensitive environments that might be threatened by a release from the site.

Although there are a variety of software tools available on the market for conducting Phase I environmental assessments, DOE does not endorse particular software products. Although EPA provides some publicly available database search capabilities through its home page on

the Internet, there are commercial sources available for conducting more comprehensive publicly available Federal and State environmental database searches for sites and specified radial areas around the sites. These sources typically tie the databases into a geographical information system (GIS) to provide maps of the site and its environs. In addition to indicating features such as hazardous waste generators, hazardous waste treatment, storage, and disposal facilities, underground storage tanks, leaking underground storage tanks, historical spills, NPL sites, CERCLIS sites, and State landfills, the maps also contain information about water supply well locations.

County and local governments are a source of historical aerial photographs which can reveal past land uses indicative of potential contamination. The same commercial sources that perform environmental database searches also perform aerial photograph and historical fire insurance land use map searches. United States Geological Survey (USGS) topological (“topo”) maps provide information about topography and significant natural and manmade features. They are often useful supplements to the other Phase I type information described above.

Limited Sampling [Page 47504, Section V., Column 2] and Extensive Sampling [Page 47504, Section V., Column 3].

If the Phase I investigation indicates a reasonable expectation that hazardous substances have been present at the site and the Expanded Phase I indicates that human populations or sensitive environments may be threatened by a release from the site, sampling should be conducted to confirm the presence of hazardous substances on the site. The purpose of the Limited Sampling step is to collect and analyze waste and environmental samples...to determine the hazardous substances present at the site and whether they are being released into the environment. [Page 47504, Section V., Column 2,3]. If the Limited Sampling step confirms the presence of hazardous substances at the site, more extensive sampling may be required. The purpose of the Extensive Sampling step is to further evaluate the degree to which a site presents a threat to human health or welfare or the environment by collecting and analyzing waste and environmental media samples. [Page 47504, Section V., Column 3].

The fourth step in the screening process is collecting and analyzing waste and environmental samples using field screening and analytical techniques where appropriate to confirm the presence of hazardous substances at the site. If limited sampling confirms the presence of hazardous substances, more extensive sampling—the fifth step in the screening process—of environmental media might be required to further evaluate whether the site presents a human health, welfare, or environmental threat.

Unless a volunteer cleanup party has significant hazardous material site investigation expertise, the traditional method for conducting limited and extensive sampling involves hiring an environmental consulting firm with experience in conducting such investigations.

6. Page 47496, Column 3. What are the resource implications for stakeholders who use these tools at each step in the process, i.e., how much is the estimated cost (in dollars and time) of conducting each step in the process?

The commercially available sources for conducting the database, aerial photograph, and historical fire insurance land use map searches described above typically charge several hundred dollars for a site location with Phase I ASTM standard radii around the site. Purchase of specific aerial photographs and fire insurance maps can cost several hundred dollars more. USGS topo maps cost less than ten dollars. There is such a broad potential scope for limited and expanded site investigations that it is difficult to provide meaningful cost information. Additionally, DOE's experiences in this area would not be typical for most volunteer cleanup parties.

7. Page 47496, Column 3. Are there preferred alternative mechanisms for screening sites? If so, please describe briefly.

In response to concerns associated with the site designation screening process, DOE proposes an alternative mechanism for screening sites. This alternative encompasses the principles of cost-effective and timely cleanup found in both the EPA's Superfund Accelerated Cleanup Model (SACM) and the DOE's Principles of Environmental Restoration. The process seeks to minimize the financial burden on private parties by reducing the number of sites required to conduct a Tier I/Tier II investigation, thus eliminating any disincentive for voluntary site cleanup. The suggested DOE alternative tiering system encompasses three major decision points: NPL inclusion; CERCLIS inclusion; and recent CERCLIS activity. Exhibit 1 summarizes the suggested alternative.

The first decision point in the proposed alternative tiering system evaluates whether the proposed site is currently included on the NPL or State equivalent. As all NPL sites require cleanup, there is no need to include existing sites in a State voluntary cleanup program. If a site is on the NPL or State equivalent, it is not eligible for a State voluntary cleanup program.

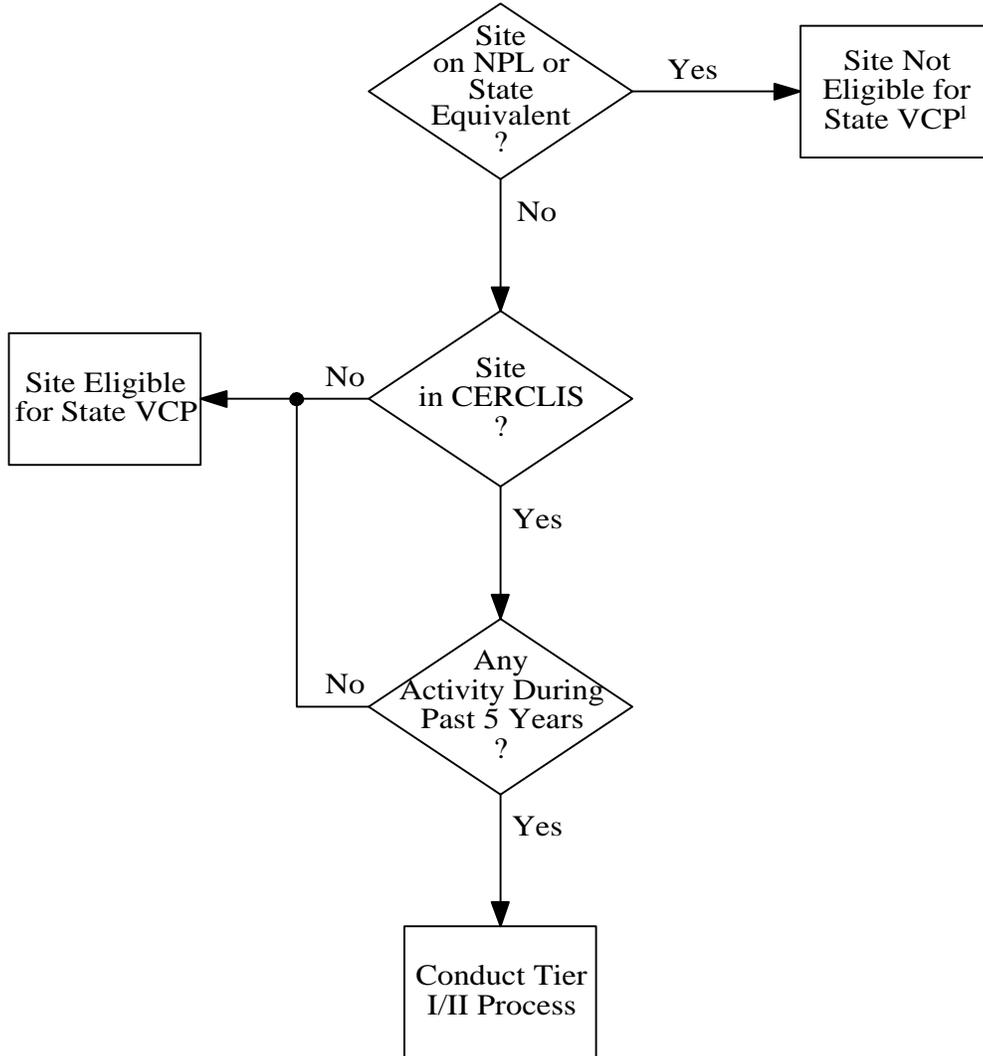
The second decision point asks if the site is currently in CERCLIS, which is a comprehensive database of all sites evaluated for potential CERCLA action and records all actions taken at each site. In the 1980's, an extensive effort was made by EPA to catalog and preliminarily evaluate hazardous waste contaminated sites in the United States. Since that time, approximately 30,000 sites have been entered into CERCLIS; many have been evaluated for inclusion on the NPL. Because of the extensive effort conducted by EPA in identifying hazardous material contaminated sites, there is a reasonably high probability that a site not on CERCLIS proposed for a State voluntary cleanup program will not be a high priority cleanup site. Therefore, if a site is not listed in CERCLIS, it could be considered presumptively eligible for a State voluntary cleanup program.

EPA and the States involved in performing preliminary assessments and site investigations prior to Hazard Ranking System (HRS) ranking choose which CERCLIS sites to receive these actions on a priority basis. Some sites on CERCLIS perceived by regulators to be of a lower level of concern wait to receive preliminary assessments and site investigations while other higher concern sites are addressed. This existing approach to evaluating CERCLIS sites is rational and reasonable. If five years or more has elapsed since the last government action at a CERCLIS site, it is indicative that the CERCLIS site is of lesser concern (i.e., lower risk) than other CERCLIS sites. This criterion—the absence of any government activity at a CERCLIS site—would be an indicator of lower priority sites. DOE suggests that such sites be considered presumptively eligible for State voluntary cleanup programs.

The population of CERCLIS sites for which there has been some activity during the past five years may consist of a mix of higher and lower priority sites. This population should not be considered presumptively eligible for State voluntary cleanup programs. Rather it is this more limited population of sites that should be subject to the proposed EPA Tier I/II screening system.

EXHIBIT 1

**DOE SUGGESTED ALTERNATIVE TIERING
SYSTEM FOR STATE VOLUNTARY CLEANUP PROGRAMS**



¹ Voluntary Cleanup Program

SPECIFIC COMMENTS

Protectiveness [62 FR 47499, Section III.F.2.] A State voluntary cleanup program should ensure that voluntary response actions are protective of human health, welfare, and the environment...Ways to determine protectiveness may include, but are not limited to:...
f. Risk-based corrective action assessment

It is unclear whether EPA referring to ASTM petroleum and chemical standards (i.e., Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites, E-1739-95, Provisional Guide for Risk-Based Corrective Action, etc.) which promote the concept of “risk-based corrective action” as a means of ensuring protectiveness. DOE recommends that the language in this section specify the exact standards for ensuring protectiveness.

Tier I/II Screening Mechanism Definitions [62 FR 47505, Section V.]

It is unclear whether the definitions found in this section are fully consistent with CERCLA and RCRA. For example, it is clear that the definition of “Facility” in the guidance is taken from CERCLA. By contrast, the RCRA regulations define facility [40 CFR 260.10] as:

(1) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

(2) For the purpose of implementing corrective action under Sec. 264.101, all contiguous property under the control of the owner or operator seeking a permit under subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h).

It appears that the RCRA definition is less broad than the CERCLA definition. Given the relationship between State voluntary cleanup programs and future RCRA corrective actions [62 FR 47498, Section III.C.], DOE questions if this potential inconsistency could cause a problem in the implementation of the guidance with respect to future RCRA corrective actions. EPA should examine this issue to determine whether a clarification in definition or applicability of the guidance to the RCRA corrective action program is appropriate. In addition, in the definition of “Facility,” should the phrase “falling stock” be “rolling stock?” DOE recommends that this section be reviewed and revised as necessary.