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Conducting Non-Time-Critical Removal Actions Under CERCLA

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Office of Emergency and Remedial Response
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Quick Reference Fact Sheet

This fact sheet summarizes a document entitled "Guidance on Conducting Non-Time-Critical Removal Actions Under CERCLA" (OSWER Directive 9360.0-32). The guidance describes the essential components of the non-time-critical removal action process with particular emphasis placed on conducting the Engineering Evaluation/Cost Analysis (EE/CA). This document also provides general guidance on other activities carried out during a non-time-critical removal action, such as enforcement, public involvement, and Action Memorandum preparation. The guidance is to be used in conjunction with EPA's Emergency Response Division (ERD) Superfund Removal Procedures (SRP) manual, which provides detailed guidance for carrying out various activities at all types of removal sites.

INTRODUCTION

Non-time-critical removal actions are conducted at Superfund sites when the lead Agency determines, based on the site evaluation, that a removal action is appropriate, and a planning period of at least six months is available before on-site activities must begin. Because non-time-critical removal actions can address priority risks, they provide an important method of moving sites more quickly through the Superfund process. Thus, conducting non-time-critical removal actions advances the goals of the Superfund Accelerated Cleanup Model (SACM) to include substantial, prioritized risk reduction in shorter time frames and to communicate program accomplishments to the public more effectively.

RESPONSIBILITIES AND RESOURCES

Most non-time-critical removal actions are led by EPA, unless the State, potentially responsible party (PRP), Federal agency, political subdivision, or Indian Tribe has the financial and technical ability to lead the response. Regardless of who takes the lead, the EPA On-Scene Coordinator (OSC) or Remedial Project Manager (RPM) is responsible for arranging for technical assistance from other agencies, if the OSC/RPM determines such assistance is needed. For non-time-critical removal actions, the OSC/RPM directs or reviews the work of other agencies, PRPs, and contractors to ensure compliance with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The OSC/RPM also reviews all decision documents, enforcement orders, and work plans; oversees all expenditures of EPA funds; and ensures all staff working on the site know operating and safety procedures.

EPA should not conduct Fund-financed removal actions when the response is within the independent financial and technical capabilities of a State, PRP, Federal agency, political subdivision, or Indian Tribe. To lead a non-time-critical removal action, a State, political subdivision, or Indian Tribe must first apply for a removal Cooperative Agreement (CA) pursuant to 40 CFR Subpart O, section 35.6200. When EPA retains the lead for non-time-critical removal actions without financial participation from a State, political subdivision, or Indian Tribe, the Regional Decision Team (RDT) should assess the urgency of the situation and determine whether the removal action should proceed without such participation.

The RDT ensures effective coordination, communication, and integration of Superfund program authority, expertise, resources, and tools. Although RDT involvement in removal assessments and decision-making may vary from Region to Region, for non-time-critical removal actions the RDT should help assess the opportunity for response and help initiate the preparation of the EE/CA Approval Memorandum, the EE/CA, and the Action Memorandum.

Because at least a 6-month planning period is available for non-time-critical removal actions, there is time to obtain commitment from a State or local government or PRP to perform and fund necessary post-removal site control (PRSC) activities prior to initiating the response. If the OSC/RPM is unable to secure such an agreement, removal options that involve continuing PRSC should be avoided where other options are feasible.

Technical assistance resources available to the lead Agency in carrying out a non-time-critical removal action include: national, Regional, and specialized response teams; contractors; other Federal agencies; and State and local governments. The Long-Term Contracting Strategy (OSWER Publication 9242.6-07) provides a road map to Superfund contract support and gives Regions full responsibility for contracts management.

ENFORCEMENT ACTIVITIES

A PRP search should begin as soon as a removal action appears likely. If enforcement will be pursued for a non-time-critical removal site, a CERCLA section 122(e) special notice letter should be used to solicit a written good faith offer from the PRP, which demonstrates the PRP's qualifications and willingness to conduct or finance the removal action. Issuance of a special notice triggers a 60- to 120-day moratorium on EPA conducting the removal action (although additional studies or investigations authorized under CERCLA section 104(b), including the EE/CA, may be initiated).

During the moratorium, the OSC/RPM should consult with Regional staff in developing an Administrative Order on Consent (AOC), which is a legally enforceable agreement signed by EPA and the PRP whereby the PRP agrees to perform or pay the cost of site cleanup, and may forfeit the right to make a claim against the Fund. An AOC outlines the activities the PRP must undertake and the completion dates for those activities. The State should always be notified prior to negotiating or issuing an AOC.

If the OSC/RPM wishes to pursue informal negotiations without using a CERCLA section 122(e) special notice letter, CERCLA section 122(a) requires EPA to issue a notice letter to the PRP explaining why special notice procedures will not be used. In cases where no negotiation is desirable, the OSC/RPM can use the notice letter simply to inform the PRP of their potential liability and provide notice that the Agency has taken or plans to take a response action.

The statute of limitations for cost recovery for removal actions is 3 years from the completion of the removal action, unless a consistency exemption to the statutory limits under CERCLA section 104(c)(1)(C) has been approved (in which case the statute of limitations is 6 years from the date of the last exemption). A decision not to pursue cost recovery must be documented in a Removal Action Cost Recovery Close-Out Memorandum prepared in consultation with the Office of Regional Counsel.

PUBLIC INVOLVEMENT

Sections 300.415(m) and 300.820 of the NCP specify community relations and administrative record activities as two forms of public participation necessary for all removal actions. The OSC/RPM is responsible for ensuring that these requirements are met.

Community relations requirements during removal actions are intended to promote active communication between communities affected by a release or a threat of release (including the PRP) and the lead agency. The following community relations activities are required for non-time-critical removal actions:

- Designate a community relations spokesperson
- Establish the information repository
- Conduct community interviews
- Prepare Community Relations Plan (CRP)
- Issue public notice of availability of the EE/CA.

The administrative record file, a subset of the site file, is the body of documents used by the Agency during a removal action to select a response. It includes site-specific data and documents that reflect the views of the public, including PRPs, concerning this selection. For non-time-critical removal actions, the EE/CA Approval Memorandum and EE/CA are the critical components of the administrative record file. The required administrative record requirements for non-time-critical removal actions are as follows:

- Establish the administrative record file
- Publish public notice of the availability of the administrative record file
- Hold a public comment period
- Develop written responses to significant public comments
- Complete the administrative record file after selecting the response.

CONDUCTING THE EE/CA

Section 300.415(b)(4)(i) of the NCP requires an EE/CA for all non-time-critical removal actions. It is intended to: (1) satisfy environmental review requirements for removal actions; (2) satisfy administrative record requirements for improved documentation of removal action selection; and (3) provide a framework for evaluating and selecting alternative technologies. In doing so, the EE/CA identifies the objectives of the removal action and analyzes the effectiveness, implementability, and cost of various alternatives that may satisfy these objectives. Thus, an EE/CA serves an analogous function to, but is more streamlined than, the remedial investigation/feasibility study (RI/FS) conducted for remedial actions. The results of the EE/CA and EPA's response decision are summarized in the Action Memorandum.

The EE/CA Approval Memorandum, which is prepared once the need for a non-time-critical removal action has been determined, serves three important functions. First, it secures management and funding approval to conduct the EE/CA. If the action is PRP-lead, provision for oversight funding will be contained in an Administrative Order and should be included in the EE/CA Approval Memorandum. Second, it documents that the situation meets the NCP criteria for initiating a non-time-critical removal action. Third, it provides a finding of an actual or threatened release from the site and, if present, a finding of an imminent and substantial endangerment, or refers to a document establishing such a determination. The EE/CA Approval Memorandum also provides general information pertaining to the site background; threats to public health, welfare, or the environment posed by the site (including expected changes in the site situation if no action is taken or if the action is delayed); enforcement activities related to the site; and estimated EE/CA costs.

The Regional Administrator (or authorized designee) evaluates the EE/CA Approval Memorandum and provides authorization. Funds expended in preparing the EE/CA Approval Memorandum are considered CERCLA section 104(b)(1) monies and are not counted toward the $2 million statutory limit for removal actions. The EE/CA Approval Memorandum contains the following sections:

- Subject
- Background
- Threat to public health, welfare, or the environment (including expected change if no action is taken or if action is delayed)
- Imminent and substantial endangerment, if present
- Enforcement actions
- Proposed project/oversight and cost
- Approval/disapproval.

Once the EE/CA Approval Memorandum is authorized, preparation of the EE/CA can begin. The EE/CA includes the following sections:

- Executive summary
- Site characterization
  - Site description and background
  - Previous removal actions
  - Source, nature, and extent of contamination
  - Analytical data
  - Streamlined risk evaluation
- Identification of removal action objectives
  - Statutory limits on removal actions
  - Determination of removal scope
  - Determination of removal schedule
  - Planned remedial activities
- Identification and analysis of removal action alternatives
  - Effectiveness
  - Implementability
  - Cost
- Comparative analysis of removal action alternatives
- Recommended removal action alternative.

The EE/CA executive summary provides a general overview of the contents of the EE/CA. The executive summary is intended to make the EE/CA simpler for the public to review. It can be used in the Action Memorandum to describe the EE/CA.

The site characterization section should summarize available data on the physical, demographic, and other characteristics of the site and surrounding areas to provide background engineering information for analyzing removal alternatives. Data on the site may be available from a removal site evaluation or from other EPA documents regarding the site. Source documents should be placed in the administrative record for the site. EPA should coordinate activities of the OSC/RPM with those of the site assessment manager, risk assessor, and enforcement/legal staff to ensure appropriate data are collected to characterize the site.

Identifying the removal action scope, goals, and objectives involves considering the $2 million and 12-month statutory limits for Fund-financed removal actions. If there is a need for an exemption from these limits, the details should be described in the EE/CA as well as in the Action Memorandum requesting the exemption. This

section should also identify specific objectives that clearly define the scope of the removal action (e.g., total site cleanup, site stabilization, or surface cleanup of hazardous substances). EE/CAs for removal actions at non-NPL sites should consider the potential for future NPL listing to ensure the goals of the removal action are consistent with any potential long-term remediation. When a non-time-critical removal action will be the only or last action taken to clean up a potential NPL site, the EE/CA should provide adequate documentation that activities performed at the site are sufficient to meet completion requirements. In addition, this section should provide a general schedule of removal activities, including both the start and completion time for the non-time-critical removal action. This schedule can be an important factor in evaluating removal action alternatives based on their implementation times.

Once the removal action scope, goals, and objectives have been identified, a few relevant and viable removal alternatives should be chosen for evaluation and comparison. Removal alternatives should be analyzed for their effectiveness, implementability, and cost. Effectiveness can be evaluated in terms of protectiveness and ability to achieve removal objectives. The protectiveness of the alternatives can be assessed in terms of how well they protect public health and the community, protect workers during implementation, protect the environment, and comply with applicable or relevant and appropriate requirements (ARARs). The implementability of the alternatives depends on their technical feasibility, the availability of necessary resources to support the alternatives, and their administrative feasibility. The cost of the alternatives is determined by looking at capital costs, costs for PRSC, and present worth cost.

Once the alternatives have been described and individually assessed against the criteria, a comparative analysis should be conducted to evaluate the relative performance of each alternative in relation to each of the criteria. This process should identify key trade-offs that would affect the remedy selection. Based on this analysis, the EE/CA should determine the recommended action and describe the reasons for the recommendation. This determination can be summarized in fact sheet form and placed in the administrative record file.

NOTICE: The policies set out in this fact sheet are not final agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this fact sheet, or to act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

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