



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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OFFICE OF
LAND AND EMERGENCY
MANAGEMENT

MEMORANDUM

SUBJECT: 2019 Guidance to Support the Preparation of National Capacity Assurance Statements

FROM: *for* James E. Woolford, Director *David Stalup*
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TO: Superfund and Emergency Management Division Directors, Regions 1-10
Land, Chemicals and Redevelopment Division Directors, Regions 1 – 10

PURPOSE

This memorandum is a resource to help states meet their statutorily required capacity assurance requirement to the U.S. Environmental Protection Agency. In order to fulfill this requirement, each state must show that adequate capacity exists to treat or dispose of all hazardous waste that is reasonably expected to be generated within the state during the 20-year period following the date when they enter into a Superfund state contract (SSC) or remedial action cooperative agreement (CA).¹

BACKGROUND

Section 104(c)(9) of CERCLA has multiple requirements and provisions, which are provided in Attachment 1 to this memorandum. One of these provisions prohibits EPA from providing any remedial actions unless an individual state first enters into an SSC or CA with EPA. A component of these contracts and agreements includes the state's assurance that adequate capacity exists to manage in-state generated hazardous wastes for 20 years following the contract or agreement's issuance date. To facilitate this activity, EPA has implemented a national planning process to support states in fulfilling this statutory requirement. The existing Statement of National Capacity (completed in 2015) indicating that adequate capacity exists nationwide through the year 2039 expires on December 31, 2019. This memorandum supersedes the (2015) statement and provides model language for states' hazardous waste management capacity assurance in the preparation of new or amended SSCs or CAs.²

¹ Required under Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA) Section 104(c)(9), including the requirement for compliance with the Subtitle C requirements of Resource Conservation and Recovery Act (RCRA).

² This model language to guide states in the preparation of SSCs and CAs is not a regulation and does not create legal obligations. States may deviate from this model language depending on the facts of a particular case. Moreover, EPA may deviate from this model language should EPA determine that circumstances warrant different language.



RESULTS OF THE NATIONAL CAPACITY ASSESSMENT

To support this national capacity statement update, the EPA reassessed the future availability of national capacity as documented in the [2019 National Capacity Assessment Report](#), which is posted on EPA's website. As required by CERCLA 104(c)(9)(D), EPA has found sufficient permitted facilities in compliance with RCRA Subtitle C to support management of hazardous waste over the near term.³ Based on this review, EPA concludes that it expects there to be adequate national capacity for hazardous waste treatment and disposal through December 31, 2044.

While EPA's analysis has shown that there is adequate capacity through 2044, assuring such capacity requires all parties, including states, tribal governments, industry and commercial management facilities, to actively plan and coordinate. This planning and coordination entails, by necessity, that all states periodically examine their capacity situations, identify areas of concern and develop plans that consider future needs. These planning exercises will add to state and tribe's knowledge of their hazardous waste management systems, help them implement waste minimization programs, and encourage companies to replace inefficient treatment technologies with safer and more innovative technologies. Capacity planning can be especially important if hazardous waste management data suggest capacity issues for specific waste streams that may reasonably be expected to be generated within a state's borders.

2019 CAPACITY ASSURANCE STATEMENT

Based on the 2019 National Capacity Assessment Report (December 2019), the Agency has developed the following new capacity assurance language, which can be used in all new or amended SSCs or remedial action CAs signed between EPA and states, beginning immediately and through December 31, 2024.

EPA's 2019 National Capacity Assessment Report shows that there is adequate national capacity for the treatment and disposal of hazardous waste through calendar year 2044. This assessment included 2017 Biennial Report data provided by the state of (name of state).

Based upon the assessment and other data, as appropriate, EPA expects that there will be adequate national hazardous waste treatment and disposal capacity during the 20-year period following signature of this (contract or agreement). (Name of state) hereby assures the availability of hazardous waste treatment or disposal facilities for the next 20 years, following signature of this (contract or agreement), pursuant to CERCLA 104(c)(9), 42 U.S.C. 9604(c)(9).

³ RCRA Subtitle C permits are generally issued by states for a period of only 5 to 10 years, not the 20 years needed for capacity assurance under CERCLA.

In order to ensure the continued availability of capacity for the treatment and disposal of hazardous waste, the state of (name of state) agrees to work with EPA to meaningfully participate in the national capacity planning process and any activities needed to either identify shortfalls in capacity or to address any identified shortfalls.

Previous language based on the 2015 National Statement of Capacity is obsolete and should not be used. States should refer to this 2019 memorandum and the above data sources along with state specific information in developing state specific assurances that adequate hazardous waste management capacity in their CAs or SSCs.

Available information indicates that RCRA facility compliance status has not constrained capacity to create a shortfall, and we do not have any information to suggest compliance status would constrain capacity for the next 25 years. EPA does not expect facility noncompliance to be an issue provided that EPA, states and facilities continue to work quickly to identify and to correct any significant noncompliance issues. Continued correction of noncompliance is important to maintaining national capacity. To support this Statement of National Capacity, EPA will continue to review the compliance status of hazardous waste facilities, monitor the operating status of these facilities, and adjust the national capacity planning estimates if needed.

This estimate of capacity may be affected should permitted capacity for the treatment, storage and disposal of waste fail to be permitted. Incineration facilities will age with time and replacement facilities may be needed should the waste streams that these facilities treat continue to be generated. Similarly, permitted landfill capacity may need to be expanded to provide for future waste disposal.

CONCLUSION

We recommend that states use the model language in this memorandum to satisfy the CERCLA 104(c)(9) SSC or CA requirements. EPA regional offices should share this memorandum with their states to facilitate inclusion of the updated waste capacity assurance in new and amended SSCs and remedial action CAs.

If there are questions on the preparation or requirement for a capacity assurance statement in CAs or SSCs, please contact Brigid Lowery, Director of the Assessment and Remediation Division at 703-603-8752 (lowery.brigid@epa.gov).

If at any time a state or a region has reason to believe that there is a shortage of any specific type of capacity that would justify a closer review, please contact Sonya Sasseville, Director of the Program Implementation and Information Division, ORCR at 703-308-8648 (sasseville.sonya@epa.gov). For information on ORCR's efforts to characterize national capacity for hazardous waste management, please contact Laura Lopez of the Information Collection and Analysis Branch of the Office of Resource Conservation and Recovery at 703-308-8440 (lopez.laura@epa.gov).

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Attachment 1: CERCLA Statutory Requirements

CERCLA Sec. 104(c)(9)

- ▶ *(9) Siting. Effective 3 years after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which*

CERCLA Sec. 104(c)(9)(A)

- ▶ *have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,*

CERCLA Sec. 104(c)(9)(B)

- ▶ *(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,*

CERCLA Sec. 104(c)(9)(C)

- ▶ *(C) are acceptable to the President, and*

CERCLA Sec. 104(c)(9)(D)

- ▶ *(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act*