

**JOINT POLICY  
OF THE  
COLORADO STATEWIDE DEFENSE INITIATIVES  
AND THE  
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**

**ESTABLISHING  
EVALUATION GUIDELINES AND REVIEW PROCEDURES  
PERTAINING TO DEFERRAL REQUESTS**

**June 19, 1998**

Pursuant to Executive Order D 013-98, the Director of the Colorado Statewide Defense Initiatives ("the Director"), in coordination with the Colorado Department of Public Health and Environment, has developed this joint policy establishing the evaluation guidelines and review procedures pertaining to deferral requests pursuant to section 334 of the Defense Authorization Act for FY 1997 which are set forth below<sup>1</sup>.

This policy shall be employed in the event that a request is received, pursuant to section 334 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, which allows deferral of the requirement that remedial action be conducted before contaminated federal property can be transferred, section 120(h)(3)(A)(ii)(I) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The evaluation guidelines set forth herein represent the considerations to be brought to the analysis; site-specific circumstances will call for the submission of information in various formats and level of detail, as determined to be appropriate at the time of application.

I. Deferral Application

The Deferral Application shall include the following:

- A. A legal description of the real property owned by the United States that is proposed for deferral;
- B. Information providing basis for a determination that *\*the property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment\**, 120(h)(3)(C)(i)(I), including:
  - 1. A description of the nature and extent of contamination with supporting

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<sup>1</sup> The portions of this document which are required specifically by Pub. L. No. 104-201 are set forth in italic print, offset by \*s, citation provided.

documentation (reference may be made to existing documents with relevant information);

2. A detailed description of the reuse plan (approved by the local land use authority<sup>2</sup>), along with corresponding identification of specific exposure pathways, and reasonably anticipated use scenarios; and,
3. An assessment of risk, pertinent to the parcel proposed for early transfer, which considers unrestricted use and reasonably anticipated use scenarios pursuant to the Reuse Plan for the parcel.

C. *\*With regard to a release or threatened release of a hazardous substance<sup>3</sup> for which a federal agency is potentially responsible, the\* proposed \*deed or other\* transfer \*agreement which contains the following limitations and assurances\*, (C)(i)(II):*

1. *\*Any necessary restrictions on the use of the property\* or related natural resources *\*to ensure the protection of human health and the environment\**, (C)(ii)(I);*
2. *\*Any necessary restrictions on the use of the property\* or related natural resources *\*to ensure that required remedial investigations, response action, and oversight activities will not be disrupted\**, (C)(ii)(II);*
3. *\*All necessary response actions will be taken\**, (C)(ii)(III);
4. *\*Identification of schedules for investigation and completion of all necessary response actions as approved by the appropriate regulatory agency\**, (C)(ii)(III); and,
5. *\*The federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations\**, (C)(ii)(IV).

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<sup>2</sup> It is noted that local jurisdictions with land use authority will need adequate time for review and action; prior consultation will expedite the deferral process.

<sup>3</sup> “Hazardous Substance” is defined at 42 U.S.C. § 9601(14).

- D. Factual basis for a determination that *\*the requested deferral and the transfer of the property will not substantially delay any necessary response action at the property\**, (C)(i)(IV).
- E. Demonstration that *\*the federal agency\** in coordination with the Governor, through the lead state official<sup>4</sup>, *\*has provided notice by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit comments on the suitability for transfer for at least 30 days following the date of notice\**, (C)(i)(III), as follows:

Upon determination that the Deferral Application is complete the Governor, through the lead state official, shall initiate a public comment period that is at least of thirty days' duration. A notice (display advertisement) of the comment period shall be published upon the Colorado Government homepage of the InterNet and in a newspaper of general circulation in the area affected by the proposed transfer, and will be posted in the affected neighborhoods and in local information repositories. In addition, notice of the comment period will be provided to local governments, citizen or restoration advisory boards, local redevelopment authorities, and to all individuals and organizations who have expressed a prior interest in such matters. The notice shall state that the Governor and the federal agency are seeking public input on the proposed CERCLA § 120(h)(3) Deferral Application and will include:

1. a designation of the titles of related submittal with information about how to obtain copies of the deferral application and any/all of the related submittal;
  2. a statement that comments shall be directed to the lead state official, and the name, mailing and electronic addresses, and telephone and telefax numbers for such person;
  3. the beginning and ending dates of the comment period;
  4. designation of the time and place of a public meeting;
  5. a brief description of the property in question;
  6. a brief description of the proposed reuse plan; and,
  7. a brief description of the proposed remedial action.
- F. A statement of any public access restrictions necessary and appropriate during the completion of investigations and cleanup.
- G. Enforceable Agreement. Section 334 does not provide a legal mechanism for the

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<sup>4</sup> By Executive Order, the Director of the Colorado Statewide Defense Initiatives is the designated lead state official.

state or EPA to enforce requirements that are to be included in transfer agreements or deeds. Before the Governor will approve or concur with a "deferred cleanup" transfer in this state, a sufficient enforceable agreement among the state (and/or EPA), the transferee (its successors, assigns and transferees), and the transferring federal agency, or other assurance that the cleanup will be performed responsibly, must be in place. Whether EPA will be a party to an agreement between the State and the transferring federal agency will be determined on a case-by-case basis. A Proposed Enforcement Agreement will be included as an appendix to the Proposed Deferral Application when it is presented for public comment.

1. An enforceable agreement, or other assurance, should include the following:

- a. An enforceable cleanup plan which may be modified for good cause as provided in the agreement. This plan can be a CERCLA ROD, a Colorado Hazardous Waste Act (CHWA) Closure Plan, a Colorado Hazardous Waste Act Corrective Action Decision (CAD), or any other similar document containing remedial alternative analyses, projections for long-term operations and maintenance, cost estimates and enforceable schedules with milestones for intermediate and final completion of cleanup. Such plan and schedule must be approved by the state agencies with statutory obligations for oversight or interest in the subject property; all additional approvals required by law will be sought from the appropriate local, state, and federal agencies.

If the transfer is contemplated before the cleanup plan is finalized, there must nevertheless be provided an enforceable commitment that *\*all necessary response action will be taken and\** an identification of *\*the schedules for investigation and completion of all necessary response actions as approved by ... regulatory agency.\** (C)(ii) (III).

- b. A delineation of cleanup responsibilities, including operation, maintenance and reporting, of the transferring agency and the transferee, and the parties' financial commitments regarding these responsibilities;
- c. A provision clearly establishing the parties' cleanup responsibility in the event new information is discovered subsequent to transfer, such as previously unknown contamination or new risk information;
- d. It is understood that, if land or resource use changes, causing the

cleanup standards to change, the responsibility for any additional cleanup is a matter to be negotiated between the transferor and transferee. The enforceable agreement shall include express provisions regarding the responsibilities of the parties to perform any such additional cleanup should actual land/resource use change from the reasonably anticipated use scenarios pursuant to the Reuse Plan, or should actual exposures be greater than represented in the Assessment of Risk, either (or both) of which may be appended or incorporated by reference;

- e. Identification of any land use restrictions and other institutional controls to be relied upon during and after the period of deferral/cleanup, including monitoring necessary to assure public health and environmental protection; designation of the party bearing responsibility to monitor effectiveness of controls; and, description of the enforcement mechanisms and remedies for any breach of such restrictions and controls;
- f. A provision requiring that the contract of sale, or other agreement governing the transfer, shall provide that all restrictions on the use of the property shall apply to, and be binding upon, any transferee or assignee of the contract, shall run with the land; that the parties intend that such restrictions shall run with the land and be enforceable against future transferees, successors, and assigns; and, that the United States, the state of Colorado, and local governing bodies are third-party beneficiaries for the purposes of enforcing the land use restrictions until such time as the restrictions are determined by the appropriate regulatory agency to no longer be necessary to protect human health and the environment. A copy of the proposed deed restriction(s) shall be appended to the Enforcement Agreement;
- g. Provision guaranteeing access to United States and state, or their designees, to perform oversight or cleanup activities required by transfer agreement or by section 120(h) of CERCLA. A copy of the deed restriction(s) ensuring that future use will not disrupt oversight and cleanup activities shall be appended to the Enforcement Agreement;
- h. Where relevant, a provision clarifying the relationship of the cleanup of transferred parcel to site-wide cleanup, and delineating

responsibility for additional cleanup based on site-wide risks (necessary if a site-wide ROD is not complete prior to transfer, or where additional contamination is discovered on-site resulting in unacceptable additive risk from the transferred parcel); and,

- i. Clear statement of scope of the parties' respective duties to indemnify each other (or not).
  - j. Appropriate assurances that the transferee will comply with the agreement and will not raise sovereign immunity as a defense to any action to enforce the agreement.
  - k. *\*Acknowledgment that a deferral, in accordance with federal law, shall not increase, diminish, or affect in any manner any rights or obligations of a federal agency (including any rights or obligations under sections 106, 107, and 120 existing prior to transfer) with respect to the property proposed for transfer\*, (C)(iv).*
  - l. A provision establishing the respective parties' responsibilities to pay the state's oversight costs as well as costs for continued participation of citizen or restoration advisory boards (CABs/RABs).
2. If the transferee is to perform the cleanup, the following additional safeguards are required in the Enforcement Agreement or other assurance:
- a. The transferee shall provide adequate financial assurances to cover the costs of the proposed response action, including monitoring, operations and maintenance. This can be demonstrated by:
    - (1) compliance with the corrective action requirements of Section 1.8 of the Regulations pertaining to Solid Waste Disposal Sites and Facilities 6 CCR 1007-2<sup>5</sup>. The instrument wording in Appendix A of the above named regulations shall be modified to reflect that the instrument was established for the transfer of federal lands and that the corrective action is per the referenced Enforcement Agreement; or

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<sup>5</sup> This regulatory requirement for financial assurance includes a variety of options, including bonding and insurance; the regulation should be consulted for a full and complete list of options.

- (2) Sufficient funds shall be placed into escrow to cover the costs of cleanup in sufficient funding to the event of transferee non-compliance; or
    - (3) The United States will take back the property and complete the cleanup if the transferee does not comply with the cleanup requirements of the agreement.
  - b. In the event the transferee does not comply, the United States will ensure performance of the cleanup plan by conducting or contracting for the cleanup in accordance with the plan;
  - c. The transferee shall provide proof of technical and managerial capacity to implement the selected remedy;
  - d. The transferee shall be precluded from transferring its cleanup responsibility without approval of CDPHE/EPA; and,
- 3. If the United States is to finance or perform the cleanup, the following requirements will be included in the Enforcement Agreement or other assurance:
  - a. The federal agency will provide evidence that funds will be available to complete work, including long term maintenance, operation and closeout; or
  - b. The federal agency will submit budget requests to the Director of the Office of Management and Budget that, if appropriated, would result in sufficient funding to comply fully with all agreements pertaining to the transfer of property, including schedules for investigation and completion of all necessary response actions, including long term maintenance, operation and closeout.

## II. Review Procedures

- A. Submission of working drafts prior to submission of a formal application for deferral is encouraged. (If submitted, working drafts will be distributed by the Governor in the same manner as provided in paragraph B, below.)
- B. The federal transferring agency shall submit applications for section 334 transfers

directly to the Governor who will then transmit the applications to appropriate state and local agencies, local redevelopment authorities, U.S. EPA-8, and standing citizen or restoration advisory boards.

- C. The lead state official will expedite review to make a determination of completeness of the application in consideration of the requirements of section 120(h) of CERCLA and this Implementation Policy and in consultation with state and local agencies, local redevelopment authorities, U.S. EPA-8, and the citizen or restoration advisory board.
- D. At the close of the comment period, the lead state official, in consultation with CDPHE and the transferring parties, will respond to the comments; the federal agency may revise the Deferral Application and/or other submittal.
- E. Upon completion of the Response to Comments and receipt of any revised submittal the lead state official, in consultation with state agencies, will advise the Governor whether the property is suitable for transfer and whether the proposed enforcement agreement is sufficient.
- F. Upon making a determination to approve or disapprove the Deferral Application, or to approve it with modification, the Governor shall provide a written Notice of Decision upon the Deferral Application. Copies of this notice will be provided to the applicants, the citizen or restoration advisory board, and all participating state and local agencies. A copy of the Notice of Decision will also be placed in local information repositories.
- G. Upon transfer in accordance with the Governor's Decision upon the Deferral Application, the federal agency will be required to provide the lead state official with evidence that the deed, including all required limitations and assurances, was duly recorded in the records of the appropriate county (counties).

### III. Community Participation

- A. The community will be accorded an opportunity to review and comment on the Deferral Application, including any transfer agreements and enforcement agreements proposed pursuant to section 334 and this Implementation Policy. Such community participation shall be solicited through citizen or restoration advisory boards existing at the site where transfer is being considered in addition to the public comment prescribed by section 334. Public input will be coordinated by the lead state official. All negotiated costs of community relations will be paid by the transferee or

transferring federal agency.

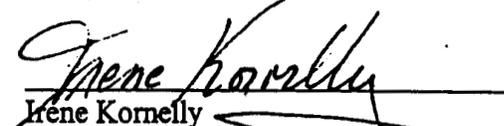
- B. Community acceptance and approval, as determined through consultation with local government, local redevelopment authorities, and standing citizen or restoration advisory boards, is a vital part of the review process outlined by this Implementation Policy.
- C. Citizen or restoration advisory boards will be involved in cleanups (whether they are performed by the United States or the transferee) in accordance with regulations and guidance in effect at the time, including the provision of administrative and technical support as provided by law or agreement. Any transfer of federal property is not intended to diminish the role of local government, local redevelopment authorities, citizen or restoration advisory boards or the general public in remedy selection and implementation, or in land use planning.

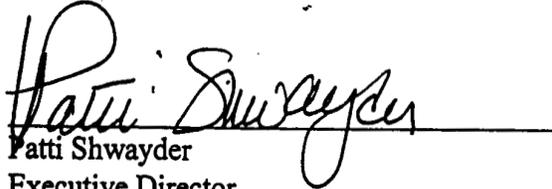
#### IV. Termination of Deferral

- A. A post-remediation review may be necessary to determine if cleanup goals were accomplished, if any new or ongoing institutional controls are necessary, and if future Operations and Maintenance activities are required.
- B. Completion of all necessary response actions must be approved by the appropriate regulatory agencies, along with completion of all required regulatory procedures and documents.
- C. *\*When all response actions necessary to protect human health and the environment\* have been taken in accordance with the enforceable agreement, or when there has been a demonstration to the state that the approved remedy is operating effectively (regardless of whether the transferring federal agency or the transferee has taken the action), *\*the United States transferring agency shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken. This warranty will be considered as satisfying the Covenant requirements of section 120 (h) (3) (A) (ii) (1) of CERCLA.\** The transferee shall provide a copy of such warranty to the lead state official and local jurisdictions.*

- D. Periodic reviews of the remedy shall be conducted to the extent required by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or other applicable law. A written report of every such review shall be provided to the lead state official and local jurisdictions.

DATED this 19th day of June, 1998.

  
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