



MANAGEMENT MEMO

Management Memo #EO-99-003 -MM (Supersedes EO-93-007-PP)

Title: Decisions Not to Pursue Cost Recovery

Affected Programs: Site Mitigation
Office of Legal Counsel
Administrative Services

BACKGROUND:

The Department of Toxic Substances Control (DTSC) is required by Health and Safety Code section 25360 to recover the costs it incurs in site mitigation removal and remediation work. When it is not possible for DTSC to recover all such costs effectively, the decision not to pursue further costs recovery action must be documented. This management memo sets forth the procedure for making a decision to pursue no further cost recovery action (NFCRA) on a site and for documenting the decision. This memo applies prospectively, and does not require signed NFCRA memos to be revised. A NFCRA decision by DTSC does not affect DTSC's legal rights if it reevaluates the case or obtains new information in the future; it simply documents an internal decision not to pursue a potential legal claim at a point in time.

ACTION:

It is DTSC's policy to make all reasonable, cost effective efforts to recover the costs incurred for site mitigation removal and remediation work. A decision that it is not reasonable or cost effective to pursue further cost recovery in a particular case will be made on the basis of the following factors:

- The strength of the evidence establishing the liability of potential Responsible Parties (RPs) and other essential elements of a legal action for cost recovery. A weak legal case can result in additional litigation costs and a failure to recover any costs.
- The financial status of the RPs. If the RPs cannot in fact pay a judgment even if one is obtained, there is no point in pursuing litigation. The determination that an RP is not financially viable should be made in consultation with the Audit Unit and should be documented with appropriate financial information.
- The amount of the costs incurred by DTSC and the cost of pursuing cost recovery. The outstanding costs should be weighed against any additional expense that would be incurred by pursuing cost recovery to determine whether it is cost effective.
- The statute of limitations (SOL) date. If the SOL has passed, DTSC will not pursue cost recovery. See guidance on SOLs from Office of Legal Counsel.
- The strength of the documentation supporting the costs. For example, miscoded time sheets would not support cost recovery.

- The type of activity charged to the site, e.g., whether there was removal or remedial work done or the activity was only file review and/or cost recovery work.
- Any other factors that affect an evaluation of the prospect of pursuing cost recovery successfully.

NFCRA decisions must be documented in a NFCRA memorandum. A standard form is attached. The form calls for a brief description of the site and the work performed, a summary of the costs, and a discussion of the criteria on which the decision is based.

NFCRA Memorandum Form (Attachment 1)

The attached form for NFCRA memos is designed to be simple, but to include the information that is necessary to understand why DTSC decided not to pursue specified costs.

The section entitled "Reason for NFCRA Decision" should explain why it would not be reasonable or cost effective for DTSC to make any additional efforts to recover the outstanding costs. If there is more than one reason, all reasons should be discussed. If there is more than one RP, the reasons for not pursuing cost recovery against each RP must be included.

The section entitled "Site Description" should include a brief description of the site (size, past use, contamination, ownership, etc.).

The section entitled "Description of DTSC Activity" should include a brief description of the activity that generated the costs.

The section entitled "Costs" should include the amount of costs due to DTSC and the source and date of the cost information such as a Summary by Activity Report or an Estimated Incurred Costs Report. This section should also summarize efforts made to collect the costs and specify the period of time covered by this decision not to pursue costs. If no RP search was conducted, check the box. If an invoice was sent to the RPs, check the box. If the site was the subject of a settlement agreement, check the box and attach a copy. If there are or will be additional costs (after the period covered by the memo), check the box.

Lines are provided for the required approvals. Not all listed parties are required to approve each NFCRA; enter NA (not applicable) if a signature is not required.

Sites with Costs Less Than \$250, No Costs, or Credit Balances

If work on a site has been completed and there are outstanding costs of less than \$250, no outstanding costs, or a credit balance, a NFCRA memo is not necessary. Instead, send the Cost Recovery Unit a "Zero, under \$250, or Credit Balance Closeout Memorandum" in order to remove the site from DTSC's list of sites requiring cost recovery. A standard form is attached as Attachment 2.

Sites Where No RP Search Has Been Conducted

If a search for RPs has never been conducted for a site, it should be done before a decision is made not to pursue cost recovery unless the costs do not justify the additional costs that would be incurred performing the investigation, the SOL has past, or other circumstances make it clear that DTSC could not recover its costs even if it found an RP.

Settlements

If DTSC entered into an agreement compromising the costs, the agreement settles past cost periods, and the settlement amount has been paid, a NFCRA memo is appropriate for the settled cost periods. If a settlement agreement is not a complete settlement of all outstanding costs, i.e., there are other RPs that DTSC may pursue, a NFCRA memo is not appropriate until cost recovery possibilities have been exhausted.

Future Payments on a Payment Schedule

A NFCRA decision may be made even though a settlement agreement provides for payments that have not yet been made, e.g., an RP signs an agreement to pay over the next three years. In this situation DTSC has an enforceable agreement that the RP will pay an agreed-upon amount pursuant to a payment schedule. If the RP defaults on the agreement, DTSC would pursue payment under the agreement.

Relationship to Dispute Resolution Procedure

Disputes about the costs on a particular current invoice are dealt with through DTSC's dispute resolution procedure, not by means of a NFCRA. If DTSC decided prior to establishment of the dispute resolution procedure that it wished to compromise its costs on a disputed invoice, and made an agreement with an RP to accept a smaller amount, then a NFCRA memo is appropriate.

New Information after Approval of NFCRA Memo

If new information affecting a decision not to pursue cost recovery becomes available, the decision should be reevaluated to determine if cost recovery action should be resumed. For example, if DTSC decided not to pursue cost recovery against an RP because the RP was insolvent and then the RP inherited a substantial sum, DTSC should resume cost recovery efforts.

Miscoded Costs

If costs result from miscoded time sheets, contractor invoices, or travel claims, and it is within the three fiscal years within which documents can be corrected, initiate the correction and notify CRU so that it can prepare a new Summary by Activity Report. If it is too late to correct the documents, a NFCRA memo can be used to close out cost recovery for the site. The amount of costs on the NFCRA memo should be shown as the incorrect amount appearing on the invoice for the site.

Routing and Record Keeping

After a NFCRA memo has been approved, the originating branch will place the original in the site file and send copies to the Statewide Cleanup Operations Division (SCOD), OLC, CRU, and Site Mitigation Program Planning and Policy Branch. SMP Planning and Policy Branch is responsible for keeping a complete file of all NFCRA memos.

Confidentiality

NFCRA memos will be placed in the public file available for public inspection. NFCRA memos that have been labeled “confidential” previously should be reviewed and placed in the public file, if appropriate, if a Public Records Act request is made to review the file.

Cal Sites

If a site is on Cal Sites, the program unit that initiated the NFCRA must enter the data into Cal Sites when the NFCRA memo is approved.

Sign-off Authority

The Chief of the Statewide Cleanup Operations Division (SCOD) is authorized to approve NFCRA memos for costs of \$10,000 or less, unless there has been an OLC attorney assigned to the case previously or the sole reason for not pursuing cost recovery is the statute of limitations, in which case OLC must also approve the memo. If the cost exceeds \$10,000, the SCOD Chief and OLC must approve the memo. If the cost exceeds \$1,000,000, the SCOD Chief will consult with the Deputy Director prior to sign off.

CONTACTS:

Kathleen Hartshorne
Policy and Planning Branch
Site Mitigation Program
(916)323-3395

July 21, 1999
Date

/Original Signed by /Edwin F. Lowry
Edwin F. Lowry
Director
Department of Toxic Substances Control
(916) 322-0504

NO FURTHER COST RECOVERY ACTION (NFCRA)
MEMORANDUM

SITE NAME: _____

SITE CODE: _____

REASON FOR NFCRA DECISION:

SITE DESCRIPTION:

DESCRIPTION OF DTSC ACTIVITY:

AMOUNT OF COSTS THAT WILL NOT BE PURSUED: \$ _____

SOURCE OF COST DATA:

DATES COVERED BY NFCRA DECISION:

- ' No RP search conducted
- ' Invoice sent
- ' Settlement (copy attached)
- ' There will be (are) costs incurred after the period covered by this memo.
- ' There are no costs after the period covered by this memo.

Author _____

Date _____

APPROVALS (as necessary):

Unit Chief _____

Date _____

Branch Chief _____

Date _____

OLC _____

Date _____

Division Chief _____

Date _____

MEMORANDUM

TO: Larry Hoskins, Chief
Cost Recovery Unit
ATTN: **[Regional Liaison]**

FROM: **[Branch Chief]**, Chief
[Branch Name]

DATE:

SUBJECT: ZERO, UNDER \$250, OR CREDIT BALANCE CLOSEOUT MEMORANDUM
[SITE NAME, SITE CODE]

Work on this site was completed as of **[date]**. No additional work is expected. We believe this site has a zero, under \$250, or credit balance because [explain reasons]. Please close your records on this site as soon as possible.

Thank you for your attention to this matter. If you have any questions, please contact the Project Manager, **[Project Manager's Name]**, at **[phone number]** or me at **[Branch Chief's phone number]**.

cc: Lach McClenahan, Chief
Planning and Policy Management Branch

Barbara Coler, Chief
Statewide Cleanup Operations Division