UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 1 - 2011

MEMORANDUM

SUBJECT: Program Priorities for Federal Facility Five-Year Review

FROM: Reggie Cheatham, Acting Director
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Office of Enforcement and Compliance Assurance

TO: Superfund National Policy Managers, Regions 1-10

PURPOSE

The purpose of this memorandum is to provide information on the Federal Facility program priorities for five-year reviews. The memorandum describes: 1) management controls that will be implemented to ensure that recommendations in federal facility five-year review reports are tracked, monitored and implemented by the U.S. Environmental Protection Agency (EPA) and the federal agencies; 2) the actions needed by the Remedial Project Manager (RPM) to ensure that the reviews are completed on-time and guidance on how EPA makes an independent decision on the protectiveness; 3) changes to the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) five-year review module to ensure that federal facility five-year review reports are submitted at least every five years; and 4) confirms that five-year reviews are generally enforceable under the Federal Facility Agreements (FFAs). Separately, the Office of Enforcement and Compliance Assurance (OECA) is developing an enforcement guidance that will address the Office of Inspector General's (OIG) recommendation regarding enforcement tools, processes and authorities to achieve completion of the five-year reviews. The memorandum also describes a joint project with the Federal Facilities Restoration and Reuse Office (FFRRO), the Department of Defense (DoD) and the Department of Energy (DOE) that will improve the five year-review reports by standardizing the process and including information on the long-term stewardship of the site.

Attached to this memorandum are several documents. Attachment 1, "Roadmap to Completing Five-Year Reviews on Time" provides four scenarios that could occur when the reviews are due. The roadmap is a framework for EPA to identify protectiveness statements

regardless of whether the Regions can concur on the report submitted by the other federal agency. Attachments 2, 3, and 4 are flowcharts for each scenario. Attachment 5 is a checklist of information that should be included in the concurrence and non-concurrence letters.

BACKGROUND

The purpose of the five-year review is to evaluate the implementation and performance of the remedy in order to determine if the remedy is or will be protective of human health and the environment. Five-year reviews are required under section 121(c) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) which states that "If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each five years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented". In 2001, the Office of Solid Waste and Emergency Response (OSWER) developed a national comprehensive guidance on how to perform a five-year review. The purpose of the guidance was to assist regional staff and support agencies responsible for conducting five-year reviews under CERCLA and to promote national consistency in implementing the five-year review process. Chapter 2 of the Comprehensive Guidance describes the roles and responsibilities for EPA, states, Tribes and other federal agencies. Section 2.5 of Guidance states that for federal facility sites that are listed on the National Priorities List, five-year reviews are conducted by the other federal agency, but EPA retains final authority over whether the five-year review adequately addresses the protectiveness of remedies. EPA may concur with the final Federal agency or department protectiveness determination, or EPA may provide independent findings.

EPA's OIG has conducted several independent studies of the five-year review process. The first study addressed the backlog of five-year reviews that were not completed. The second study indicated that OSWER had made strides in reducing the backlog but more work needed to be done. From the second study, OSWER committed to increase national consistency by adding a Headquarters' review component and updating the five-year review CERCLIS module. The CERCLIS changes included being able to associate the protectiveness determination for every Operable Unit, automatically generate due dates and track and monitor the issues and recommendations included in the report. The most recent OIG study focused on federal facility sites and recommended that EPA improve its oversight of federal facility five-year reviews. The OIG recommended that OSWER implement management controls to ensure that the recommendations in the report are being tracked, monitored and implemented and to establish a policy so that the due date for the reviews is every five years. OSWER agreed with the OIG's recommendations and this memorandum to the Regions implements several changes to the Federal Facility program regarding five-year reviews.

Consistent with CERCLA Section 120(e)(4)(A), EPA and the other federal agencies both have a joint responsibility to select CERCLA remedies (and EPA has the ultimate responsibility where the agencies do not agree on the remedy); those remedies must meet the requirements of CERCLA, including but not limited to the requirements in CERCLA Section 121 for ensuring protectiveness of human health and the environment, achieving ARARs, and utilizing treatment alternatives to the maximum extent practicable, among others. These remedial action

requirements are ongoing; they do not expire at the signature of the Record of Decision (ROD). The five year review process mandated by CERCLA section 121 is designed to ensure that remedies originally selected (either jointly, or by EPA alone) remain protective over the long-term where hazardous substances are left on-site. It is critically important that federal agencies prepare five year review reports that result in accurate, timely, and scientifically sound information on protectiveness in order for EPA to be able to fulfill its statutory responsibilities to assure that remedies at federal facility NPL sites are protective. EPA's concurrence on a federal agency's finding of protectiveness in a five year review report demonstrates our mutual CERCLA responsibilities are carried out properly. Also, EPA reports annually to Congress on sites that have completed the five-year review and the protectiveness of the remedies.

FEDERAL FACILITY FIVE-YEAR REVIEW PROGRAM PRIORITIES

Management Controls:

FFRRO will incorporate changes to the mid-year and end- of- year workplanning meetings to address issues and recommendations identified in the report that have not been updated or implemented within the last six months. FFRRO has developed a CERCLIS report which has been shared with the Regions that lists the recommendations that are late or not implemented. During our workplanning meetings, we will review the report and request updates from the Regional management. During our planned monthly calls with the Regions, we will continue to request updates on sites where recommendations have not been implemented.

At the end of the calendar year, FFRRO will submit to the Assistant Administrator of OSWER an End of the Year Report. This annual report will identify the federal facility sites that have completed a five-year review report and the protectiveness statements; those reviews that are late and an explanation of why the reviews are late; and how EPA is addressing the recommendations in the five-year reviews. The data used to generate the report will also be used in our annual report to Congress. It is critical that EPA RPMs request updates from the federal agencies on the recommendations in the five-year review reports during their site planning meetings.

EPA's Independent Finding on Protectiveness of the Remedy:

Section 2.5 of the 2001 Comprehensive Five-Year Guidance states that "EPA will either concur with the other federal agency or department protectiveness determination, or EPA may make an independent finding". If the RPM determines that the report is either technically inaccurate or has not been submitted by the federal agency, then the RPM should follow attachment 1, "The Roadmap for Completing Five-Year Reviews on Time". The RPM should document in a letter to the other federal agency our independent finding and update CERCLIS to reflect our finding. The letter should also state that EPA will be reporting to Congress the protectiveness determination for the site.

Before EPA makes an independent determination of the protectiveness of the remedy, there should be early notification and planning with the other federal agency. Chapter 3 of the 2001 Comprehensive Five-Year Review Guidance states that the review team should develop a

review schedule to meet the appropriate five-year review date of completion. The EPA RPM should notify the other federal agency during the site planning meeting the due date for the report and should begin discussing the schedule for completion.

Changes to CERCLIS to Reflect Due Dates:

In fiscal year (FY) 2011, FFRRO has made a CERCLIS change such that the future date will be based on the planned completion date. What this means is that starting this fiscal year, if the date the five-year review report is concurred on by EPA is July 30, 2011, then the due dates of the subsequent five-year reviews are July 30, 2016 and July 30, 2021. This will assure that due dates will not change if the reports are late or early. These changes supersede section 1.3.3 of the 2001 Comprehensive Five-Year Review Guidance for federal facilities.

Enforcement of Five-Year Review Requirements under the Federal Facility Agreement:

At federal facilities that are listed on the NPL, EPA and the applicable other federal agency, and frequently the state, enter into a legally required CERCLA Section 120 interagency agreement, typically referred to as a Federal Facility Agreement (FFA). The FFA generally covers the investigation of the contamination through cleanup completion, including long-term operation and maintenance. CERCLA Section 121(c), 42 U.S.C. § 9621(c), requires the President, typically delegated to a responsible Federal agency, to perform the five-year review as an integral part of ensuring the cleanup is protective and falls under the purview of the FFA.

The majority of FFAs are with the Department of Defense (DoD) and Department of Energy (DOE) because these two Executive departments' facilities comprise the majority of NPL federal facilities. In 1988, EPA, DoD and DOE agreed it would be prudent to develop model language for inclusion in all future FFAs to expedite negotiations and avoid unnecessary delays. In that model language, the three agencies agreed to designate a list of primary and secondary documents for EPA review and approval. Primary documents are the documents the federal agency agrees to develop and submit to EPA for review and approval, subject to dispute. Secondary documents are supposed to ultimately feed into the applicable primary documents in accordance with the express terms of the model language (although that is not always the case). Although the five-year review report is often not designated as a primary or secondary document in existing FFAs, the requirements to develop such a report within the timeframe provided by the statute, and develop it in accordance with CERCLA, the NCP, and EPA guidance, is subject to dispute and generally enforceable under the FFA. If the management controls and additional communication with the other federal agency responsible for the five-year review fail to produce a five-year review that is technically accurate and which supports the protectiveness statement, then enforcement actions should be considered under the FFA.

Joint FFRRO/DoD/DOE Improved Five-Year Review Process:

As a follow-up to the Federal Facility Cleanup Dialogue that occurred in October 2010, FFRRO is working with DoD and DOE to improve the five-year review process and to link the five-year review with the evolving long-term stewardship program. FFRRO is working with the federal agencies to develop a standardized process for completing five-year review reports. This

framework should further improve the capability to produce technically accurate and timely five-year review reports and subsequently provides for more timely and consistent review and approval. It is expected that through the Federal Facility Cleanup Dialogue, clarity and transparency of the information in the reviews will be communicated to communities.

If you have any questions on this policy memorandum, please contact me at (703) 603-9089 or David Kling (202) 564-0317.

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Attachments

1. Roadmap to Completing Five-Year Reviews on Time
2. Flowchart for Federal Facility Five-Year Review Process –Scenario 1: No Report
3. Flowchart for Federal Facility Five-Year Review Process –Scenario 2: Draft Report (No Federal Agency Signature)
4. Flowchart for Federal Facility 5 Year Review Process – Scenario 3: Final Signed Report
5. Checklist for Concurrence and Non-concurrence letters

Attachment 1 – Road Map to Completing Five-Year Reviews on Time

		Protectiveness Statements in CERCLIS		
Scenario on due date	**Concur/ Non[1]**	**Adequate Info to support & write**	**Inadequate Info to support & write**	**Recourse**
1 No Report	NA	if EPA has independent information to demonstrate OUs are not protective, this statement will be filed	Deferred	• EPA files "deferred" or "not protective" statement in CERCLIS • EPA letter to lead agency • Report to Congress • Enforcement options
2 Draft Report (no signature)	either	file protectiveness statement based on the draft	Deferred	• EPA may need to file independent statements in CERCLIS • Letter to lead agency[2] • Enforcement options
3 Final Report, missing essential information	either	Some protectiveness statements may be possible	• EPA protectiveness statements may differ from lead Agency • Some deferred statements may be required	• EPA files independent statements in CERCLIS • Letter to lead agency • Follow up work planning may lead to enforcement or dispute
4 Final Report, contains all needed information	Y	Concur with lead Agency's statement(s)	NA	• Letter to lead agency indicating concurrence
	N	Revise lead agency's statements		• Letter to lead agency

Concepts

- Existing collaborative planning, review, and consultation with the lead Agency will take place throughout the process until finalized.
- EPA will file information in CERCLIS based on the state of the report on the due date. This will be entered in CERCLIS within 5 days of the due date.
- EPA decisions can be independent of agreement with the lead agency.

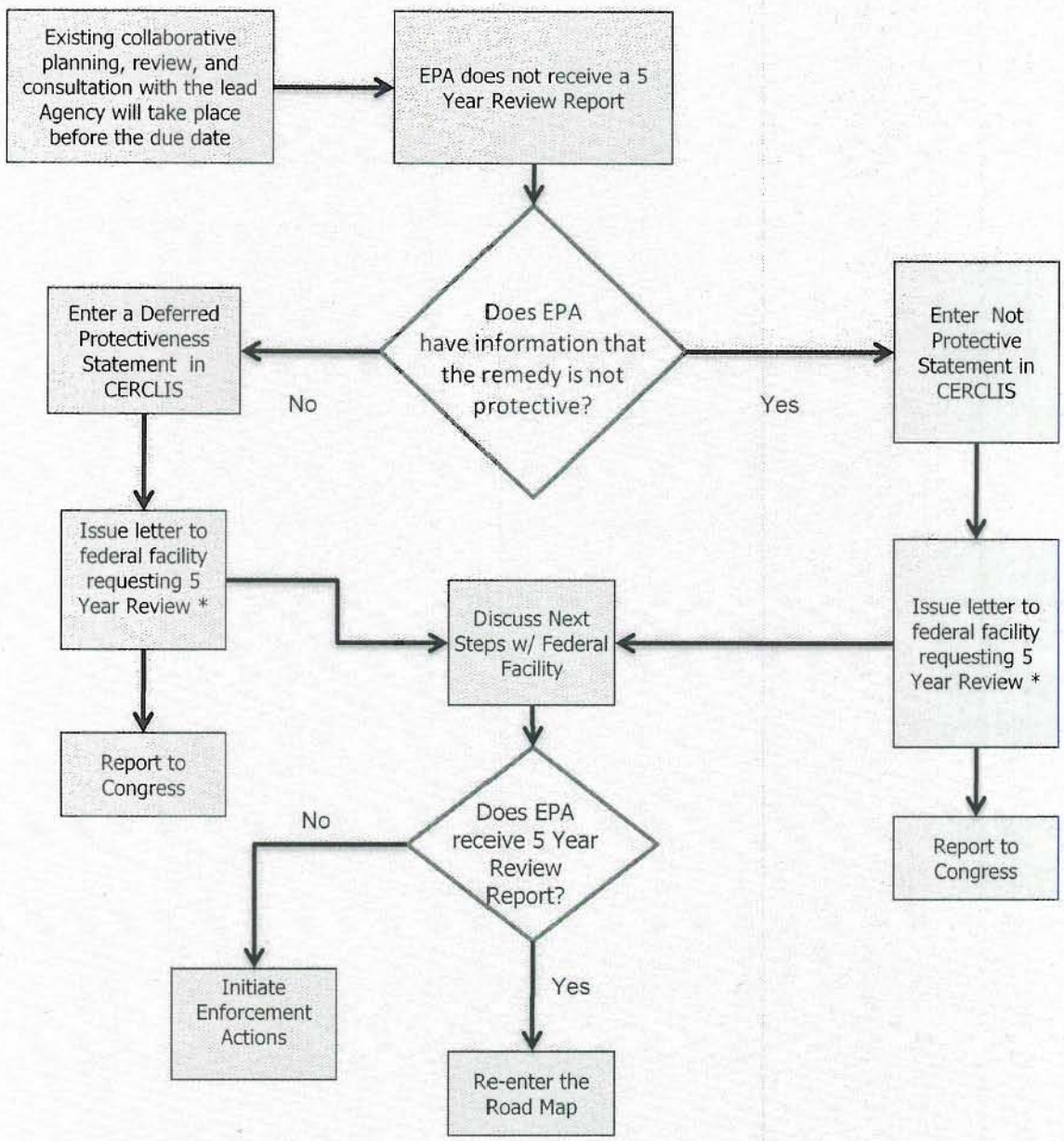
Notes: **1** Whether EPA concurs or not, a letter should be sent to the lead agency. This letter should make it clear whether EPA concurs with their Protectiveness Statements, and specify which issues and recommendations will be tracked in CERCLIS.

2 EPA can treat the draft report as final. The information in CERCLIS will not change if the Federal Facility changes the report before signing it. EPA should keep the draft report to support its 5YR determinations.

3 EPA will distinguish between a report missing some details and one which significantly misses the objectives of the statute and the 5YR guidance.

Attachment 2

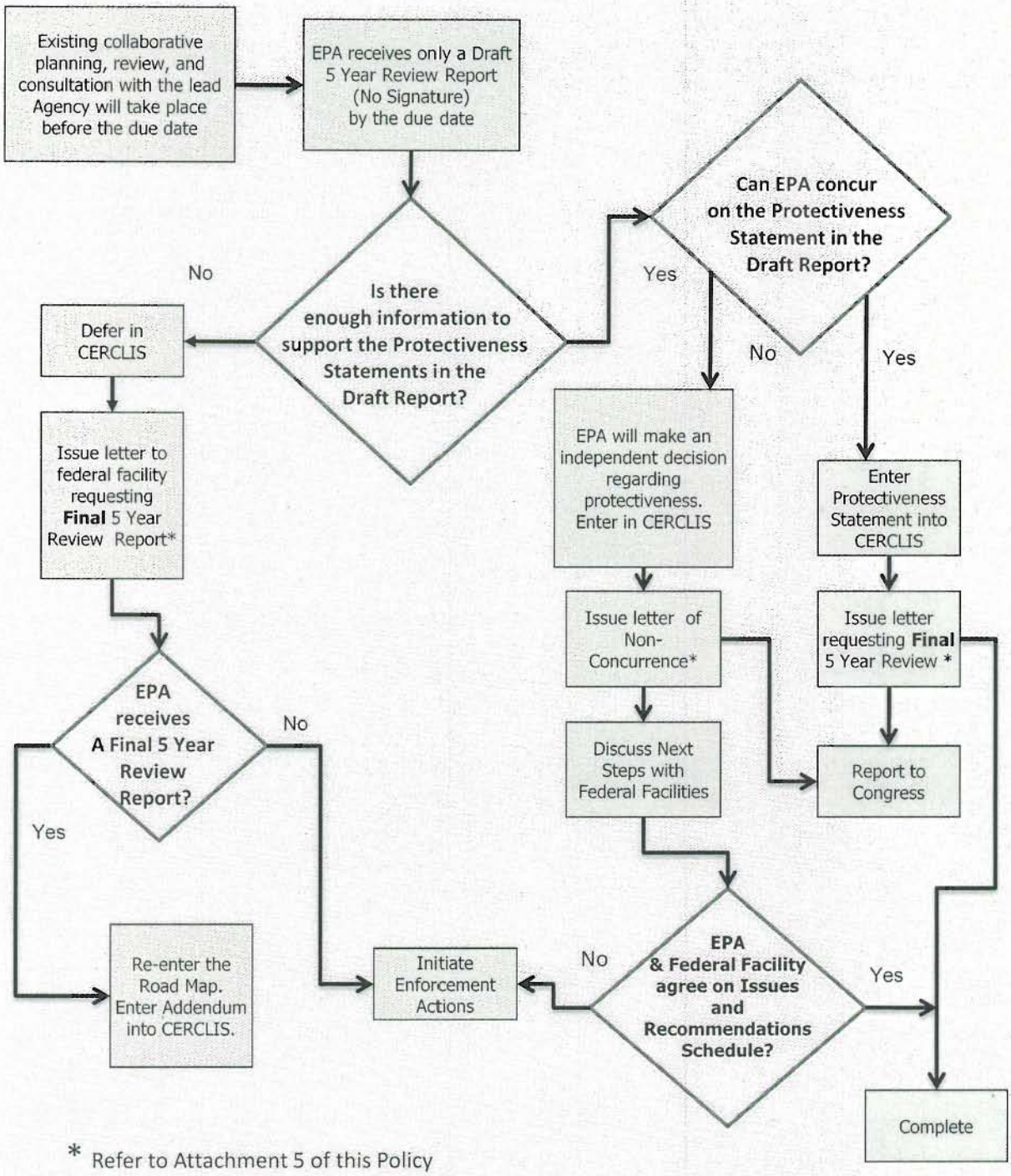
Flowchart for Federal Facility 5 Year Review Process Scenario 1: No Report



*Letter must have a new date for a 5YR submittal. Letter should state enforcement actions under the FFA should begin.

Attachment 3

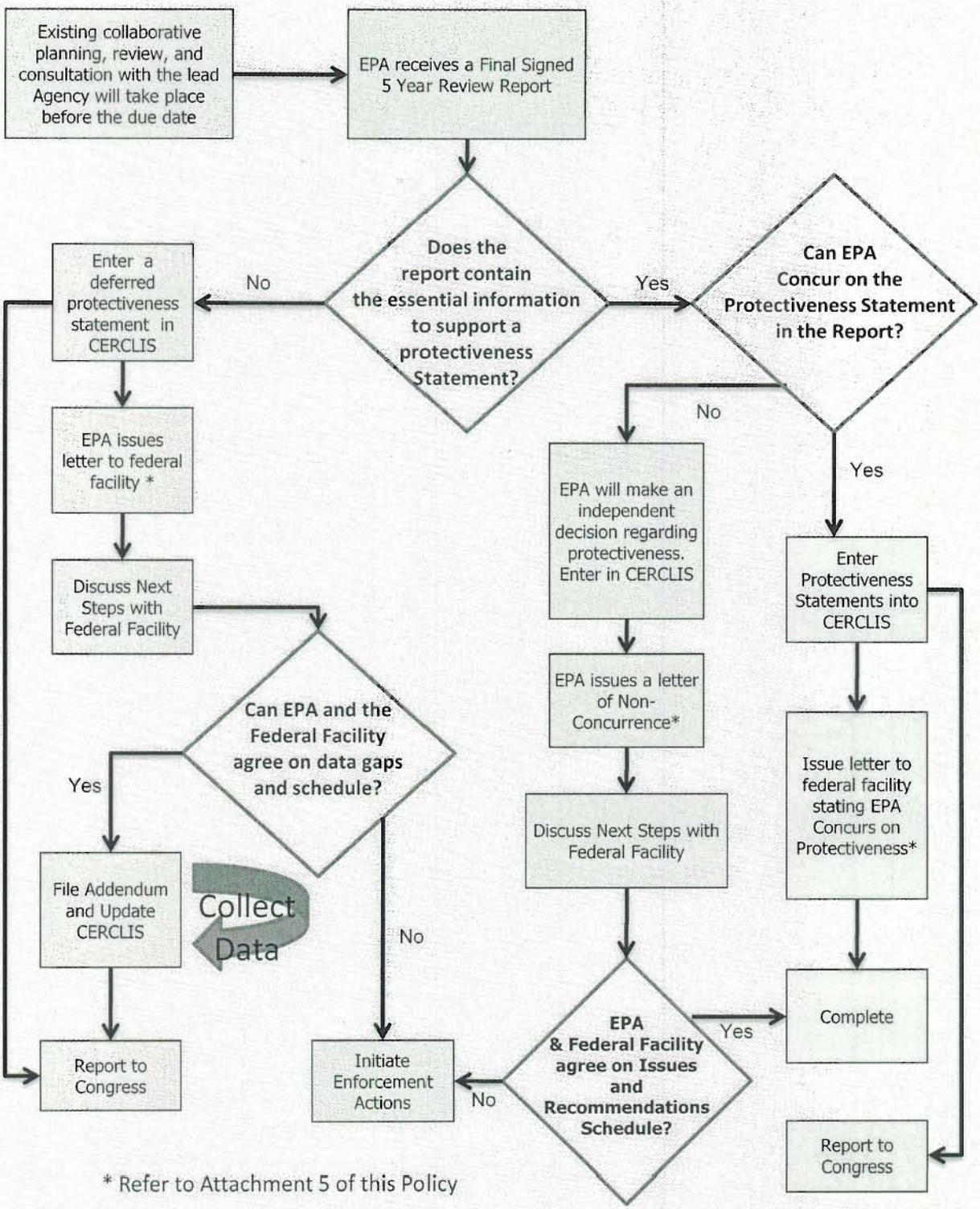
Flowchart for Federal Facility 5 Year Review Process Scenario 2: Draft Report (No Federal Agency Signature)



* Refer to Attachment 5 of this Policy

Attachment 4

Flowchart for Federal Facility 5 Year Review Process Scenarios 3 & 4: Final Signed Report



* Refer to Attachment 5 of this Policy

Attachment 5

Checklist for Concurrence Letter on Five-Year Reviews

- Address the letter to the person who is signing the final 5-year review report
- Indicate that we are concurring on the protectiveness statement for each OU
- State the protectiveness statement that will be reported to Congress
- Identify the issues and the recommendations that are being tracked in CERCLIS and the due date of when the recommendations will be implemented
- State the environmental indicator for the site
- Specify the due date for the next five-year review report

Checklist for Non-concurrence Letter on Five-Year Reviews

- Address the letter to person who is signing the final 5-year review report
- Indicate that EPA is not concurring on the protectiveness of the remedy for the specific OU because....
- State EPA's independent assessment of the protectiveness of the remedy (relate the statement to the remedial action objectives)
- State the protectiveness statement that will be reported to Congress
- Identify the issues and recommendations that will be tracked in CERCLIS
- State the environmental indicator for the site
- Specify the due date for the next five-year review
- Request the next steps and a response from the federal agency to EPA's non-concurrence letter