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

AUG -- 3 I995

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM:

SUBJECT: Clarification of NPL Listing Policy

FROM: Stephen D. Luftig, Acting Director
Office of Emergency and Remedial Response

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

Purpose

The purpose of this memo is to inform you of a recent restatement of our National Priorities List (NPL) listing policy concerning what is included in the NPL site. This addresses the perception that Federal facilities (most particularly) are listed on a fenceline-to-fenceline basis. This perception of fenceline-to-fenceline listing has created a negative impact on the Superfund program, which this restatement should ameliorate.

Background

On March 31, 1995, Administrator Browner sent a letter to Governor Voinovich of Ohio. In that letter Ms. Browner promised that EPA would clarify, "the Agency's NPL [National Priorities List] listing policy... by the summer of 1995."

As a result of the Administrator's letter, the Site Assessment Branch, within the Office of Emergency and Remedial Response, formed an interagency workgroup to work with the Department of Defense to clarify the policy. This clarification statement of the listing policy has been implemented by three distinct actions.

Implementation

First, the workgroup developed new wording for the preambles to NPL rulemaking documents. The wording, approved by the Office of General Counsel, will appear in future Federal Register notices. This wording clarifies that NPL sites include only contaminated areas. Clean portions are not included even if the site name implies that the entire (fenceline-to-fenceline) facility is listed. This clarification is needed because of the misconception stakeholders have with what is included in the listing [a copy of the wording is attached].

Second, EPA has amended all currently proposed and final NPL docket listing packages to include a clear statement that the sites are not based upon the property boundaries, but rather the areas of contamination. A notice to that effect will be placed in the **Federal Register** at the next opportunity.

Third, the group has tasked the quality assurance reviewers of Hazard Ranking System packages to flag packages which are not consistent with this policy.

Further, the group intends to prepare a fact sheet to explain the policy.

If you have any questions regarding this clarification please call Trish Gowland of my staff at (703) 603-8721.

Attachment

cc: Thomas W. L. McCall, DOD
Tim Fields, OSWER
Steve Herman, OECA
Jerry Clifford, Acting Director, OSRE
Barry Breen, Director, FFEO
Jim Woolford, Director, FFRRO
Larry Reed, OERR
Superfund Branch Chiefs (Regions I - X)
Regional Counsel Branch Chiefs (Regions I - X)
Alan Carpien, OGC
Seth Thomas Low, FFRRO
Patricia Gowland, OERR

Superfund Facility (Site) Boundaries

The National Priorities List does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (as the mere identification of releases), for it to do so.

CERCLA section 105(a)(8)(B) directs the Environmental Protection Agency to list national priorities among the known "releases or threatened releases." Thus, the purpose of the NPL as merely to identify releases that are priorities for further evaluation. Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance release has "come to be located" (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data upon which the NPL placement was based will, to some extent, describe which release is at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis (including noncontiguous releases evaluated under the NPL aggregation policy, described at 48 FR 40663 (September 8, 1983)).

When a site is listed, it is necessary to define the release (or releases) encompassed within the listing. The approach generally used is to delineate a geographical area (usually the area within the installation or plant boundaries) and define the site by reference to that area. As a legal matter, the site is not coextensive with that area, and the boundaries of the installation or plant are not the "boundaries" of the site. Rather, the site consists of all contaminated areas within the area used to define the site, and any other location to which contamination from that area has come to be located.

While geographic terms are often used to designate the site (e.g., the "Jones Co. plant site") in terms of the property owned by the particular party, the site properly understood is not limited to that property (e.g., it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (e.g., where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the "site"). The "site" is thus neither equal to nor confined by the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the facility or plant. The precise nature and extent of the site are typically not known at the time of listing.

EPA regulations provide that the "nature and extent of the threat presented by a release" will be determined by an RI/FS as more information is developed on site contamination (40 CFR 300.68(d)). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source and the migration of the contamination. However, this inquiry focuses on an evaluation of the threat posed; the boundaries of the release need not be defined. Moreover, it generally is impossible to discover the full extent of where the contamination "has come to be located" before all necessary studies and remedial work are completed at a site. Indeed, the boundaries of the contamination can be expected to change over time. Thus, in most cases, it will be impossible to describe the boundaries of a release with certainty.

For these reasons, the NPL need not be amended if further research into the extent of the contamination expands the apparent boundaries of the release. Further, the NPL is only of limited significance, as it does not assign liability to any party or to the owner of any specific property. See Report of the Senate Committee on Environment and Public Works, Senate Rep. No. 96-848, 96th Cong., 2d Sess. 60 (1980), quoted above and at 48 FR 40659 (September 8, 1983). If a party contests liability for releases on discrete parcels of property, it may do so if and when the Agency brings an action against that party to recover costs or to compel a response action at that property.

It is the Agency's policy that, in the exercise of its enforcement discretion, EPA will not take enforcement actions against an owner of residential property to require such owner to undertake response actions or pay response costs, unless the residential homeowner's activities lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site (OSWER Directive #9834.6, July 3, 1991). This policy includes residential property owners whose property is located above a ground water plume that is proposed to or on the NPL, where the residential property owner did not contribute to the contamination of the site. EPA may, however, require access to that property during the course of implementing a clean up.