

CHANGE REQUEST for FY 08-09 BUDGET REQUEST CYCLE

Department:	Colorado Department of Public Health and Environment
Priority Number:	11
Change Request Title:	DSMOA Program Funding Change

SELECT ONE (click on box):

- Decision Item FY 08-09
- Base Reduction Item FY 08-09
- Supplemental Request FY 07-08
- Budget Request Amendment FY 08-09

SELECT ONE (click on box):

Supplemental or Budget Request Amendment Criterion:

- Not a Supplemental or Budget Request Amendment
- An emergency
- A technical error which has a substantial effect on the operation of the program
- New data resulting in substantial changes in funding needs
- Unforeseen contingency such as a significant workload change

Short Summary of Request:

Through this Decision Item the Department is requesting a transfer of \$1,308,164 from federal funds spending authority to cash funds spending authority. Concurrent with this spending authority change will be a move of 5.0 FTE from federal to cash funding.

Background and Appropriation History:

The Department is requesting to discontinue participation in the federal Defense State Memorandum of Agreement (DSMOA) program and to operate the cleanup program for military installations under state hazardous and solid waste authority on cash funded basis. Currently, federal spending authority for the program is approximately \$1.6 million with 13.6 FTE authorized. The division will need to convert 5.0 FTE and \$1,308,164 from federal spending authority to cash funding authority split between the hazardous waste control program and the solid waste control program on a 90/10 basis. The balance of the federal FTE and spending authority will still be needed to complete the cleanup at approximately nine military sites under an agreement with the federal government. Based on FY 2006-2007 staff personal services records, the number of hours worked on billable activities under hazardous and solid waste authority is adequate

to support the \$1,308,164. The cash refinance includes the refinancing of the POTS allocations in the Administration and Support Division for these 5 FTE.

The Army Corps of Engineers (ACOE) has been responsible for administering the DSMOA program since its inception in the early 1990's. Unfortunately, through recent changes in interpretation, the Department of Defense (DoD) and ACOE have used DSMOA reimbursement to define the Department's oversight responsibilities at DoD facilities. While these ACOE interpretations could impact all states participating in the DSMOA program, the ACOE has primarily focused on Colorado. The Department has been required to redefine and expand the DSMOA accounting codes in response to an audit finding, and spent hundreds of hours providing ACOE with additional backup accounting documentation. In addition the Department has had to file a claim for unpaid DSMOA costs from 2004, which has yet to be resolved. The ACOE has been unwilling to work with the Department in resolving the outstanding issues and returning the DSMOA program to the cooperative approach and success it once had. In attempting to address and resolve the situation, the Department is working on three concurrent approaches. The first is to request the DoD to re-open the DSMOA Cooperative Agreement in order to identify and clarify any areas of disagreement or ambiguity. It is questionable whether the DoD will be willing to reopen the DSMOA agreement. Secondly, the Department is pursuing the possibility of negotiating separate agreements with the individual service branches independent of the DSMOA program. This option has met with some success in other states and eliminates the ACOE's ability to define what efforts and activities the Department may undertake to meet its oversight and statutory responsibilities. However, DoD may be reluctant to authorize the individual branches to enter into separate agreements with the department, especially if it leads to other states following the same course. The final approach, related directly to this Decision Item, will convert spending and FTE authority from the current federal appropriation to a cash funded appropriation. This approach will allow the Department to fully meet its federal and state regulatory and statutory responsibilities to assure the over 60 DoD facilities in the state are not adversely impacting public health and the environment, and to implement existing law to bill for and collect costs incurred in the discharge of those responsibilities wherever the authority to do so exists. This option

eliminates the ACOE's ability to question costs because rather than submitting monthly requests for reimbursement subject to ACOE interpretation, the state will bill the DoD for eligible activities under state law that requires payment.

The current DSMOA grant period ends June 30, 2008. This is the appropriate time to prepare to terminate our participation in the program.

General Description of Request:

In the past two years, it has become increasingly more difficult to work with the ACOE in administering the DSMOA program. Of primary concern are limitations placed by the ACOE on the Department associated with its regulatory responsibilities and requirements. Interpretation by the ACOE as to what are "eligible State Services" has resulted in the Department not being allowed to charge the DSMOA program for costs associated with statutory responsibilities including defining contaminated DoD sites and reviewing cleanup plans and associated guidance, regulation and supporting documentation to ensure the plans are adequate to enforce environmental requirements. Despite an audit by the Defense Contract Audit Agency (DCAA) in 2004, that reported only minor system related findings, which have been corrected to the DCAA's satisfaction, the ACOE continues to question costs and delay payment of cost reimbursement requests. This has led to undue delays in being reimbursed for costs incurred that adversely affect the Department's cash position and result in significant increases in administrative time and related costs. The limitations that ACOE has imposed on the DSMOA program is negatively affecting the Department's ability to assure that DoD cleanups are protective of the public and the environment.

Consequences if Not Funded:

The way the DoD is currently administering the DSMOA program impacts the Department's ability to meet its responsibility of ensuring adequate measures are undertaken to protect the public and the environment by refusing to pay for activities that are critical to its core functions. In addition ACOE has retaliated against states by withdrawing DSMOA program funding if enforcement actions have been taken at DoD sites under state law. The cumulative impact of this approach to managing DSMOA forces the Department to reduce state oversight and enforcement preventing it from accomplishing its statutory responsibilities and mission of this program.

If the request is not approved, the Department will continue to experience delays in reimbursement and inefficiencies in program operation and administration that have an adverse effect on the Department's cash position, generate increased administrative effort and costs and may result in unnecessary enforcement efforts and associated costs. The limitations the ACOE has imposed on the DSMOA program will continue to make it very difficult for the Department to assure that DoD site cleanups are protective of the public and the environment.

Calculations for Request:

Table 1 -Summary of Request						
Long Bill Line Item	FTE	Total Funds	General Fund	Cash Funds	Cash Funds Exempt	Federal Funds
(E)Contaminated Sites	(5.0)	(\$498,848)	\$0	\$0	\$0	(\$498,848)
(A) Administration	0.0	\$0	\$0	\$231,943	\$0	(\$231,943)
(B)Hazardous Waste Control Program	4.5	\$448,963	\$0	\$968,172	\$0	(\$519,209)
(C)Solid Waste Control Program	0.5	\$49,885	\$0	\$49,885	\$0	\$0
Total	0.0	(\$0)	\$0	\$1,250,000	\$0	(\$1,250,000)

Table 2 - Administration Line Request Detail						
	FTE	Total Funds	General Fund	Cash Funds	Cash Funds Exempt	Federal Funds
Legal Services	0.0	\$0	\$0	\$15,000	\$0	(\$15,000)
Indirect Cost Assessment	0.0	\$0	\$0	\$216,942	\$0	(\$216,942)
Total	0.0	\$0	\$0	\$231,942	\$0	(\$231,942)

Table 3 - Hazardous Waste Control Program Line Request Detail						
	FTE	Total Funds	General Fund	Cash Funds	Cash Funds Exempt	Federal Funds
Personal Services	4.5	\$433,528	\$0	\$934,887	\$0	(\$501,359)
Operating Costs	0.0	\$15,435	\$0	\$33,285	\$0	(\$17,850)
Total	4.5	\$448,963	\$0	\$968,172	\$0	(\$519,209)

Table 4 - Solid Waste Control Program Line Request Detail						
	FTE	Total Funds	General Fund	Cash Funds	Cash Funds Exempt	Federal Funds
Program Costs	0.5	\$49,885	\$0	\$49,885	\$0	\$0
Total	0.5	\$49,885	\$0	\$49,885	\$0	\$0

Table 5 – Contaminated Sites Line Request Detail						
	FTE	Total Funds	General Fund	Cash Funds	Cash Funds Exempt	Federal Funds
Personal Services	(5.0)	(\$481,698)	\$0	\$0	\$0	(\$481,698)
Operating Costs	0.0	(\$17,150)	\$0	\$0		(\$17,150)
Total	(5.0)	(\$498,848)	\$0	\$0	\$0	(\$498,848)

Assumptions for Calculations:

The Department assumes the amount of the current federal award and associated FTE will be reallocated to hazardous and solid wasted program lines as necessary and funded through the charging of fees under both hazardous and solid waste statutory authority. A reallocation from federal to cash funds within the Administrative line will also be necessary for legal and indirect costs.

The Department has also assumes the FTE and the associated total compensation will be the same under the cash funded programs as they are under the federal award and appropriation. A cash indirect rate of 21% is also assumed.

The above tables and the attached Schedule 13 provide detailed information on the reallocation.

Table 1: A summary of the reallocation by Long Bill Group reflecting the reallocation of FTE and spending authority from federal funding to cash funding.

Table 2: Detail on the reallocation of legal costs and indirect cost assessment from a federal source to a cash source using the hazardous waste cash fund and the solid waste cash fund.

Table 3: This table reflects the reallocation of 5.5 FTE and \$519,209 of spending authority in current federal authority to cash authority and a reallocation of 4.5 FTE and \$448,963 current federal authority from the contaminated sites group the hazardous waste control program cash authority. The reallocation will result in a total of 10 cash funded FTE and total cash spending authority of \$968,172.

Table 4: The addition of .5 FTE and \$49,885 in cash authority that is reallocated from the contaminated sites group.

Table 5: This table identifies the amount of federal FTE and spending authority currently in the contaminated sites federal authority that is being reallocated to the hazardous waste and solid waste programs as cash authority. The reallocation is based on 90 percent being reallocated to the hazardous waste control program and 10 percent to the solid waste control program.

Impact on Other Government Agencies:

No other state agencies will be impacted.

Cost Benefit Analysis:

While this Decision Item to discontinue participation in the federally funded DSMOA program and operate the clean up program for military installations under state hazardous and solid waste authority on a cash funded basis is generally technical in nature and does not involve new costs and FTE, and a full cost/benefit analysis is not necessary, there will be some benefit to the department.

Administratively, the Department will not be subject to requests from the ACOE for additional documentation for costs requested for reimbursement. This will result in a maximization of fund utilization for cleanup activities rather than administrative costs.

Programmatically, regulating DoD outside of DSMOA and instead through the State's hazardous and solid waste laws provides greater clarity to DoD of the Department's responsibilities. These roles and responsibilities are clearly defined by statute, resulting in expeditious review and agreement on technical plans, greatly reducing costs. Technical staff will focus on environmental oversight and not be hampered by disagreement regarding DSMOA eligible Department activities and threats of non-reimbursement.

Implementation Schedule:

Because this request will eliminate a current MOU and replace it with fees normally charged by the Department, there will not be any implementation steps that need to occur.

Task	Month/Year
Start-Up Date	July 1, 2008

Statutory and Federal Authority:

All citations are from the 2006 C.R.S.

25-15-301. Powers and duties of the department.

(1) The department shall be the entity in the state responsible for the regulation of hazardous waste management; however, the department may, in accordance with section 25-15-306, enter into agreements with local governments to conduct specified activities involving monitoring, inspections, and technical services but not permit issuance or enforcement.

(2) Pursuant to rules and regulations as provided for in section 25-15-302, the department shall:

(a) Issue permits for treatment, storage, and disposal facilities, provide for the inspection of such operations, and enforce the limitations and conditions of such permits, including any conditions and schedules established to correct noncompliance; and

(b) Assure that all generators, transporters, storers, treaters, and disposers of hazardous waste have received appropriate identification by the department, use a manifest system, and provide periodic reports on wastes manifested.

25-15-301.5. Additional powers of the department - legislative declaration - report.

(1) The general assembly hereby finds, determines, and declares that the hazardous waste control program shall be implemented to protect human health and the environment in a manner that:

- (a) Maintains program authorization by the federal government;
- (b) Promotes a community ethic to reduce or eliminate waste problems;
- (c) Is credible and accountable to industry and the public;
- (d) Is innovative and cost-effective; and
- (e) Protects the environmental quality of life for impacted residents as required by other provisions of this part 3 and rules promulgated in connection therewith.

(2) The department shall develop, implement, and continuously improve policies and procedures for carrying out its statutory responsibilities at the lowest possible cost without jeopardizing the intent stated in subsection (1) of this section. At a minimum, these policies and procedures shall, to the extent practicable, include the following:

- (a) Establish cost-effective level-of-effort guidelines for reviewing submittals including, but not limited to, permit applications and corrective action plans, to assure conformity with regulatory requirements, taking into consideration the degree of risk addressed and the complexity of the issues raised;
- (b) Establish cost-effective level-of-effort guidelines for performing inspections that focus on major violations of regulatory requirements that pose an immediate and significant threat to human health and the environment;

(c) Streamline the corrective action process with features that include, without limitation, the following:

(I) Cost-effective level-of-effort guidelines for site investigations and remediation that focus on result-based outcomes and performance-based oversight by the department;

(II) Cost-effective level-of-effort guidelines for reviewing site investigation reports and corrective action plans;

(III) The use of enforceable institutional controls to avoid unnecessary cleanup costs; and

(IV) Realistic cleanup standards that address actual risk to human health and the environment on a site-specific basis and that take into account any applicable institutional controls.

(d) Establish cost-effective level-of-effort guidelines for enforcement activities;

(e) Establish schedules for timely completion of department activities including, but not limited to, submittal reviews, inspections and inspection reports, and corrective action activities;

(f) Establish a prioritization methodology for completing activities that focuses on actual risk to human health and the environment;

(g) Establish a preference for compliance assistance with at least ten percent of the annual budget amount being allocated to compliance assistance efforts;

(h) Establish a preference for alternative dispute resolution mechanisms to timely resolve disputed issues; and

(i) Establish a mechanism that continually values and provides incentives for further improvements in the policies and procedures of the department.

(3) The department is directed to submit a report to the general assembly on or before February 1, 2002, and annually on or before each February 1 thereafter that describes the status of the hazardous waste control program, the department's efforts to carry out its

statutory responsibilities at the lowest possible cost without jeopardizing the intent stated in subsection (1) of this section, and the department's implementation of the authority to accept environmental covenants created pursuant to section 25-15-321.

Source: L. 2000: Entire section added, p. 1066, § 2, effective July 1. L. 2001: (3) amended, p. 459, § 3, effective July 1.

25-15-303. Requirements for hazardous waste treatment, storage, and disposal sites and facilities - permits.

(1) Any site or facility for the treatment, storage, or disposal of hazardous waste shall be unlawful unless a permit is granted by the department for such site or facility. Each permit shall provide for a specified term and conditions for renewal and shall provide for modification upon the permittee's request or upon a finding that a substantial threat to the public health or safety or the environment exists at the site or facility. In issuing permits for disposal facilities the department shall consider the variations within this state in climate, geology, and such other factors as may be relevant to the management of hazardous wastes.

(2) A separate permit shall not be required, unless the permittee so requests, of a person otherwise subject to the requirements of this part 3 who is engaged in mining operations pursuant to a permit issued under the "Colorado Surface Coal Mining Reclamation Act", article 33 of title 34, C.R.S.

(3) Any person who possesses a federal permit or has federal interim status under section 3005 (c) of the federal act for the treatment, storage, or disposal of hazardous waste shall be deemed to possess an identical permit or status with the department. Any such permit shall remain in effect until it expires or is suspended or revoked for failure to meet conditions in the permit or the requirements of this part 3.

(4) (a) Any deed for property which has been utilized for the disposal of hazardous waste and has received interim status or a permit under the federal act or a permit under this

part 3 or has received a certificate of designation under part 2 of this article shall contain a notation that such property has been utilized for the disposal of hazardous waste.

(b) and (c) (Deleted by amendment, L. 92, p. 1244, § 7, effective August 1, 1992.)

(5) Repealed.

(6) Any operation conducted at sites acquired by the state for the express purpose of hazardous waste treatment, storage, or disposal shall be in accordance with a lease which shall provide for payments to the state based on the quantity of waste managed, and shall also require, in lieu of taxes, payments to be transferred to the local government having jurisdiction as compensation for loss of valuation and which shall be adjusted annually to conform with current mill levies, assessment practices, and value of land improvements.

(7) As a condition to the issuance of any permit under subsection (1) of this section, the department may require, in accordance with rules and regulations, that the permittee post a bond or provide other evidence of financial assurance so that the department may, if the permittee is unable or unwilling to do so, arrange to rectify any improper hazardous waste management technique committed during the term of the permit. If a bond is posted, a portion of the bond shall be refunded to the permittee upon proper closure of the permitted hazardous waste management activity if use of such portion of the bond is not required.

(8) Prior to the issuance of any permit under subsection (1) of this section, the department shall, in accordance with the "State Administrative Procedure Act", article 4 of title 24, C.R.S., give reasonable public notice and shall, upon sufficient interest, hold a public hearing on the application in the locality of the proposed site or facility.

Source: L. 81: Entire article R&RE, p. 1355, § 1, effective July 1. **L. 83:** (2), (3), and (4)(a) amended, p. 1103, §§ 22, 23, effective November 2, 1984; (4)(a) amended, p. 2070, § 1, effective October 13. **L. 92:** (1), (3), (4), and (5)(a) amended, p. 1244, § 7, effective August 1. **L. 2000:** (5) repealed, p. 1071, § 4, effective July 1.

Am. Jur.2d. See 61C Am. Jur.2d, Pollution Control, §§ 1158, 1159.

Law reviews. For article, "Regulation of Spills of Hazardous Materials", see 12 Colo. Law. 277 (1983). For article, "Hazardous Waste Regulation: Issues for the Real Estate Practitioner", see 13 Colo. Law. 48 (1984).

25-15-304. Hazardous waste service fund created.

There is created in the state treasury a hazardous waste service fund, which shall consist of fees collected pursuant to section 25-15-302 (3.5) to reimburse the state for its annual program expenses incurred in the maintenance, monitoring, and other supervision of the lands and facilities used for the storage, treatment, and disposal of hazardous waste. Such moneys shall be appropriated annually to the department by the general assembly which shall review such expenditures to assure that they are used to accomplish the purposes of this section. All unappropriated balances in the hazardous waste service fund shall remain therein and shall not revert to the general fund.

Source: L. 81: Entire article R&RE, p. 1357, § 1, effective July 1. **L. 2000:** Entire section amended, p. 1071, § 5, effective July 1.

Editor's note: Although the act repealing and reenacting this article was effective July 1, 1981, this section was not effective until November 2, 1984. (See section 25-15-102 (3).)

Performance Measures:

Through this Decision Item, The Department will be able to ensure regulatory compliance of federally owned facilities and this compliance will contribute to the success of the following performance goals.

Objective: Healthier Coloradans Throughout the Life Cycle.					
Performance Measure	Outcome	FY 05-06 Actual	FY 06-07 Actual	FY 07-08 Approp.	FY 08-09 Request
Reduce exposures to releases of hazardous substances by increasing the percentage of contaminated sites with remedies implemented (construction of the remedy is complete)	Benchmark	55%	60%	60%	60%
	Actual	54%	56%		

STATE OF COLORADO FY 08-09 BUDGET REQUEST CYCLE: Colorado Department of Public Health and Environment

Objective: Protect and Improve Air and Water Quality Throughout the State.					
Performance Measure	Outcome	FY 05-06 Actual	FY 06-07 Actual	FY 07-08 Approp.	FY 08-09 Request
Percentage of regulated entities that are in compliance with regulatory requirements for solid and hazardous waste and radioactive materials	Benchmark	85%	85%	85%	90%
	Actual	89%	90%		

Performance Measure: Reduce Exposures to Hazardous Substances					
Workload Indicators		FY 05-06 Actual	FY 06-07 Actual	FY 07-08 Approp.	FY 08-09 Request
Number of potentially contaminated sites (to include SWMU-level sites and include all that are now or have ever been on our radar screen)		1921	1937	1962	1992