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

MAR 3 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent-Setting Issues (OSWER Directive 9360.0-19)

FROM: Henry L. Longest II, Director
Office of Emergency and Remedial Response

TO: Director, Waste Management Division
Regions I, IV, V, VII, VIII
Director, Hazardous Waste Management Division
Regions III, VI
Director, Emergency and Remedial Response Division
Region II
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division, Region X
Director, Environmental Services Division
Regions I, VI, VII

Purpose:

This memorandum transmits guidance for identifying non-NPL removal actions that may be nationally significant or precedent-setting and establishes procedures for requesting Headquarters (HQ) concurrence. The guidance also outlines procedural requirements for five categories of removals which are of special interest from a national perspective, but which are **not** subject to the HQ concurrence requirement for nationally significant or precedent-setting removals.

Background:

Delegation 14-1-A (February 1987) and OSWER Directive 9360.0-12 (April 1987) require the concurrence of the Assistant Administrator for Solid Waste and Emergency Response (AA, OSWER) prior to initiation of removal actions taken at non-NPL sites where the proposed action is of national significance or precedent-setting. Redelegation R-14-1-A transfers authority to concur to the Director of the Office of Emergency and Remedial Response (OD, OERR); authority to non-concur remains with the AA, OSWER. The purpose of the concurrence requirement is to promote national consistency in the implementation of the Superfund removal program.

It is not anticipated that a large number of removal actions will pose issues requiring HQ concurrence. Assessment of the potential long-term implications of initiating certain removal actions is largely interpretive, however, and Regional personnel should consult this guidance whenever considering a removal action at a non-NPL site.

Objective:

The objective of this guidance is to ensure Regional compliance with HQ concurrence requirement for non-NPL removal actions involving nationally significant or precedent-setting issues. This document identifies categories of potential removal situations which have been determined to be of national significance or precedent-setting and specifies procedures for requesting HQ concurrence on these actions. The guidance also identifies categories of removals subject to special procedural requirements but not to the HQ concurrence requirement.

The types of removals subject to the concurrence requirement are not limited to those categories identified in the guidance. These categories are to be used by the Regions as a guide for screening proposed removals at non-NPL sites that may require HQ concurrence. Since evaluation of these sites is largely interpretive, final determinations regarding removals of a nationally significant or precedent-setting nature should involve consultation with Emergency Response Division (ERD) Regional Coordinators.

This interim final guidance is effective immediately. Additional revisions to the guidance will be considered as experience is gained and/or further policies are established that may affect the established categories and the HQ concurrence mechanisms.

Implementation:

I. NATIONALLY SIGNIFICANT OR PRECEDENT-SETTING CATEGORIES

Six categories of removals have been designated as nationally significant or precedent-setting. The list is not exhaustive and early consultation with the Emergency Response Division (ERD) is recommended where there are questions. In making the determination, the key considerations are:

(a) whether Fund-financed response to a particular incident will establish a precedent for when or how future response actions must be taken; or

(b) whether a response will commit EPA to a course of action that could have a significant impact on future resources, due to the widespread occurrence of a particular problem.

The categories identified and the rationale for identification are as follows:

1. **Removal actions at sites within the United States or its territories involving contamination or response actions that may affect other sovereign nations, including Indian tribes.**

Rationale: HQ concurrence will facilitate the execution of proper diplomatic protocol by the Department of State, and proper coordination with Indian tribes, the Bureau of Indian Affairs, the Indian Health Service, and other appropriate organizations, where applicable.

2. **Removals involving pesticide contamination arising from:**

   - **improper storage of pesticide products awaiting indemnification**

   - **lawful application of pesticides, including special local use pesticides**

   - **grain fumigation operations.**

   Rationale: HQ concurrence will ensure that the Agency avoids commitment to cleanup of widespread contamination beyond the intended scope of CERCLA.

3. **Removal actions at sites involving any form of dioxin when it is one of the principal contaminants of concern.**

   Rationale: HQ concurrence will ensure national consistency in dioxin cleanup. The Dioxin Disposal Advisory Group (DDAG) in HQ must review all dioxin removal actions to verify that the proposed action will provide an acceptable level of protection from dioxin exposure.

4. **Removal actions at sites involving releases from consumer products in consumer use (e.g., lead-contaminated soil resulting from peeling lead-based paint on houses).**

   Rationale: HQ concurrence will ensure that the Agency avoids a commitment to the cleanup of widespread non-point source contamination that is beyond the intended scope of CERCLA.

5. **Removals involving asbestos when it is the principal contaminant of concern.**

   Rationale: HQ concurrence remains necessary because action levels for response have not yet been set and these determinations are being made on a case-by-case basis.

6. **Removal actions involving substances or releases which may be subject to statutory exclusions or limitations in CERCLA. These include:**

- **substances excluded from Fund-financed response under the SARA section 101(14) definition of "hazardous substance" (e.g., petroleum products including crude oil, and natural gas or synthetic gas usable for fuel);**

- **releases excluded from Fund-financed response under the SARA section 101(22) definition of "release" (e.g., emissions from the engine exhaust of motor vehicles; releases of radioactive material from a nuclear incident; and releases caused by normally applied fertilizer);**

- **releases excluded from Fund-financed response under SARA section 104(a)(3) including releases of a naturally occurring substances; releases from products that are part of a structure and result in exposures within the structure; and releases in public or private drinking water supplies due to system deterioration from ordinary use.**

Specific examples of substances or releases that have raised statutory interpretation or related policy issues with respect to their eligibility for CERCLA removal action include radon contamination in building structures, pentachlorophenol (PCP) contamination in log cabins, releases from coal gasification facilities, methane gas releases, and asbestos in building materials in homes.

Rationale: HQ concurrence will ensure that statutory exclusions and limitations are interpreted in a consistent manner. HQ concurrence will also ensure consistent application of EPA's authority under CERCLA section 104(a)(4) to respond to any release or threat of release if it constitutes a public health or environmental emergency and no other person will respond in a timely manner.

Concurrence Procedures

Early screening for issues of a nationally significant or precedent-setting nature is essential to ensure timely HQ concurrence when necessary. OSCs should contact the appropriate ERD Regional Coordinator when a possible nationally significant or precedent-setting removal action is first identified, to alert the Regional Coordinator that a request for HQ concurrence will be forthcoming. OSCs should also call the Regional Coordinator for advice on actions that are not specifically listed in the guidance, but which may be nationally significant or precedent-setting. Some nationally significant removal actions may require special coordination and oversight by the National Incident Coordination Team (NICT). These types of removal actions are discussed in a November 10, 1986, memorandum from the AA, OSWER entitled "Relationship between Preparedness Staff and Office of Emergency and Remedial

Response during a Nationally Significant Incident," which states that OSCs should inform the Regional Coordinator when these types of incidents occur.

For those removal actions where HQ concurrence is required, written concurrence must be received prior to the Regional Administrator's (RA) formal approval of the Action Memorandum, except in cases of emergencies (i.e., situations where a response must be initiated within hours after completion of a site evaluation). HQ concurrence procedures for non-emergency removal actions at dioxin sites have been modified to streamline procedures. These non-emergency, emergency, and special dioxin concurrence procedures are discussed below.

Non-Emergency Removal Concurrence Procedures

All non-emergency concurrences must be requested through an Action Memorandum with a Request for Concurrence form attached. The Action Memorandum should be in final draft form, except that it should not be signed by the RA. The request form must be addressed from the RA to the OD, OERR and should describe the nationally significant or precedent-setting issue. This form has been developed in an effort to minimize the additional paperwork associated with obtaining HQ concurrence. A copy of the form is attached.

The RA may approve the Action Memorandum for a nationally significant or precedent-setting removal action once the action has been concurred upon by HQ. Additional HQ concurrence is required only if the scope of work described within the Action Memorandum changes significantly. In this case, HQ concurrence on the amended Action Memorandum is required, as discussed above, prior to any additional actions at the site. HQ concurrence is not required on requests for ceiling increases or time exemptions, unless the scope of work changes significantly. Most $2 million exemption requests require approval by the AA, OSWER, unless the consistency exemption authority for that site has been delegated to the RA.

Emergency Removal Concurrence Procedures

In cases where emergency removal actions, as defined above, involve nationally significant or precedent-setting issues, Regions may initiate a removal action without HQ concurrence. In these cases, however, OSCs must take only those actions necessary to mitigate the emergency or stabilize the site, and then inform the appropriate ERD Regional Coordinator on the next working day after the removal action was initiated.

If the response is determined to be nationally significant or precedent-setting but no further actions are required beyond the emergency mitigation, the Regions must send to the Director, OERR a copy of the Action Memorandum

submitted to the RA for that removal. The Action Memorandum should clearly describe the nationally significant or precedent-setting issues involved. A request for HQ concurrence is not necessary when the incident does not require actions beyond the initial emergency measures.

For those nationally significant or precedent-setting sites where further response is required beyond the emergency measures, HQ concurrence must be obtained before taking any further action. These concurrence requests are subject to the non-emergency procedural requirements described above. HQ will expedite the review of these requests to avoid delaying on-going removal actions.

Special Dioxin Concurrence Procedures

To reduce the administrative burden that the HQ concurrence procedures place on Regions with large numbers of dioxin sites, the non-emergency concurrence procedures have been modified. This modification permits the concurrence on a single dioxin site Action Memorandum to be used for multiple dioxin sites in the same Region. To qualify for this special concurrence procedure, the additional dioxin sites must have identical forms of dioxin present, and identical cleanup measures must be employed to achieve identical cleanup goals. Regions with multiple dioxin sites meeting these criteria may obtain concurrence for them all on a single Action Memorandum if supplementary information is supplied as described below.

The additional sites should be listed on the concurrence form if they are known at the time the original Action Memorandum is submitted. It should be specifically stated that the sites are identical in nature and that identical cleanup measures will be employed. If additional dioxin sites meeting the above criteria are discovered after receipt of the original HQ concurrence, the Regions are required to inform the appropriate ERD Regional Coordinator of the location of the additional removal actions. The Regions must also note within the Action Memorandum that previous concurrence on the cleanup approach has been provided.

II. REMOVAL ACTIONS SUBJECT TO SPECIAL PROCEDURAL REQUIREMENTS

The requirements established below apply to five removal categories that do **not** present nationally significant or precedent-setting issues requiring HQ concurrence, but instead involve issues that require special Regional procedures.

The five categories of removal actions and the policy for handling each are as follows:

1. **Removals involving mining sites.**

   Procedures: OSCs must consult with their ERD Regional Coordinator and demonstrate within the Action Memorandum that they have investigated other potential cleanup authorities (e.g., the Surface Mining Act) but found that a response could not be initiated under such authorities within the time frame required to protect human health, welfare, or the environment, or that these authorities do not apply to the particular response situation.

2. **Removals involving Federal facilities.**

   Procedures: Guidance on conducting removals at Federal facilities is under development. Until this guidance is effective, OSCs must confer with the ERD Regional Coordinators to ensure that the roles and responsibilities of the various agencies are assigned appropriately.

3. **Removals involving site-specific contracts.**

   Procedures: OSCs must coordinate with the HQ Procurement and Contracts Management Division (PCMD) to confirm that the contract Statement of Work (SOW) is consistent with the Action Memorandum and the SOW conforms with CERCLA and the NCP.

4. **Removals involving radiation sites.**

   Procedures: OSCs must contact the HQ Office of Radiation Programs for guidance on health and safety in conducting radiation cleanup activities.

5. **Removals involving business relocations.**

   Procedures: Action Memoranda for removals involving business relocations may be approved by the Regional Administrators, and other response activities comprising the removal may be initiated; however, until specific guidance is developed, OSCs must confer with ERD Regional Coordinators on business relocations prior to initiating the specific business relocation activities. This is to ensure national consistency in the criteria used to determine the need for business relocations, and the specific expenses incurred.

Comments and questions on this guidance should be directed to Betty Zeller in the Emergency Response Division, FTS 382-7735.

Attachment

cc: Superfund Branch Chiefs, Regions I-X
OHM Coordinators, Regions I-X
Betti Van Epps
Tim Fields
Betty Zeller

Subject: Request for Concurrence on Proposed Nationally Significant or Precedent-Setting Removal

From: Regional Administrator

To: Director
Office of Emergency and Remedial Response

The purpose of this memorandum is to request your concurrence on the proposed removal action at the _____ site in _____. Redelegation of Authority R-14-1-A gives you the authority to concur on nationally significant or precedent-setting removals.

The OSC has discussed this proposed removal with staff of the HQ Emergency Response Division. ERD has advised the OSC that this removal is considered nationally significant or precedent-setting because _____
_____.

The action memorandum is attached for your review. My approval awaits your concurrence.

Concur

_____ _____
Director, Office of Emergency and Remedial Response Date

According to the redelegation, authority to non-concur remains with the Assistant Administrator. If you choose not to concur on this action, please forward this memo to the Assistant Administrator.

Non-Concur:

_____ _____
Assistant Administrator for Solid Waste and Emergency Response Date

Concur:

_____ _____
Assistant Administrator for Solid Waste and Emergency Response Date