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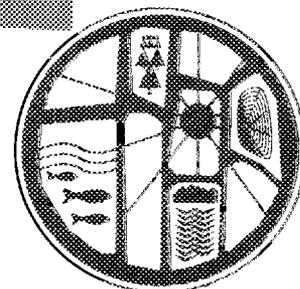
MARTIN MARIETTA

**A Brief Summary of the
Proposed National Contingency Plan
and an Analysis of Its Implications for
the U.S. Department of Energy**

M. B. Levine
C. F. Baes III

Environmental Sciences Division
Publication No. 3270

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**A BRIEF SUMMARY OF THE PROPOSED NATIONAL
CONTINGENCY PLAN AND AN ANALYSIS OF
ITS IMPLICATIONS FOR
THE U.S. DEPARTMENT OF ENERGY**

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Environmental Sciences Division
Publication No. 3270

Date Published — July 1989

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It is subject to revision or correction and therefore does not represent a
final report.

Prepared for the
U.S. Department of Energy
Office of Environmental Guidance and Compliance
Activity No. HA01022000

Prepared by the
OAK RIDGE NATIONAL LABORATORY
Oak Ridge, Tennessee 37831-6285
operated by
MARTIN MARIETTA ENERGY SYSTEMS
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U.S. DEPARTMENT OF ENERGY
under Contract No. DE-AC05-84OR21400

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LIST OF ACRONYMS

Acronym	Definition
ARARs	Applicable or relevant and appropriate requirements
CERCLA	The Comprehensive Environmental Response, Compensation, and Liability Act of 1980
CERCLIS	CERCLA Information System
CFR	Code of Federal Regulations
CRP	Community Relations Plan
DOD	U.S. Department of Defense
DOE	U.S. Department of Energy
EE/CA	Engineering Evaluation/Cost Analysis
E.O.	Executive Order
ERA	Expedited Response Action
EPA	U.S. Environmental Protection Agency
FR	<i>Federal Register</i>
FS	Feasibility Study
HRS	Hazard Ranking System
IAG	Inter-Agency Agreement
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
NCP	National Contingency Plan
NPL	National Priorities List
NRC	National Response Center
NRT	National Response Team
O&M	Operation and Maintenance
OSC	On-Scene Coordinator
PA	Preliminary Assessment
PRP	Potentially Responsible Parties
RCP	Regional Contingency Plan
RCRA	The Resource Conservation and Recovery Act of 1976
RD/RA	Remedial Design/Remedial Action
RI	Remedial Investigation
ROD	Record of Decision
RPM	Remedial Project Manager
RRT	Regional Response Team
SAC	Support Agency Coordinator
SARA	The Superfund Amendments and Reauthorization Act of 1986
SDWA	Safe Drinking Water Act
SI	Site Inspection
SMOA	Superfund Memorandum of Agreement
TBCs	Other information to be considered
USCG	U.S. Coast Guard

ABSTRACT

On December 21, 1988, the U.S. Environmental Protection Agency (EPA) published in the *Federal Register* (53 FR 51394) a proposal to revise the existing National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The following report has been prepared to assist the U.S. Department of Energy's (DOE) Office of Environmental Guidance and Compliance in (1) understanding the proposed NCP changes, (2) assessing the impact of the proposed NCP on DOE facilities, and (3) responding to EPA's request for comments on the NCP.

The proposal modifies the current NCP to conform with the regulatory changes required by the Superfund Amendments and Reauthorization Act (SARA), to reflect more accurately the sequence of response actions, and to clarify existing NCP language. Major revisions include:

- o In Subpart A (Introduction), important terms such as *applicable requirements*, *lead agency*, and *on-site* were revised and added to the definitions section.
- o Subpart B (Responsibility and Organization of Response), Subpart D (Operational Response Phases to Oil Removal), and Subpart J (Use of Dispersants and Other Chemicals) were reorganized but not substantively revised.
- o Subpart C (Planning and Preparedness) revised current Subpart D so that it conforms with state and local emergency preparedness activities under SARA Title III.
- o Subpart E (Hazardous Substance Response) was revised to conform with SARA requirements, such as (1) limitations on responses (e.g., to address naturally-occurring substances); (2) statutory financial and time limitations for fund-financed removals (now \$2 million or 12 months); and (3) community relations requirements (e.g., the establishment of an administrative record, conducting interviews with local citizens, and creating a formal community relations plan). The criteria for selecting remedial alternatives were substantially revised, and a number of alternative selection procedures were proposed.
- o Subpart F (State Involvement in Hazardous Substance Response) combined current Sections 300.62 ("State Role") and 300.68 ("State Involvement in Remedial Action") and described the EPA/State Superfund Memorandum of Agreement.
- o Subpart G (Trustees for Natural Resources) was revised to clarify trustee agency authorities and to conform with SARA.
- o Subpart H (Participation by Other Persons) combined existing Sections 300.25 ("Nongovernment Participation") and 300.71 ("Other Party Responses") and includes new SARA authorities.
- o Subpart I (Administrative Record for Selection of Response Action) implemented SARA requirements for the establishment of an administrative record.

- o Subpart K (Federal Facilities) is reserved in the proposed NCP. The EPA intends to propose this subpart sometime in the near future and to finalize Subpart K as expeditiously as possible after consideration of public comments.

Despite major revisions, deficiencies still exist in the proposed NCP. These deficiencies include: (1) a lack of precise and meaningful definitions for a number of important concepts; (2) missing or unclear delegation of jurisdiction and authority for response actions; and (3) a lack of integration of procedures for complying with community relations and other administrative requirements, as follows:

- o The terms *hazardous waste management facility*, *on-site*, and *naturally occurring substance* need to be defined, or their definitions need to be clarified. These terms were either not defined in the proposed NCP, or it is unclear how they apply or relate to other terms in the NCP. A definition for *removal action* also needs to be provided, and it needs to differentiate between the four types of removals (emergency, time-critical, non-time-critical, and expedited response action).
- o The proposed NCP fails to clearly specify which party (1) designates On-Scene Coordinators and Remedial Project Managers when the release is on or solely from a facility or vessel under the jurisdiction, custody, or control of a federal agency; (2) has the authority to initiate a response when a release is on or solely from a facility or vessel under the jurisdiction, custody, or control of a federal agency; (3) decides whether a response action is needed and whether the response should be taken under removal or remedial authority; (4) grants the exemptions to the financial and time limitations on removal actions; and (5) selects the remedy for federal facilities that are not on the National Priorities List. These questions arise, because the necessary authority was not granted in the proposed rule, because the jurisdiction provided in the rule conflicts with Executive Order 12580, or because the policies described by the EPA in the preamble conflict with the proposed NCP itself.
- o The proposed NCP fails to integrate procedures in a comprehensive manner. For example, it is unclear how the engineering evaluation and cost analysis (EE/CA) required for expedited response actions (ERA) would interface with the remedial investigation and feasibility study (RI/FS) when the need for a removal is discovered after the RI/FS is complete. It is conceivable that another FS would have to be conducted when the ERA makes the preferred remedy obsolete. In addition, the proposed NCP couples community relations requirements in a manner that is inappropriate. For example, emergency and time-critical removals continuing beyond 120 days have two distinct sets of requirements, one within 60 days of initiation of on-site removal activity and another at 120 days. The coupling of these requirements is cumbersome.

The implications of the proposed NCP on the DOE are not clear at this time since Subpart K, which specifically addresses federal facilities, has been reserved and is currently being drafted. Many issues involving the jurisdictional and procedural concerns for the DOE will likely be addressed in Subpart K. At this time, however, it appears that the DOE must follow NCP requirements for all remedial actions taken at its facilities, regardless of whether the sites are listed

on the National Priorities List. The preamble does exempt federal agencies from requirements specific to "Fund-financed" responses, of which there are seven. However, the preamble also states that *de facto* compliance with these requirements may still be necessary.

1. INTRODUCTION

On December 21, 1988, the U.S. Environmental Protection Agency (EPA) published in the *Federal Register* (53 FR 51394) a proposal to revise the existing National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The NCP is the regulation that implements the oil and hazardous substance release response provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) and Section 311 of the Clean Water Act. In 1986 the Congress passed the Superfund Amendments and Reauthorization Act (SARA), which extensively revised and added new authorities to CERCLA. Among these modifications was a requirement that the NCP be revised within 18 months of the enactment of SARA [see CERCLA Section 105(b)]. The belated proposal of December 21, 1988 implements the regulatory changes required by SARA, reorganizes the NCP to conform more accurately to the sequence of CERCLA response actions based on eight years of experience, and seeks to clarify existing NCP language.

The following report has been prepared by staff in the Environmental Compliance Group of the Environmental Sciences Division of Oak Ridge National Laboratory. The intent of the report is to assist the U.S. Department of Energy's (DOE) Office of Environmental Guidance and Compliance in (1) understanding the proposed NCP, (2) assessing the impact of the proposed NCP on DOE facilities, and (3) responding to EPA's request for comment on the NCP. The comment period closes March 23, 1989. Section 1 of this report provides background on the proposed NCP and outlines its main provisions. Section 2 identifies the major procedural and jurisdictional issues of potential concern to the DOE raised by the proposed rule. Other minor issues of potential importance to the DOE are identified and discussed in Section 3. Finally, Section 4 identifies the requirements placed on the DOE by the proposed rule and discuss associated technical and economic impacts.

1.1 BACKGROUND

The NCP was last revised on November 20, 1985 (50 FR 47912). In the fall of 1986, the EPA began a broad, comprehensive rulemaking effort to restructure the NCP to conform with the requirements of SARA. In addition, the revisions to the NCP were intended to:

- o reorganize the NCP to coincide more accurately with the sequence of response actions;
- o incorporate changes suggested by program experience since the last revision of the NCP; and
- o clarify existing language on roles, responsibilities, and activities of affected parties.

At the start of the rulemaking process, an NCP rulemaking workgroup was formed. The workgroup was comprised of representatives from the EPA Headquarters, EPA Regions, states, and other federal agencies. Subgroups were created to revise the selection of the remedy process and to address state involvement. Another subgroup was comprised of National Response Team (NRT) members, which included the DOE. The NRT subgroup's role included drafting the NCP subpart on NRT organization and responsibilities and reviewing and commenting on the entire draft NCP. Following the workgroup's review of the draft, the EPA's upper management and the Office of Management and Budget reviewed and approved the proposal.

Appendix A to the NCP, the Hazard Ranking System (HRS), also is undergoing revision. The EPA published a separate proposal for the HRS on December 23, 1988 (see 53 FR 51962).

1.2 OUTLINE OF THE PROPOSED NCP

This section outlines the proposed NCP in order to familiarize the reader with the organization of the proposed version and to note revisions. A table has been included in the preamble to the proposed NCP (53 FR 51397) to allow the reader to match existing sections in the current NCP to the equivalent section in the proposed NCP.

1.2.1 Subpart A -- Introduction

Proposed Subpart A serves as a preface to the NCP. It contains statements of purpose, authority, applicability, and scope, as well as definitions and abbreviations. It is similar to current Subpart A, except that it has been reorganized, and the definitions section has been revised.

1.2.1.1 Purpose and objective Section 300.1 has been clarified to indicate that the purpose of the NCP is twofold: (1) to provide the organizational structure for, and (2) to establish procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, or contaminants.

1.2.1.2 Authority and applicability The "Authority" section has been combined with the "Application" section to form Section 300.2 and to eliminate redundancies between the two. Section 300.3, entitled "Scope," has been revised to indicate that the NCP applies to federal agencies *and* states, as provided for in SARA.

1.2.1.3 Abbreviations and definitions The abbreviations section, now Section 300.4, has been expanded to include abbreviations commonly used in EPA communications. The definitions section, now Section 300.5, has been substantially revised. Several important definitions have been revised and added, as outlined below.

The definitions of *applicable requirements* and *relevant and appropriate requirements* have been revised to include state requirements that are more stringent than federal requirements. Remedial actions under CERCLA must comply with all applicable and relevant and appropriate requirements of other laws. SARA amended CERCLA to include more stringent state-promulgated laws.

The definition of *lead agency* has been revised to reflect Executive Order (E.O.) 12580 (52 FR 2923). This order delegates lead agency authorities to the DOE, the Department of Defense (DOD), and other federal agencies under certain specific conditions. The expanded definition states:

"Lead agency" means the agency that provides the OSC/RPM [On-Scene Coordinator/Remedial Project Manager] to plan and implement response action under the NCP. The EPA, the USCG [U.S. Coast Guard], another Federal agency, or a State (or political subdivision of a State) . . . may be the lead agency for a response action. In the case of a release of a hazardous substance, pollutant, or contaminant, where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of Department of Defense (DOD) or Department of Energy (DOE), then DOD or DOE will be the lead agency. Where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of a Federal agency

other than the EPA, the USCG, the DOD, or the DOE, then that agency will be the lead agency for remedial actions and removal actions other than emergencies. The Federal agency maintains its lead agency responsibilities whether the remedy is selected by the Federal agency for non-NPL sites or by the EPA and the Federal agency or by the EPA alone under CERCLA Section 120. The lead agency will consult with the support agency, if one exists, throughout the response process.

The definitions of *On-Scene Coordinator* (OSC) and *Remedial Project Manager* (RPM) have been simplified. They also recognize that other federal agencies besides the EPA, the USCG, the DOE, and the DOD can designate the OSC or RPM, as provided by E.O. 12580.

The definition of *on-site* for permitting purposes has been expanded to accommodate situations where response activities require the use of areas not entirely within the contaminated area. Section 300.5 states that "on-site for permitting purposes, means the areal extent of contamination *and* all suitable areas in close proximity to the contamination necessary for implementation of the response action."

The definition of *State* has been modified to include federally-recognized Indian Tribes.

A definition for *support agency* has been added to this section. The support agency provides the Support Agency Coordinator (SAC) to furnish necessary data to the lead agency, review response data and documents, and provide other assistance as requested by the OSC or RPM. The EPA, USCG, other federal agency, or a state may be the support agency if operating under a cooperative agreement.

1.2.1.4 New sections Two new sections have been added to Subpart A. Section 300.6 specifies that words in the singular include the plural and those in the masculine gender include the feminine and vice versa. Section 300.7 addresses how specified time periods should be computed.

1.2.2 Subpart B – Responsibility and Organization for Response

Proposed Subpart B describes the responsibilities of Federal agencies for response and preparedness planning and the organizational structure within which the Federal response takes place. No major substantive revisions were made to this subpart. It has been reorganized, however. Specifically, the proposal combines Subparts B ("Responsibility") and C ("Organization") in the current NCP. Furthermore, the sections are presented so that they better reflect the chronology of the response activities.

1.2.2.1 Presidential delegations Section 300.100 acknowledges that the President delegated certain functions and responsibilities to federal agencies, as provided in E.O. 11735 and E.O. 12580. Executive Order 12580 revokes E.O. 12316, which is noted in the current NCP.

1.2.2.2 General organizational concepts Section 300.105 outlines the organizational system of the National Response Team (NRT), Regional Response Teams (RRTs), On-Scene Coordinators (OSCs), and Remedial Project Managers (RPMs). Sections 300.110 and 300.115 cover the NRT and RRTs, respectively. Only minor editorial and organizational changes have been made to these sections.

The role and responsibilities of the OSC/RPM are described in Section 300.120. This section also describes the conditions under which a federal agency or state can be the

lead agency and, therefore, can provide the OSC/RPM. This provision recognizes the new authorities granted to federal agencies in E.O. 12580 (see the definition of "lead agency" provided under Section 1.2.1.3 above for a description of these conditions). Two new paragraphs have been added to this section. One describes RPM responsibilities for federal-lead, non-Fund-financed responses. Specifically, the RPM coordinates, directs, and reviews the work of other agencies and contractors to assure compliance with the NCP. These responsibilities are not much different from those of the RPM for Fund-financed responses. The other paragraph outlines the responsibilities of the Support Agency Coordinator (SAC). These responsibilities include providing and reviewing data and documents as requested by the OSC/RPM.

1.2.2.3 Response operations Section 300.125 discusses the National Response Center (NRC) and addresses the requirements for the notification of discharges or releases. The title of this section has been changed to "Notification and communication" to reflect the position of the NRC in the NRT/RRT/OSC/RPM system.

Once notification has occurred, the process of initiating a response may begin. This is addressed in Section 300.130. This section discusses the initiation of a federal response, the response management responsibilities of the NRT co-chairs (the EPA and the USCG), the special authorities and circumstances that may affect the initiation of a response, and other response authorities.

During the response action, the OSC/RPM has specific responsibilities, which are provided in Section 300.135. This section clarifies the position of the OSC/RPM in the NRT/RRT/OSC/RPM system. When a discharge or release extends over an area covered by two or more regional contingency plans or moves from one region to another, the OSC/RPM authority should shift. The jurisdiction of response organizations in these multi-regional responses is described in Section 300.140.

During the response action, the lead agency must assure that a program for occupational safety and health is made available for the protection of workers at the site. The requirements of this section have been expanded to apply to lead agencies conducting *any* response action under the NCP, not just federal fund-financed responses.

The title of Section 300.155 has been changed to "Public information and community relations" to indicate that obligations during response actions extend to informing the public and performing community relations activities. The requirement for a community relations plan (CRP) is mentioned in this section.

A section that addresses documentation and cost recovery has been added to this subpart (Section 300.160). The section was added to conform with the SARA requirements making responsible parties liable for the costs of any health assessment or health effects study carried out under CERCLA Section 104(i). This section outlines the documentation requirements necessary to assure that these cost will be recoverable.

When the response action is finished, the OSC must submit an OSC report within 90 days. Section 300.165 addresses OSC reports and increases the time for submitting the reports from 60 to 90 days.

1.2.2.4 Participation in responses The descriptions of the availability of Strike Teams, the Environmental Response Team, Radiological Assistance Teams, Scientific Support Coordinators, and the USCG Public Information Assist Team remain essentially unchanged from the current NCP (see proposed Section 300.145). The availability of assistance from federal agencies to OSC/RPM is discussed in Section 300.170. Federal capabilities and the

expertise of each NRT member agency are covered in Section 300.175, which describes the type of assistance that an agency can render during a response action. The participation of state and local representatives is discussed under Section 300.180. This section outlines how state and local governments can participate in planning and preparedness. Volunteers can also participate in response actions under conditions specified in Section 300.185.

1.2.3 Subpart C – Planning and Preparedness

Proposed Subpart C summarizes emergency preparedness activities relating to hazardous substances; describes the federal, state, and local planning structure; provides for three levels of federal contingency plans; and cross-references state and local emergency preparedness activities under SARA Title III (The Emergency Planning and Community Right-to-Know Act of 1986). This subpart revises and is similar to existing Subpart D, with no substantive changes. Regulations implementing Title III are codified separately from the NCP (see 40 CFR, Subchapter J).

1.2.4 Subpart D – Operational Response Phases for Oil Removal

Proposed Subpart D outlines the response program for discharges of oil. It contains only minor clarifying and editorial changes to existing Subpart E. These changes make this subpart more understandable and consistent with the remainder of the proposed NCP.

1.2.5 Subpart E – Hazardous Substance Response

This subpart establishes general procedures for discovery or notification, response, and remediation of releases that pose a threat to human health and the environment. Because of the variety of releases and threats encountered, response actions and cleanup levels must be determined on a site-specific basis. This subpart describes how site-specific decisions on response actions will be made.

The first step in the response process is discovery or notification (Fig. 1). This can occur in a variety of ways. Notice of a release is typically directed to the NRC. Before any response action is taken, a site evaluation is performed to determine the conditions and problems that exist at the site. If there is some reason to believe that prompt response may be necessary, a removal site evaluation will be conducted. In all other cases, a remedial site evaluation will be performed to gather information necessary for determining if a site should be included on the National Priorities List (NPL). Both of these site evaluations may consist of a preliminary assessment (PA) and a site inspection (SI). While PA/SIs will vary depending on the perceived urgency of the situation, they generally involve a review of existing available information about the site and an on-site evaluation such as field sampling.

If the site evaluation indicates that there is some near-term threat, a removal action should be undertaken. The best technical judgment of the OSC/RPM must be relied upon to determine how quickly a response must be initiated and, therefore, which response authority is appropriate. Removal actions are generally short-term and mitigative in nature. In contrast, remedial actions are long-term response that generally involve complete cleanup of a site. While removal and remedial activities are described as separate processes, a decision to conduct a removal action may be made during the remedial process, and sites initially evaluated for removal may be referred to the remedial program.

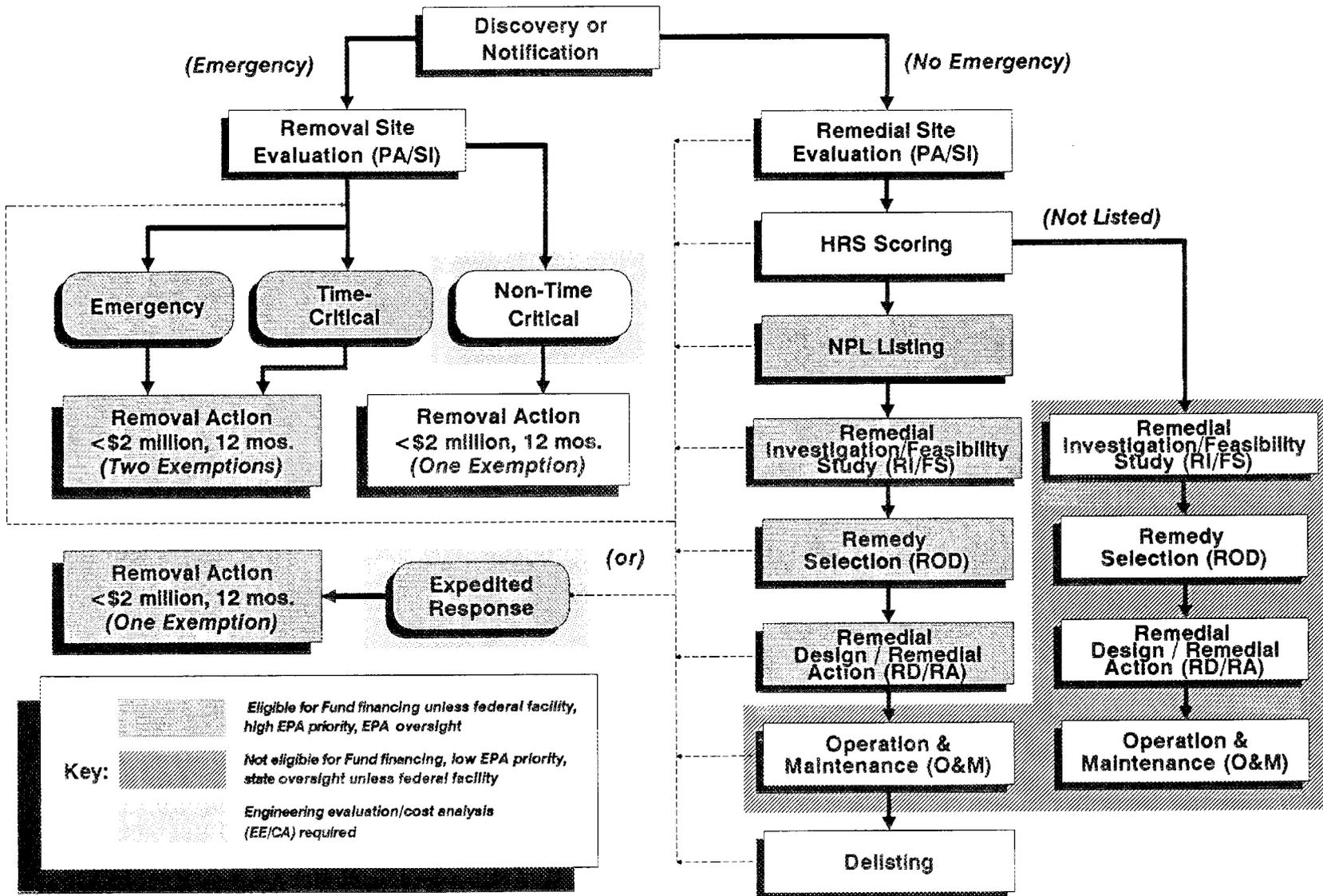


Figure 1. Flow diagram of removal and remedial response actions under the proposed National Oil and Hazardous Substances Pollution Contingency Plan. The removal and remedial response pathways are interrelated as indicated.

to determine how quickly a response must be initiated and, therefore, which response authority is appropriate. Removal actions are generally short-term and mitigative in nature. In contrast, remedial actions are long-term response that generally involve complete cleanup of a site. While removal and remedial activities are described as separate processes, a decision to conduct a removal action may be made during the remedial process, and sites initially evaluated for removal may be referred to the remedial program.

Following remedial site evaluation, the lead agency conducts a remedial investigation and feasibility study (RI/FS). The purpose of the RI is to gather sufficient data to characterize the conditions at the site in order to assist in determining the appropriate action. The purpose of the FS is to develop and analyze alternatives for appropriate action. Based on these studies, a remedy is selected and included in the Record of Decision (ROD).

Once the ROD is final, the remedial design is carried out. This stage includes developing the plans and specifications for the selected remedy. Once the remedial design is complete, the lead agency conducts the construction (implementation) of the remedy or the remedial action. Operation and maintenance may be needed once the remedial action is finished to maintain the effectiveness of the response action.

1.2.5.1 General Section 300.400 discusses information of a general nature about response actions. It places limits on response as required by SARA. For example, Fund-financed responses cannot be undertaken for releases involving naturally-occurring substances. Paragraph (d) of this section describes new statutory authority when entry and access to areas is needed to determine the necessity for response or to implement a response. This paragraph also provides additional details on the use of administrative orders for such entry and access.

Pursuant to Section 121(e) of CERCLA, paragraph (e) of this section states that permits are not required for response actions conducted entirely on-site (see the definition provided in 1.2.1.3). The EPA has suggested several alternative definitions of "on-site" in the preamble (53 FR 51406).

1.2.5.2 Discovery or notification Section 300.405 discusses how CERCLA sites may be discovered, the responsibility to report releases, and the details of the notification process. No major revisions were made to this section.

1.2.5.3 Removal actions A new section, 300.410, has been added to discuss removal site evaluations, which may consist of a removal PA and a removal SI. The purpose of this process is to evaluate site conditions in order to identify needed actions. Paragraph (g) of this section has been revised to require the notification of trustees of affected natural resources whenever any data indicate that natural resources will be threatened. The lead agency must also coordinate response activities with the trustees.

Section 300.415 discusses the criteria for determining the appropriateness of a removal action and the requirements that must be met during the removal. It incorporates revisions made necessary by SARA. For example, the statutory financial and time limits for Fund-financed removals have been increased from \$1 million or 6 months to \$2 million or 12 months. A new exemption has been added to these limits for actions consistent with the remedial action to be taken. The EPA proposes in the preamble that this new exemption should be used for proposed and final NPL sites and should be used for non-NPL sites only in rare circumstances. Furthermore, a requirement has been added so that removal actions

should contribute, to the extent practicable, to the efficient performance of any long term remedial action.

Paragraph (b)(4) of this section requires the lead agency to conduct an engineering evaluation and cost analysis (EE/CA) when at least six months is available before the removal action begins. The EE/CA is an analysis of removal alternatives for the site. It is similar to the RI/FS conducted under the remedial action program.

Paragraph (n) of this section addresses community relations in removal actions. The proposed changes for public involvement during removal actions are:

- o When less than six months exists before on-site removal activity must begin, the administrative record must be made available to the public within 60 days of initiation of activity. A public comment period of not less than 30 days must be provided. These requirements are for emergency or time-critical removals.
- o For all removal actions lasting over 120 days, the lead agency must conduct interviews with local citizens, create a formal community relations plan (currently required for removals over 45 days), and establish a local information repository at or near the site.
- o When at least six months exists prior to initiation of the on-site removal activity [i.e., non-time critical removal actions or expedited response actions (see Fig. 1)], the lead agency must conduct interviews with local citizens, create a formal community relations plan, and establish an information repository at or near the site prior to completion of the EE/CA; publish a notice of availability of the EE/CA in a major local newspaper; and provide at least a 30-day public comment period.

1.2.5.4 Remedial actions Section 300.420 addresses remedial site evaluation, which may consist of a remedial PA and a remedial SI. The purpose of the remedial PA has been expanded to include the gathering of data to assist in developing a HRS score, and the scope of the PA has been expanded to include on-site reconnaissance. Currently, a remedial PA is used to set priorities for SIs, determine whether removal action is warranted, and eliminate from consideration those releases that do not pose a threat.

Paragraph (b)(4) has been added to this section to require the lead agency to complete a PA report, which includes a description of the release, the probable nature of the release, and a recommendation on the necessity of further action. Paragraph (b)(5) has been added to conform with new SARA requirements. This paragraph grants any person the right to petition the EPA or a federal agency when the release is from a federal facility to perform a PA if such person is or may be affected by the release. The federal agency must perform a removal or remedial PA within one year of the date of receipt of a complete petition unless the agency determines that a PA is not appropriate [see Section 300.420(b)(5)(A) and (B) for the appropriate criteria].

The EPA proposes in paragraph (c) to expand the scope of data collection and sampling so that the release can be characterized more accurately. This paragraph also would require the lead agency to complete an SI report, which (1) includes a description of waste handling, of known contaminants, and of pathways of contaminant migration; (2) identifies and describes human and environmental targets; and (3) recommends the necessity of further action.

Section 300.425 addresses the establishment of remedial priorities. Few substantive changes have been made to this section. As in the current NCP, this section describes the criteria and procedures for placing sites on and deleting and deferring them from the NPL. The proposed NCP deletes the current requirement that the proposed NPL be submitted to the NRT for review and comment. The preamble to this section describes and requests comments on the EPA's proposals to use a new category, "Construction Completion," to classify sites on the NPL. Comment also is requested on a proposal to broaden the current policy of deferring certain categories of sites from listing on the NPL (53 FR 51415).

Section 300.430 outlines the RI/FS process and the selection of remedy. The EPA incorporated into the NCP the statutory preference for remedies with treatment as a principal element and the mandate to use permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. The basic structure of the current remedy selection process has been retained, however. A bias for quick action, streamlining, and site management planning considerations have also been incorporated into the proposal and are described in the preamble (53 FR 51423).

Most of the regulatory requirements for complying with applicable or relevant and appropriate federal and state requirements (ARARs), as required by SARA, are included in this section. The preamble discusses compliance with ARARs in great detail (53 FR 51435), including the history of compliance with ARARs; the definition of ARARs and the difference between applicable and relevant and appropriate requirements; how to identify ARARs in the remedial process; how to supplement ARARs when they are not sufficient to be protective; waivers to ARARs; and compliance with ARARs in the Resource Conservation and Recovery Act (RCRA).

Major changes have been made regarding the range of alternatives that must be developed. Section 300.430(e)(3)-(6) requires development of a range of treatment alternatives, a containment alternative, and a no-action alternative. Current NCP language requires five alternatives, including alternatives that do not attain, that do attain, and that exceed ARARs, as well as no-action and off-site alternatives. In the proposed NCP the requirement for consideration of five alternatives is waived in favor of a detailed analysis of alternatives using nine specific evaluation criteria, as follows:

- *Threshold criteria* — (1) Overall protection of human health and the environment and (2) compliance with ARARs.
- *Primary balancing criteria* — (3) Long-term effectiveness and permanence; (4) reduction of toxicity, mobility, or volume; (5) short-term effectiveness; (6) implementability; and (7) cost.
- *Modifying criteria* — (8) State acceptance and (9) community acceptance.

In the preamble, the EPA discusses two major variations on the site-specific balancing approach outlined above (53 FR 51430). These variations are under consideration for inclusion in the final NCP. The first variation has a cost-effectiveness screen. Under this approach, the alternatives would be evaluated using three categories of criteria: effectiveness (long and short-term), implementability, and cost. State and community acceptance are not criteria under this variation. The second variation uses a sequential decisionmaking approach. Under this approach, alternatives would be ranked for effectiveness and then implementability. These rankings would be combined in a joint

effectiveness/implementability ranking, which would be compared to relative cost. The cost-effective alternative with the highest effectiveness/implementability ranking would be chosen.

The EPA is also considering two non-site-specific approaches (53 FR 51431). In the "point of departure strategy," all treatment alternatives that could result in absolute destruction, detoxification, or immobilization of the waste would be identified. These options would then be screened using implementability. The alternative that was most effective, implementable, and least costly would be selected. Under the "site stabilization strategy," only those sites or portions of sites where treatment was immediately necessary to protect human health and the environment would be treated. This would maximize the number of sites that could be addressed by the Superfund program. This strategy would consist of two phases: one phase in which sites were stabilized to prevent further degradation and another phase in which a permanent remedy was applied.

Using the criteria that the EPA proposed, a remedial alternative would be chosen. For federal facilities on the NPL, the EPA and federal facility jointly select the remedy or if mutual agreement is not reached, then the EPA selects the remedy. This section does not address which agency selects the remedy when the federal facility is not listed on the NPL or what the state's role is in the selection process. The basis for the selection should be described in the Record of Decision (ROD).

Requirements for community relations after remedy selection are provided in paragraph (f)(2). This paragraph is a combination of current NCP requirements, current policy, and statutory requirements. The new requirements are:

- o conduct local interviews (current policy);
- o prepare a community relations plan (current regulation);
- o establish a local information repository at or near the site (current policy);
- o provide a public comment period of at least 30 days for the draft FS (the current NCP requires at least 21 days);
- o provide public notice after the signing of the ROD (statutory requirement); and
- o allow for additional community involvement if there is a significant change in the remedial action selected in the ROD.

Remedial design and remedial action (RD/RA) and operation and maintenance (O&M) phases are addressed in Section 300.435. This proposed section is entirely new, although it generally follows currently used procedures (with modifications to accommodate SARA). Under SARA, remedial action includes groundwater and surface water restoration measures that continue up to 10 years after the commencement of the remedial action. Source control maintenance and pumping and treating solely for the purpose of providing drinking water supplies are not included in this 10-year provision. Comments are requested on the possibilities of expanding this approach.

Operation and maintenance activities are initiated after the remedy is operational and functional. Groundwater and surface water restoration activities that continue beyond the 10-year limit are considered O&M. For federal facilities, the federal agency finances O&M. For other sites, the state or responsible party, as appropriate, finances O&M.

1.2.6 Subpart F – State Involvement in Hazardous Substance Response

Section 121(f)(1) of CERCLA requires that all states be provided an opportunity for "substantial and meaningful" involvement in pre-remedial, remedial, and enforcement response activities. To meet this requirement and to strengthen the EPA/state partnership, proposed Subpart F establishes a mechanism for state involvement in response action and seeks to establish the EPA/state partnership in all aspects of the cleanup program.

Proposed Subpart F is completely new. It combines concepts described in the current Sections 300.62 ("State Role") and 300.68 ("State Involvement in Remedial Action"). The proposed new subpart codifies in one place all regulatory requirements for state participation and involvement in CERCLA-authorized response activities. This subpart also includes the minimum requirements that the EPA will follow to ensure that all states are provided an opportunity for "substantial and meaningful" involvement.

The major mechanism for ensuring such involvement is the EPA/State Superfund Memorandum of Agreement (SMOA). A SMOA defines the operating relationship between the EPA and a state. This relationship is dictated and agreed to by the EPA Regional Office and the state and is executed by the Regional Administrator and the state Agency Director. SMOAs are encouraged but are not mandatory unless (1) the state wishes to recommend the remedy for EPA concurrence for a Fund-financed action, or (2) the state wants to be recognized as the lead agency for a non-Fund-financed action at an NPL site. A SMOA may address, in general, EPA/state interaction at federal facilities, but the SMOA cannot impose requirements or obligations on the federal agencies concerned or provide any authorities to states with respect to federal facilities.

As provided in CERCLA Section 120(f), the substantive requirements of Subpart F do apply to federal facility responses. The federal facility must involve the states in remedial response actions taken at federal facilities. The EPA intends to further address state involvement at federal facilities in the proposed Subpart K, currently being drafted.

1.2.6.1 General Section 300.500 introduces the EPA/state partnership and encourages states to participate in Fund-financed responses by assuming the lead through a cooperative agreement or becoming a support agency in EPA-lead remedial response.

1.2.6.2 Superfund Memorandum of Agreement Section 300.505 is new. It describes the potential contents of the Superfund Memorandum of Agreement (SMOA). The primary goals of a SMOA are to:

- provide maximum flexibility to the EPA and states in planning and implementing remedial response actions;
- ensure an equitable EPA/state partnership during response;
- reduce or eliminate misunderstandings by clarifying the EPA's and state's expectations; and
- designate lead agency status for states in the absence of a cooperative agreement.

The SMOA does not address removal actions, because the EPA Regional offices and the states generally agree that the current EPA/state removal interaction is effective.

1.2.6.3 State involvement in responses Section 300.510 describes the assurances a state must provide to the EPA prior to initiation of a Fund-financed remedial action pursuant to CERCLA Section 104(a). The proposal also codifies the statutory provisions for use of credits to offset a state's required cost share.

Section 300.515 combines existing language from Sections 300.62 and 300.68 of the current NCP. It includes new language that describes how the EPA intends to satisfy requirements for state involvement in remedial and enforcement response actions, as established in SARA. Paragraph (a) presents various criteria that the EPA would use to assist the EPA Regional offices and the states in deciding whether it is appropriate for the state to assume lead agency responsibilities at a given NPL site.

Under proposed paragraph (c), the EPA proposes to ensure significant state involvement in pre-remedial activities by requiring the EPA to consult with the state during the NPL listing or delisting processes.

The process for lead and support agency consultation on ARARs and other criteria, guidance, and advisories to be considered (TBCs) is outlined in paragraph (d). Paragraph (e) discusses the roles of the EPA and the states during the selection of the remedial alternative. It provides states with responsibilities in the process of remedy selection when they are acting as the lead agency in either Fund-financed or non-Fund-financed actions. The process of concurrence has been modified to increase EPA involvement at state-lead, non-Fund-financed sites and provide for a greater state role in the selection of remedy process at Fund-financed sites.

When a SMOA has not been signed, states have responsibilities that are outlined in paragraph (h). These include annual consultations, identification of ARARs, and state review and comment opportunities.

Section 300.520 addresses state involvement in EPA-lead enforcement negotiations. This section is proposed to meet the CERCLA Section 121(f)(2) requirement that the EPA provide notice to states regarding negotiation with potentially responsible parties (PRPs). State involvement in removal actions is covered in Section 300.525. Statutory requirements for removals are not the same as those for remedial and enforcement response and, therefore, state involvement differs significantly. The EPA encourages state-lead removals to the extent practicable.

1.2.7 Subpart G – Trustees for Natural Resources

The primary purpose of proposed Subpart G remains the designation of trustees for natural resources. The trustees for the principal federal land managing agencies are the Secretaries of the Departments of Interior, Agriculture, Defense, and Energy. Proposed revisions to this subpart are primarily for clarifying trustee agency authorities and to conform with SARA. For example, Indian Tribes can be authorized to act as trustees of their own natural resources. Furthermore, the provision for claims against the Fund for damages to natural resources has been eliminated. This subpart also authorizes trustees to conduct investigations at sites where damage to resources is suspected and describes the preliminary activities that trustees conduct to perform their responsibilities.

1.2.8 Subpart H – Participation by Other Persons

Proposed Subpart H focuses on the authorities that allow persons other than the federal government to respond to releases and to receive reimbursement for response costs. This is a new subpart which consolidates information from existing Sections 300.25

("Nongovernment Participation") and 300.71 ("Other Party Responses") and new SARA authorities. In addition, information from the soon-to-be proposed CERCLA response claims regulations is also incorporated. The proposed revisions are mostly non-substantive and are primarily concerned with describing what other persons must do to act consistently with the NCP during their response actions.

1.2.9 Subpart I – Administrative Record for Selection of Response Action

Proposed Subpart I of the NCP is entirely new. It implements CERCLA requirements concerning the establishment of an administrative record. Under CERCLA, the administrative record serves two primary purposes. First, per Section 300.113(j), it is the limit for judicial review of any issue concerning the adequacy of a response action. Secondly, per Section 113(k), it is a vehicle for public participation in the selection of the response action.

CERCLA Section 113(k)(2)(B) establishes minimum procedures for public participation in development of the administrative record for remedial actions. Because the nature of removal actions is quite different from that of remedial actions and often involves the need for prompt action, separate and distinct procedures regarding public participation and the establishment of the administrative record are proposed for remedial and removal actions under this Subpart I, which expands the public participation requirements of proposed Subpart E. These proposed administrative record requirements build upon and formalize existing procedures for the exchange of information on the selection of a response action.

1.2.9.1 Establishment Section 300.800 addresses administrative records for federal facilities. Executive Order 12580 authorizes federal agencies to establish the administrative record for selection of response actions for facilities under their jurisdiction, custody, or control. Federal agencies must compile and maintain records as required by this subpart. The EPA may furnish documents which the federal agency must place in the record file to ensure that the administrative record includes all documents that form the basis for the selection of the response action. When the EPA or USCG is the lead agency at a federal facility, the EPA or the USCG shall compile and maintain the administrative record.

Paragraph (b)(3) requires federal agencies to provide the EPA with a copy of the index of the documents included in the administrative record when the EPA is involved in remedy selection. In the preamble, the EPA is soliciting comments on alternative procedures for the EPA's involvement in the development of the administrative record for federal facilities.

1.2.9.2 Location Section 300.805 requires that the administrative record file generally be located at or near the facility and at an office of the lead agency or other central location.

1.2.9.3 Contents Section 300.810 specifies which documents should be included in the administrative record file. All documents considered by the decision maker, including those relied upon by the decision maker in selecting the response action are to be included, such as:

- o factual information/data;
- o policy and guidance documents;

- o documents from or made available to the public;
- o other party (e.g., Natural Resource Trustee) information;
- o decision documents;
- o enforcement documents; and
- o an index.

1.2.9.4 Public information requirements Section 300.815(a) requires that the administrative record developed for remedial actions be available for public inspection at the commencement of the remedial investigation phase (i.e., when the final RI/FS work plan is available). This section also requires the lead agency to publish a notice of availability of the administrative record file in a major local newspaper of general circulation. Interested persons may submit comments for inclusion in the administrative record file during the public comment period. A written response to significant comments must be included in the administrative record file.

Section 300.820 requires that the administrative record for a non-time-critical removal action be made available for public inspection when the EE/CA report is made available for public comment. This section also requires that compliance with the public participation requirements for non-time-critical removal actions, set forth in Section 300.415(n)(3)(i) through (iii), be documented for inclusion in the administrative record. For emergency and time-critical removal actions, the record should be made available to the public no later than 60 days after initiation of on-site removal activity. A public comment period of at least 30 days is required. The EPA solicits comments on the proposed and other approaches to public participation in removal actions outlined in the preamble (53 FR 51450).

Documents may be added to the administrative record after the response action has been selected under the following conditions specified in Section 300.825:

- o when the decision document (e.g., action memorandum or ROD) does not address or reserves a portion of the response action decision; or
- o when an explanation of significant differences as provided for in Section 300.435(c) (community relations during remedial design/remedial action) or an amended decision document is required.

An explanation of significant differences is issued when, after adopting a final remedial action plan, the remedial action or enforcement action taken, or the settlement or consent decree entered into, significantly differs in scope, performance, or cost from the final plan. The lead agency can solicit additional comments on the response action whenever it determines that new information or other circumstances warrant additional input.

Section 300.825(c) governs public comments received after the close of the comment period. The lead agency will need to consider such comments only if they could not have been submitted during the comment period and provide critical, new information relevant

to the response selection which substantially supports the need to significantly alter the response action.

1.2.10 Subpart J – Use Of Dispersants and Other Chemicals

Proposed Subpart J applies to the use of any chemical agents or other additives (as defined in proposed Section 300.5) that may be used to remove or control oil discharges. This subpart is very similar to existing Subpart H and contains only minor clarifying and editorial changes to make it more understandable and consistent with the rest of the proposed NCP. Definitions formerly in this subpart have been moved to Section 300.5, and a new definition has been added for "miscellaneous oil spill control agents."

1.2.11 Subpart K – Federal Agencies

Subpart K is reserved in this proposal. The EPA intends to propose this subpart sometime after revisions to the NCP have been proposed. A workgroup has been formed to develop this subpart. It will be managed by the EPA and will include members from interested federal agencies and states. The EPA plans to finalize Subpart K as expeditiously as possible after consideration of public comment.

Section 120(a) of CERCLA as amended by SARA describes the applicability of the statute and implementing regulations and guidance to facilities owned or operated by federal departments or agencies. In general, such facilities are subject to the same procedural and substantive requirements as any nongovernmental entity. Section 120 also defines the process that federal agencies must use in undertaking remediation at their facilities.

In the preamble (53 FR 51396), the EPA states that the requirements of the NCP are applicable to federal agency response actions under CERCLA at NPL and non-NPL sites, except where specifically noted that the requirements apply only to Fund-financed actions. However, even in instances where NCP requirements do not appear strictly to apply to federal agency response, the EPA advocates that *de facto* compliance may still be necessary. One such example provided is the statutory time and dollar limitations on Fund-financed removal actions (see Section 300.415). The limitations serve not only to establish the funding limits on removals but also as markers signaling the end point of removal authority. Thus, while the limits have no real application to funding a response action at a federal facility (a non-Fund-financed response), the EPA wants to use them to mark the point at which applicable remedial requirements of the NCP must begin to be met.

2. MAJOR ISSUES

The EPA has done a commendable job in revising the NCP to conform with the new requirements of SARA and in reorganizing the NCP to better correspond with the actual sequence of response actions. However, additional effort will be required to clarify a number of issues that are still unresolved. Deficiencies include: (1) a lack of precise and meaningful definitions of a number of important concepts; (2) unclear delegation of jurisdiction and authority for response actions at both NPL and non-NPL federal facilities; and (3) a lack of integration of procedures for complying with community relations and other administrative requirements. The following sections address the major deficiencies identified above in greater detail.

2.1 ITEMS THAT REQUIRE CLARIFYING DEFINITIONS

The purpose of this section is to discuss those definitions that require further clarification. This is needed, because either (1) terms were not defined in the proposed NCP's definitions section or (2) it is unclear how the terms are applied or relate to other terms.

2.1.1 Hazardous Waste Management Facilities

The term *hazardous waste management facility* is used in the proposed NCP, yet no definition is provided. It is also not defined in CERCLA Section 101, in the Federal Water Pollution Control Act [Section 311(a)], or in RCRA (Section 1004). This term is important, because it is used in proposed Section 300.120(a)(1) to define the jurisdiction of the USCG:

The USCG shall provide an initial response to discharges or releases from *hazardous waste management facilities* within the coastal zone in accordance with DOT/EPA Instrument of Delegation (46 FR 63294, December 31, 1981). The USCG OSC shall contact the cognizant RPM as soon as it is evident that a removal may require a follow-up remedial action, to ensure that the required planning can be initiated and an orderly transition to an EPA or state lead can occur.

It is unclear whether facilities under the jurisdiction, custody, or control of the DOD, the DOE, or other federal agencies are hazardous waste management facilities. If these facilities are included in the definition, then another sentence should be added to proposed Section 300.120(a)(1), such as "*When a release is from or solely on a vessel or facility under the jurisdiction, custody, or control of a Federal agency, the USCG OSC shall contact the appropriate Federal agency-designated OSC as soon as possible to ensure that an orderly transition to a DOD, DOE, or other Federal agency lead can occur.*" This addition would allow the paragraph to conform with E.O. 12580 and proposed Section 300.120(b) and (c). Accordingly, under this modified paragraph, the USCG OSC could initiate a response for releases on or solely from a federal facility or vessel and the appropriate federal agency OSC could take over the response action.

2.1.2 Removal Actions

Four types of removal actions are identified in the preamble to the proposed rule (53 FR 51409 and 51411). *Emergency removals* are performed when a release requires that response activities begin "within hours of the lead agency's determination that a removal action is appropriate." *Time-critical removals* are initiated within six months of the identification that a removal action is appropriate. *Non-time-critical* removals have a planning period of more than six months available before on-site activities should begin. An *expedited response action* (ERA) is performed during the remedial response process when a newly discovered release must be handled quickly and a response under the remedial program could not be initiated quickly. ERAs are performed when the release is such that a planning period of at least six months is available before on-site activities should begin.

Although these terms are discussed in the preamble, they are not defined in the proposed NCP. They are used there, however. For example, proposed Section 300.120(b) uses these terms to define the jurisdiction of the federal agencies in providing OSCs and

RPMs. Under this section, DOD and DOE provide OSC/RPMs for "all response actions" whereas other federal agencies only provide them for "removal actions that are not emergencies." This conforms with E.O. 12580, which also states that "The Administrator [of the EPA] shall define the term 'emergency,' solely for the purposes of this subsection, either by regulation or by a memorandum of understanding with the head of an Executive department or agency." We recommend that a definition of *emergency* be included in the definition of *removal action*, which should be added to proposed Section 300.5.

The definition of removal action should also include a discussion of the other types of removal actions noted above. These terms could then be substituted into the proposed NCP to enhance readability. For example, proposed Section 300.415(n)(2) states "For actions where, based on the site evaluation, the lead agency determines that a removal is appropriate, and that less than six months exists before on-site removal activity must begin" This paragraph would read more clearly if it stated "*For actions where the lead agency determines that an emergency or time-critical removal is appropriate based on the site evaluation*"

2.1.3 On-Site

Section 300.5 states that "On-site for permitting purposes, means the areal extent of contamination and all suitable areas in close proximity to the contamination necessary for implementation of the action." It is unclear if this definition applies to other uses of *on-site*. For example, Section 300.415(b)(5) states that "Fund-financed removal actions . . . shall be terminated after \$2 million has been obligated for the action or twelve months have elapsed from the date that removal activities begin *on-site*" If the given definition applies here also, then activity in the area "in close proximity to" the contamination (e.g., preparation of the staging area) would start the 12-month clock although activity in the contaminated area itself had not yet begun. We propose that *facility* (as defined in Section 300.5) should replace *on-site* in Section 300.415(b)(5).

The preamble (53 FR 51435) states that ARAR requirements apply "as a matter of law only to remedial activities occurring on-site." We feel that the proposed Section 300.5 definition of *on-site* is appropriate to application of ARARs. If the given definition of *on-site* is in actuality applicable only for permitting purposes, then a definition for other purposes also should be provided.

It is also unclear how or if *on-site* (as defined) relates with *unit*. The preamble (53 FR 51444) states that "Movement of hazardous waste entirely within a unit does not constitute "land disposal" under Subtitle C of RCRA." Hence the term *unit*, which is not defined in the proposed NCP, may be used as a matter of policy to determine the applicability of RCRA land disposal ARARs. A question arises as to whether everything *on-site* constitutes a *unit*. If so, then waste could be moved from the area of contamination to the area "in close proximity to" the contamination necessary for implementing the response action without triggering RCRA land disposal ARARs. We do not believe this to be the EPA's intention. Therefore, the EPA should define the term *unit* and clarify the relationship between a unit, a CERCLA facility, and on-site.

2.1.4 Naturally Occurring Substances

Section 300.400(b) states "Unless the lead agency determines that a release constitutes a public health or environmental emergency and no other person with the authority and capability to respond will do so in a timely manner, a Fund-financed removal or remedial action shall not be undertaken in response to a release of a naturally occurring

substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." We believe that this paragraph should apply only when the concentration of the naturally occurring substance is below or equivalent to natural background levels. The EPA could provide guidance on this term by including a definition for *naturally occurring substances* in Section 300.5.

2.2 JURISDICTIONAL ISSUES

The purpose of this section is to discuss areas of the proposed NCP that require clarification of the jurisdiction of appropriate agencies. These areas may arise, because (1) necessary authority was not granted by the rule, (2) the jurisdiction provided in the rule appears to conflict with E.O. 12580, or (3) the jurisdiction granted in the proposed rule conflicts with its discussion in the preamble.

2.2.1 Designation of OSC/RPMs

Proposed Section 300.120(a)(1) describes the jurisdiction of parties for releases in the coastal zone. As discussed in Section 2.1.1 above, it is unclear whether the DOD, the DOE, or other federal agencies provide the OSC's for removal actions taken in the coastal zone to address releases on or solely from facilities or vessels under their jurisdiction, custody, or control. We believe that it is appropriate for the USCG to have the authority to initiate a response. However, we believe that the Federal agency OSC should be notified promptly so that he can take over removal responsibilities and the appropriate Federal agency can become the lead agency.

The jurisdiction of DOE and other Federal agencies in the coastal zone is further muddied in Section 300.120(a)(2), which states that "EPA will assume *all* remedial actions at NPL sites in the coastal zone, even where removals are initiated by the USCG, except those involving vessels." This statement implies that the EPA is the lead agency for coastal NPL sites even if those sites are under the jurisdiction, custody, or control of a Federal agency. This conflicts with E.O. 12580.

Section 300.120(a)(2) describes jurisdiction in the inland zone. It states that "EPA shall provide OSCs for discharges or releases into or threatening the inland zone and shall provide RPMs for Federally-funded remedial actions, except in the case of state-lead Federally-funded response and as provided in paragraph (b) of this section." First it is not clear whether "Federally-funded" is equivalent to "Fund-financed" in this instance. If so, then the term "Fund-financed" should be used. Secondly, it is not clear whether the exception applies for OSCs and RPMs or RPMs alone. It is our understanding that the DOD, the DOE, or other Federal agency can provide both the OSC and RPM pursuant to Section 300.120(b). These issues require clarification.

2.2.2 Initiation of Responses

The proposed NCP fails to clarify whether the DOE can initiate a response action. For example, Section 300.130(a) states that "The Administrator of the EPA or the Secretary of the Department in which the USCG is operating, as appropriate, is authorized to act for the United States to take response measures deemed necessary to protect the public health or welfare or environment from discharges of oil or releases of hazardous substances, pollutants, or contaminants except with respect to such releases on or from vessels or facilities under the jurisdiction, custody, or control of other Federal agencies." This section

could be interpreted to mean that the EPA Administrator or Secretary of the USCG loses his authority to initiate a response when the exception is triggered. However, the paragraph does not grant initiation authority to the Secretary or Administrator of the Federal agency having jurisdiction over the vessel or facility. If this authority is needed, then it should be granted in this section of the rule.

2.2.3 Determining the Appropriateness of a Response Action

It is unclear who determines the necessity of a response action and the appropriateness of conducting a response under the removal or the remedial process. Neither of these issues is explicitly addressed in the proposed NCP.

The proposed NCP should identify who determines when a response is needed and what criteria should be used in making this decision. Many of the criteria provided in Section 300.410(e) for terminating a removal site evaluation would be excellent criteria for determining if a response action is necessary. These criteria include (1) there is no release; (2) the source is neither a facility nor a vessel; (3) the release involves neither a hazardous substance, pollutant, nor contaminant; (4) a response to the release is not permitted under Section 300.400(b); (5) the amount, quantity, or concentration released does not warrant federal response; and (6) a party responsible for the release is providing appropriate response and on-scene monitoring is not required. We propose that the lead agency in cooperation with the EPA should determine the necessity of a removal action based on criteria similar to those outlined above. If these criteria are used, the EPA will have to define *Federal* response and discuss what criteria are used to distinguish a Federal response from a non-Federal response.

The proposed NCP also needs to clarify who decides whether a response should be a *removal* or a *remedial* action. The lead agency can apparently designate the response as a removal or remedial action on its own. Section 300.415(a)(1) states that "In determining the appropriate extent of action to be taken in response to a given release, the lead agency shall first review the removal site evaluation, any information produced through a remedial site evaluation, . . . and the current site conditions to determine if removal action is appropriate." This section fails to address whether the EPA can redesignate an action as *remedial* if it disagrees with the lead agency's original designation. It would appear that the EPA would have to respect the designation until the statutory limits on removals were reached, if they apply.

2.2.4 Granting Exemptions under Removal Authority

The proposed NCP fails to specify whether the statutory time and money limits apply to a non-Fund financed removal action at a Federal facility. Section 300.415(b)(5) states that "Fund-financed removal actions . . . shall be terminated after \$2 million has been obligated for the action or twelve months have elapsed from the date that removal activities begin on-site" At first glance, these limits would not appear to apply. The preamble (53 FR 51396) even states that "The requirements of the NCP . . . are applicable to Federal agency response actions under CERCLA at NPL and non-NPL sites, except where specifically noted that the requirements apply only to Fund-financed activities." However, the clarity of this direction was muddled in the very next paragraph of the preamble, which states that "Even in instances where NCP requirements do not appear strictly to apply to Federal agency response, *de facto* compliance may still be necessary. One such example is the statutory limitations of 12 months and \$2 million on removal actions."

We disagree that these limits should apply. The current NCP Section 300.65(b)(3) states that *removal actions* shall be terminated when the limits are met. It is not clear why the EPA would add the term *Fund-financed* to the proposed NCP if they intended that these limits should apply to all removals. The EPA claims in the preamble (53 FR 51409) that "Congress originally put the statutory limits in place, because it intended that the removal program generally be short-term and mitigative in nature." However, this rationale is contradicted in proposed Section 300.415(k), which exempts these statutory limits for removal actions undertaken per CERCLA Sections 106 (Abatement actions) and 122 (Settlements). We believe that it is much more likely that the intent of Congress was to conserve Fund monies. Therefore, we believe that the statutory limits should be applicable to Fund-financed removal actions only.

We concur with the EPA's statement in the preamble that these statutory limits may be valuable markers for signaling the end point of non-Fund-financed removal actions. However, we feel a more reasonable approach than requiring termination of removals upon reaching either the \$2 million or 12-month limit is to require some form of review of the removal action by the EPA. Based on the progress and site conditions, the EPA, in consultation with the lead agency, could then determine whether it is appropriate to continue the response action under removal or remedial authority.

Exemptions to the statutory limits on removals do exist. Section 300.415(b)(5) states that the limits apply "unless the lead agency determines that: (i) There is an immediate risk to public health or welfare or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or (ii) Continued response action is otherwise appropriate and consistent with the remedial action to be taken." If the time and dollar limits apply to non-Fund-financed actions at sites under the jurisdiction, custody, or control of a Federal agency, then that Federal agency, as the lead agency, will determine whether the exemptions should be granted. This directly conflicts with the preamble (53 FR 51409), which states that "EPA believes that the new exemption [Section 300.415(b)(5)(ii)] should be used primarily for proposed and final NPL sites and should be used for non-NPL sites only in rare circumstances." They intend to ensure that this policy is followed by requiring that each decision for using the new exemption at non-NPL sites be approved by the Assistant Administrator for the Office of Solid Waste and Emergency Response. This may be appropriate when the EPA is the lead agency. It is not appropriate when a Federal agency or state is the lead agency.

2.2.5 Selection of Remedy

Section 300.430(f)(3)(vi) addresses the selection of the remedial alternative at Federal facilities on the NPL. It provides for "(A) joint selection of remedial action by the head of the relevant department, agency, or instrumentality, and EPA; or (B) If mutual agreement on the remedy is not reached, selection of the remedy is made by EPA." It is unclear from this whether the head of the Federal agency alone can select the remedy for sites that are not listed on the NPL. Subpart K should address this. It should be noted that CERCLA Section 120(a)(4) states that "State laws concerning removal and remedial action, including state laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States, when such facilities are not included on the National Priorities List." It is unclear whether this means that the DOE must comply with state laws only and not the NCP when it performs remedial actions at its non-NPL sites.

2.3 PROCEDURAL ISSUES

The purpose of this section is to identify those procedures outlined in the proposed NCP that need to be integrated in a more comprehensive manner.

2.3.1 Public Information and Community Relations

The proposed NCP couples community relations requirements in a manner that is inappropriate. For example, Section 300.415(n) requires the lead agency conducting either emergency or time-critical removal actions which continue beyond 120 days to (1) publish a notice of availability of the administrative record, provide at least a 30 day public comment period, and respond to the significant comments *and* (2) conduct interviews, prepare a formal CRP, and establish an information repository. The coupling of these requirements seems burdensome. First, it is unclear what additional information could be gained from public interviews that would not be elicited during the public comment period. The CRP could be based on the public comments rather than the community interviews. Accordingly, the community interview requirements should be waived for those removals for which a public comment period is provided. Secondly, the 60-day requirements should be postponed until 120 days. This is consistent with EPA reasoning as outlined in the preamble (53 FR 51450): "The additional time allocation in the proposed regulation (120 days versus 45 days as in the current NCP) provides more flexibility, allows for more effective use of lead agency resources, and also provides a more realistic time period for assessing the community's specific needs."

The proposed NCP also couples community relations requirements during ERAs and the remedial actions itself. Prior to the selection of the remedial alternative, the lead agency must conduct public interviews, prepare a formal CRP, and establish a local information repository [Section 300.430(c)(2)] *and* make the proposed remedial plan available to the public, provide at least a 30 day public comment period, provide the opportunity for a public meeting, and prepare a written summary of comments and lead agencies responses to them [Section 300.430(f)(2)]. Prior to implementation of the ERA, the lead agency must conduct interviews, prepare a formal CRP, establish an information repository, provide at least a 30-day public comment period on the EE/CA, and respond to significant comments [Section 300.415(n)(4)]. Again, the coupling of these requirements is cumbersome.

Sections 300.415(n)(3)(ii) and 300.430(c)(2) require the preparation of a community relations plan (CRP). It is unclear what this plan is and what it should include. Adding a definition of CRP into proposed Section 300.5 would clarify this. The definition should describe its purpose and provide examples of its contents (e.g., "*The CPR may include, but is not limited to, the following activities:*").

Section 300.415(n)(2)(ii) requires a public comment of not less than 30 days from the time the administrative record file was made available to the public for emergency and time-critical removal actions. This requirement is meaningless for those actions which are already completed by this time (as noted in the preamble; 53 FR 51469). No public involvement in the response action selection can occur. Hence, this paragraph should be edited to read: "Provide a public comment period of not less than 30 days from the time the administrative record is made available for public inspection, pursuant to Section 300.820(b)(2), *unless the removal activity has already been completed by that time.*" Likewise, Section 300.820(b)(2) should be edited to read: "The lead agency shall provide a public comment period of not less than 30 days beginning at the time the administrative record

is made available to the public, *unless the removal activity has already been completed by that time.*" Accordingly, the public would have access to information on the removal action taken, but the lead agency would not have to receive or respond to public comments.

2.3.2 ARARs

Section 300.310(c) states that "Oil and contaminated materials recovered in cleanup operations shall be disposed of in accordance with the CRP and OSC contingency plan and any applicable laws, regulations, or requirements." If the purpose of this paragraph is to require that the disposal of cleanup materials meet ARARs (as stated in the preamble; p. 51403), then this paragraph should read: "Oil and contaminated materials recovered in cleanup operations shall be disposed of in accordance with the CRP and OSC contingency plan and any *ARARs*." For procedural consistency, language similar to Section 300.400(g) on ARARs for hazardous substance responses should then be added here to aid in the identification of ARARs for oil responses.

It is unclear whether non-Fund-financed removal actions must attain or exceed ARARs. Section 300.415(j) notes that Fund-financed removals must comply with ARARs "to the extent practicable considering the exigencies of the situation." The EPA should clarify if *de facto* compliance to this requirement is expected.

2.3.3 EE/CA and RI/FS

According to the preamble (53 FR 51411), an EE/CA is required for expedited response action (ERAs) taken during the remedial process. It is unclear how this EE/CA would interface with the RI/FS when the need for a removal is discovered after the RI/FS is complete. For example, it is conceivable that another FS would have to be conducted when the ERA makes the preferred remedy obsolete. These procedures should be better integrated. Also, it would be useful for the EPA to extend its recontracting authority per Section 300.435(e) to Federal agencies when the need for a removal is discovered after the Federal facility has entered into a contract for remedial action work.

3. OTHER ISSUES

Section 300.115(b)(1) states that "The [RRT] standing team's jurisdiction corresponds to the *standard Federal regions*." These regions are not defined in Section 300.5. Figure 2 may depict these regions, but it is not referenced in the text (nor is Figure 3). This figure should be referenced if, in fact, it depicts the appropriate standard Federal regions, or the definition of this term should be added to Section 300.5.

Section 300.120(a) states that "RPMs shall be assigned by the lead agency to manage remedial or other response actions *at NPL sites*, except as provided in paragraphs (b) and (c) of the section." Section 300.120(e), however, states that "The RPM is the prime contact for remedial or other response actions being taken (or needed) at sites on the proposed or promulgated NPL, *and for sites not on the NPL but under the jurisdiction, custody, or control of a Federal agency.*" This is somewhat confusing. The exception in paragraph (a) could apply to the assignment of the RPM or to the sites that are to be managed. To clarify this issue, this paragraph should read "RPMs shall be assigned by the lead agency to manage remedial or other response actions at NPL sites and sites not on the NPL but

under the jurisdiction, custody, or control of a Federal agency, as provided in paragraphs (b) and (c) of the section."

Section 300.135(b) authorizes the first Federal official affiliated with a NRT member agency who arrives at the scene of a release or discharge to initiate, in consultation with the OSC, any necessary actions normally carried out by the OSC until the arrival of the predesignated OSC. The logical structure of the NCP would be improved if this authorization were discussed under Section 300.130 with the other authorizations for the initiation of response.

Section 300.140(b) could be edited to read "The RRT shall designate the OSC/RPM if the *lead* agencies who have response authority within the affected areas are unable to agree on the designation." The use of "lead" rather than "RRT member" is more accurate.

Section 300.425(e)(1) discusses deletion of sites from the NPL. If the policy of deletion of sites from the NPL via deferral to another statutory authority is adopted, then this paragraph may have to be edited to reflect this.

Section 300.435(c) addresses the community relations required during the Remedial Design/Remedial Action (RD/RA) phase of remedial response. EPA has solicited comments on the advisability of including other community relations requirements during the RD/RA (53 FR 51453). This is unnecessary. The public should already have sufficient information regarding the remedial design via the community relation requirements of the Remedial Investigation/Feasibility Study (RI/FS) phase. Furthermore, requiring additional community relations at this stage would divert needed funds and effort from the response itself.

4. IMPLICATIONS FOR THE DEPARTMENT OF ENERGY

The implications of the proposed NCP on the DOE are not clear at this time, because Subpart K, which specifically addresses federal facilities, has been reserved and is currently being drafted. Many issues involving the jurisdictional and procedural concerns for the DOE should be addressed in Subpart K. However, a review of drafts of the National Contingency Plan dated February 12, 1988 and July 30, 1988 by the Energetics Corporation raised several questions regarding impacts on the DOE. Some of these questions were resolved in the December 21, 1988 proposed NCP. The following is a presentation of the major questions raised by those reviews and corresponding answers. Additionally, general questions regarding impacts on the DOE traditionally raised in analysis of any new proposal are also presented.

What requirements of the NCP are intended to apply specifically to the DOE?

The DOE is specifically required to predesignate OSCs and RPMs for releases of hazardous substances, pollutants, or contaminants from facilities under DOE's jurisdiction, custody, or control. Section 300.120(b)(1) states that "In the case of DOD or DOE, DOD or DOE shall provide OSCs/RPMs responsible for taking all response actions." The proposed NCP places the responsibility for predesignating OSCs/RPMs on the regional or district head of the lead agency [see Section 300.135(a)]. The lead agency should provide appropriate training for its OSCs, RPMs, and other response personnel so they can perform

their responsibilities under the NCP [see Section 120(g)(1)]. The OSC is responsible for developing an OSC contingency plan [Section 300.120(d)] and for writing an OSC report within 90 days of the completion of on-site removal activities (Section 300.165). Section 300.210(c)(1) states that "Boundaries for OSC contingency plans shall coincide with those agreed upon among EPA, USCG, DOE, and DOD, subject to functions and authorities delegated in Executive Order 12580, to determine OSC areas of responsibility and should be clearly indicated in the RCP [Regional Contingency Plan]." The RPM is responsible for coordinating, directing, and reviewing the work of other agencies and contractors to assure that the response activities comply with the NCP [see Section 300.120(e)(2)]. The appropriate training includes a program for occupational health and safety [see Section 300.150(c)].

The DOE is also specifically identified as a trustee for natural resources. Section 300.600(b)(3) states that "The trustees for the principal federal land managing agencies are the Secretaries of the Department of the Interior, the Department of Defense, and the Department of Energy." Trustee responsibilities are outlined in proposed Section 300.615. The trustee must provide the RRT with information on appropriate contacts to receive any notifications from the OSCs/RPMs of potential damages to natural resources under their trust. Trustees may conduct damage assessments on potentially impacted trust resources and devise a plan for and conduct resource restoration, rehabilitation, replacement, or acquisition activities.

Can the DOE develop its own separate but parallel requirements for response actions it takes at DOE facilities?

It appears that the DOE must follow NCP requirements for all remedial actions taken at its facilities. The preamble, which reflects current EPA policy, states that "The requirements of the NCP . . . are applicable to federal agency response actions under CERCLA at NPL and non-NPL sites, except where specifically noted that the requirements apply only to Fund-financed activities" (see 53 FR 51396). Federal facilities are not eligible for Fund-financed remedial actions except as provided in CERCLA Sections 111(c) and (e)(3). These sections address the costs for restoring damaged natural resources, establishing and maintaining federal agency response teams under the NCP, providing a program to protect the health and safety of response personnel, and providing alternative water supplies in cases where groundwater contamination spreads outside the boundaries of a federal facility and the federal facility is not the only potentially responsible party. Based on waiving "Fund-financed" requirements, it appears that the DOE can:

- o respond to releases of naturally occurring substances, releases from products that are part of the structure and result in exposure within buildings, or releases into public or private drinking water supplies due to deterioration of the system through ordinary use [Section 300.400(b)];
- o continue removal activities after \$2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site [Section 300.410(b)(5)];

- decline to list the release in the CERCLIS removal inventory when a removal is initiated [Section 300.415(e)];
- perform removal actions which fail to attain or exceed ARARs [Section 300.415(j)]; and
- designate groundwater or surface water treatment or restoration measures as "remedial action" for an unlimited length of time [Section 300.435(f)].

However, it appears that DOE is unable to:

- waive ARARs when their attainment would not provide a balance between the need for protection of human health and the environment at the site and the availability of funds to respond to other sites that may present a threat to human health or the environment [Section 300.430(f)(3)(iv)(F)] or
- extend an existing contract for a federal-lead remedial action to continue work that is outside the scope of the original contract [Section 300.435(e)(1)].

The problem arises, because the preamble (53 FR 51396) also states that "Even in instances where NCP requirements do not appear strictly to apply to federal agency response, *de facto* compliance may still be necessary." The example provided is the statutory \$2 million/12-month limits. Hence, DOE may have to meet NCP requirements for all actions, including actions involving *de minimis* levels of contaminants.

At this point, it is unclear what freedom federal agencies can exercise at their non-Fund-financed sites. Their freedom may be bounded by CERCLA Section 120(a)(2), which states that "No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this chapter." However, EPA's freedom on this issue may be bounded by CERCLA Section 120(a)(4), which states that "State laws concerning removal and remedial action, including state laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States, when such facilities are not included on the National Priorities List." Subpart K will need to address explicitly non-Fund-financed response action at federal facilities, both those that are listed and not listed on the NPL.

Is there any way that DOE facilities could be deferred from listing on the National Priorities List? How can facilities get delisted once they are on the NPL?

Currently, the EPA defers the listing of sites on the NPL when other authorities exist that are capable of accomplishing the needed corrective action. These authorities include RCRA Subtitle C (corrective action authorities) and the Nuclear Regulatory Commission (53 FR 51416). The EPA is considering deferring more generally to Federal authorities. The EPA provides two reasons for this: (1) by deferring to other authorities, a maximum number of potentially dangerous hazardous waste sites can be addressed, with efforts and Superfund monies directed at those sites where remedial action cannot be

achieved by other means; and (2) it is appropriate to defer to authorities that are in place to achieve corrective action (53 FR 51415).

Where DOE facilities could be regulated under these new proposed authorities, they may be possible for them to be deferred from listing. These new proposed authorities are (1) the corrective action provisions in RCRA Subtitles D and I; (2) the Surface Mining Control and Reclamation Act of 1977 in cases where states address sites using State-share monies from the Abandoned Mine Land Reclamation Fund; (3) the Federal Insecticide Fungicide and Rodenticide Act for pesticide application sites; and (4) other federal or state authorities when appropriate. For response actions under these new authorities, the EPA proposes that some oversight by CERCLA officials or the application of CERCLA cleanup standards should be required. For those sites that could be regulated by a mix of authorities, the EPA requests comments on whether these sites should be deferred to the mix or addressed comprehensively under CERCLA.

Deferral from listing has the advantage of preventing the stigma of being listed and its associated public relations problems. However, under deferral, it may be difficult to identify those response procedures and timetables that are applicable. These would have to be explicitly described under the authority to which the site was deferred. Secondly, for DOE facilities, it may be more difficult to acquire cleanup funds from Congress for those sites which are not seen as "top priorities" according to the NPL and CERCLA.

The EPA also is considering deferring from listing sites where potentially responsible parties (PRPs) enter into federal enforceable agreements for site remediation under CERCLA (53 FR 51419). The EPA states that this may "facilitate EPA efforts to expeditiously obtain such enforceable agreements for remedial action that would otherwise be listed on the NPL and evaluated under the CERCLA remedial program" (53 FR 51420). State concurrence would be necessary before such sites could be deferred. It is unclear whether this policy includes or could be expanded to include Federal facilities.

Once sites are listed on the NPL, they can be deleted when all appropriate response actions have been implemented, no further response action is appropriate, or the remedial investigation has shown that the release poses no significant threat and therefore no action is appropriate [see proposed Section 300.425(e)]. Under the proposed NCP revisions, state concurrence would be required before a site could be deleted from the NPL. The EPA is also considering a policy to delete sites from the NPL before a cleanup is complete when the site is being or will be addressed under another statute or authority (53 FR 51421). The EPA states that this may be applied in limited circumstances and on a case-by-case basis, given that a review of all sites on the NPL would be too time consuming. A site may be an acceptable candidate for deletion based upon deferral where the EPA has evidence that: (1) a site is currently being addressed by another regulatory authority under an enforceable order or permit requiring corrective action or when PRPs have entered into a CERCLA consent order to perform the RD/RA; (2) remediation is progressing adequately; (3) deletion would otherwise not disrupt the on-going response; and (4) all criteria for deferral to that authority have been met.

What cleanup levels can the DOE be expected to achieve for surface water and groundwater?

Remediation of groundwater at CERCLA sites will be conducted within the framework of the EPA's Groundwater Protection Strategy (53 FR 51433). This strategy established different degrees of protection for groundwater based on its vulnerability, use,

and value. There are three classes of groundwater under the strategy. Class I groundwaters are resources of unusually high value that are highly vulnerable to contamination because of the hydrological characteristics of the areas where they occur. They may be the sole source of drinking water or provide the base flow for sensitive ecological systems. Class II groundwaters are all non-Class I groundwaters that are currently used or are potentially available for drinking water or other beneficial uses. Class III groundwaters are not considered to be potential sources of drinking water and are of limited beneficial use. These include highly saline aquifers and aquifers that are contaminated beyond restoration levels.

For Class I and II groundwaters and surface waters that may be used for drinking, Maximum Contaminant Levels (MCLs) will be relevant and appropriate as cleanup standards (53 FR 51441). MCLs are enforceable standards promulgated under the Safe Drinking Water Act (SDWA). They represent the maximum allowable level of a contaminant in water that is delivered by public water systems. A MCL is required to set as close as feasible to its respective Maximum Contaminant Level Goal (MCLG), taking into account the best technology, treatment techniques, and other factor such as cost. MCLGs are health-based goals set at levels at which no adverse health effects may arise, with a margin of safety. In many cases (e.g., for noncarcinogens), the MCL will be equivalent to the MCLGs.

For Class III aquifers, drinking water standards are neither applicable nor relevant and appropriate. Cleanup alternatives for these groundwaters will be site-specific, and the evaluation will be less extensive than for Class I and II groundwaters. The primary goal of remediation will be to prevent the spread of contamination to surface water or higher class groundwater.

Will the CERCLIS data base contain information on DOE Federal facilities?

It is not clear whether CERCLIS will contain information on all response action at DOE facilities. The preamble (53 FR 51399) indicates that CERCLIS is an inventory of "potential hazardous waste sites" at which removal, remedial, and enforcement activities may be needed or are occurring. It is supposed to contain a comprehensive list of all Superfund activities.

Proposed Section 300.415(e) states that "When a *Fund-financed* removal action is initiated, the release shall be listed in the CERCLIS removal inventory." It fails to address non-Fund-financed removals. Accordingly, by omission, removals at federal facilities may not be listed on CERCLIS. Section 300.410(h) states that "If a remedial site evaluation is performed, the releases will be listed in the CERCLIS remedial inventory, if not already included." Hence, all sites where a remedial site evaluation is performed would appear in CERCLIS, regardless of whether the site is NPL, non-NPL, Fund-financed, or non-Fund-financed.

The proposed NCP is silent about what information must be provided for listing in CERCLIS. The DOE may be able to withhold any information that it deems is privileged.

What response decisions can DOE make on its own?

The proposed NCP fails to address this explicitly. However, it appears that DOE, as a lead agency, can select the removal actions to be taken at facilities under DOE

jurisdiction, custody, or control on its own. Section 300.415(b)(1) states that "At any release . . . where the lead agency makes the determination . . . that there is a threat to public health or welfare or the environment, the lead agency may take any appropriate action to abate, minimize, stabilize, mitigate, or eliminate the release or the threat of release." As noted in Section 2.2.3 above, there may be limits to this discretion.

What form will IAGs take and how will they be implemented?

The interagency agreement (IAG) is not specifically addressed in the proposed NCP. It most likely will be discussed in Subpart K regarding federal facilities. IAGs are addressed in CERCLA Section 120(e). The head of the federal agency must enter into an IAG with the EPA Administrator within 180 days of the time when the EPA Administrator reviews the results of the RI/FS. The IAG may include a review of alternative remedial actions and the selection of the final remediation process, a schedule for the completion of each remedial action, and arrangements for long-term operation and maintenance of the facility.

What will be the relationship between DOE and the State?

The lead agency has several responsibilities regarding state involvement in response actions. These can be classified as notification requirements and cooperation requirements.

The lead agency OSC is responsible for most of the notification requirements. The OSC must notify the Governor or his designee of the state affected by a release [Section 300.405(e)] and the appropriate state natural resource trustee if trust resources may be or are threatened by a release (Section 300.605). The lead agency's community relations spokesperson must notify affected citizens and state and local officials after a release or a threat of a release [Section 300.415(n)(1)].

The lead agency must cooperate with the states as follows. The OSC should develop the OSC contingency plan in cooperation with state and local representatives [Section 300.120(d)] and must coordinate the response efforts with the appropriate state and local agencies [Section 300.135(d)]. The lead agency must also cooperate with the state in the identification of ARARs. According to the preamble (53 FR 51398), the state will be a support agency to the lead federal agency. As such, the state will identify its ARARs and TBCs and provide them to the lead agency. Finally, the lead agency must consider state acceptance as a modifying criteria when developing and selecting a remedial alternative [Section 300.430(f)(3)(1)(iii)]. The lead agency must consider (1) the state's position and key concerns related to the preferred alternative and other alternatives and (2) state comments on ARARs or the proposed use of waivers [Section 300.430(e)(9)(iii)(H)]. Nothing in the proposed NCP requires the lead agency to concur with the state. State acceptance is *not* required for selection of a final remedy. However, the preamble implies that the DOE would have to address state objections in its selection of a remedy. At non-NPL sites, the states may have considerable authority in selecting the remedial alternative, as may be granted by CERCLA Section 120(a)(4). Subpart K will have to address this.

Are the requirements in the proposed rule appropriate and reasonable?

The majority of the requirements dictated by the proposed NCP are appropriate and reasonable. However, many issues regarding non-Fund-financed responses in general and federal facilities in particular are unresolved. We are unable to render a definitive answer to this question until Subpart K is proposed, yet we will provide the following observations. First, the NCP as proposed places several requirements on federal facilities that are inappropriate and unreasonable. These requirements appear arbitrary and capricious when compared to private party and EPA requirements. Secondly, certain public information and community relations requirements appear inappropriate.

SARA amended CERCLA to require federal facilities to comply with CERCLA to the same extent as private parties. CERCLA Section 120(a)(1) states that "Each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . ." Two requirements proposed in the preamble are more stringent for federal facilities than for private facilities.

First, private parties that enter into a settlement under CERCLA Section 106 (Abatement Actions) or 122 (Settlements) are exempted from the requirements to terminate removal action after \$2 million has been obligated or 12 months have elapsed from the time removal activities begin on-site [Section 300.415(k)(3)]. The preamble (53 FR 51396) states that federal facilities will have to respect these limits (see also the discussion in Section 2.2.4 above).

Secondly, the EPA is considering a policy of not listing sites on the NPL where PRPs enter into a federal enforceable agreement for site remediation under CERCLA. The EPA states that this may "facilitate EPA efforts to expeditiously obtain such enforceable agreements for remedial action that would otherwise be listed on the NPL and evaluated under the CERCLA remedial program" (53 FR 51420). We agree that this policy is valuable. However, a similar policy should be extended to federal facilities. While we understand that CERCLA Section 120(e) may bind the EPA to list federal facilities on the NPL so that the RI/FS and IAG timetables are triggered, we feel that a delisting policy should be adopted. Specifically, federal facilities should be delisted from the NPL following the procedures outlined in Section 300.425(e) once the federal agency and the EPA have entered into a IAG for the site. This would give the federal agency an incentive to complete the RI/FS and IAG expeditiously, allow the EPA to focus on sites that are not being addressed by another party, and reduce risks to human health and the environment via more timely action.

The proposed NCP also places responsibilities on federal agencies other than the EPA that are more stringent than those when EPA is the lead agency. For example, the EPA (as the lead agency for Fund-financed responses) can waive ARARs when the attainment of ARARs will not provide a balance between the need for protection of health and environment at the site and the availability of funds to respond to other sites that may present a threat to health or environment [Section 300.430(f)(3)(iv)(F)]. Secondly, the EPA can extend an existing contract for remedial action to continue work that is outside the scope of the original contract [Section 300.435(e)(1)]. Finally, under Fund-financed responses, the state must fund the entire additional cost associated with compliance with state ARARs that the state has identified but that the EPA has determined are not ARARs or has decided to waive. We suggest that these provision be extended to include all federal responses, regardless of whether the EPA or other federal agency is the lead agency.

Federal agencies must use fund-balancing techniques to appropriate funds among their response sites and must conserve funds in the same manner that the EPA fund-balances and conserves monies in the Hazardous Substance Superfund.

We believe that two of the community relations requirements are inappropriate and over-burdensome, as outlined in Section 2.3.1 above. These include (1) holding a public comment period and addressing those comments even when the removal is finished and (2) conducting public interviews. The resources directed toward these activities would be better spent on the response action itself. These proposed policies go beyond the Congressional mandate for public involvement and may subvert efforts to facilitate expeditious response actions. A more enlightened policy that grants more flexibility regarding public relations programs would allow for greater resources to be directed toward cleanup.

Are the philosophical and analytical approaches of the rule consistent with previous rules in the same technical or statutory areas?

We have identified three definitions in the proposed rule which are not consistent with other hazardous waste rules. The definitions of *discharge*, *facility*, and *on-site* are substantially different between CERCLA (per Section 300.5) and RCRA (per Section 260.10). When RCRA requirements are ARARs, it is unclear whether the RCRA or CERCLA definitions should be used.

Under RCRA, *discharge* means "the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of hazardous waste into or on any land or water." In the proposed NCP, *discharge* refers only to oil.

Under the RCRA program, *facility* means "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste; a facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them)." Under the proposed NCP (Section 300.5), *facility*, per CERCLA Section 101(9), means "any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."

Under the RCRA program, *on-site* means "the same or geographically contiguous property which may be divided by public or private right-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right-of-way; non-contiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property." Under Section 300.5 in the proposed NCP, *on-site* for permitting purposes means "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."

Does the rule identify all appropriate options and are they clearly and adequately described?

The rule fails to identify all appropriate options. Through this failure, it provides enough flexibility to tailor response action to site-specific situations. Each response site is unique, and response activities at different sites may need significantly different approaches. Hence, all options cannot be identified or clearly described. Nevertheless, a more thorough description of options at non-Fund-financed and non-NPL sites could be made.

Are the procedures and technologies specified in the rule likely to provide sufficient information to meet their intended purposes or requirements?

Procedures are provided for performing removal and remedial site evaluations and the RI/FS. The purpose of the removal site evaluation is to provide information to the lead agency so the appropriateness of a removal action can be determined [Section 300.415(a)(1)]. The purpose of the remedial site evaluation is equivalent to that for removals, but information necessary to score a site using the HRS must also be obtained [Section 300.415(c)(1)]. The actions performed during the site evaluations would provide sufficient information to meet their purposes. It is unclear whether the proposed HRS score meets its intended purpose of specifying priorities and triggering additional requirements of process and justification of actions under CERCLA. However, the HRS is not addressed in the proposed rule, and this issue is beyond the scope of this report. The purpose of the RI/FS is to collect information necessary to select a remedial alternative. The process outlined in the proposal will provide information sufficient to do this.

When two or more technical analyses, test procedures, etc. are proposed by the rule, will they be likely to yield comparable results? Will they require the same level of effort to complete? Is there any bias built into the rule?

The alternatives proposed in the preamble (53 FR 51430) for selecting remedies during the RI/FS process would yield different results. The EPA's preferred alternative involving nine criteria (2 threshold, 5 primary balancing, and 2 modifying) does not appear to address the major limitations to cleaning up CERCLA sites — feasibility and cost. The "variation number 1" option may be the most beneficial screening process because it adds additional structure while maintaining appropriate flexibility. Limiting the balancing criteria to three broad categories makes the selection process more manageable. "Variation number 2" is too structured to accommodate the selection process. "Alternative strategy i: point of departure" strategy is undesirable because it may prevent appropriate distribution of limited DOE resources. The "analytical tools and techniques" process is too structured, although use of some analytical tools may be beneficial.

What technical and economic resources are required by the proposed rule? What demands is it likely to place on the DOE's internal capabilities and resources?

The DOE will have to develop or contract for technical expertise to fulfill their obligations under the proposed NCP. These include (1) designating and training DOE OSC, RPM, and other response personnel so they can assure that the DOE response will comply with the NCP [Section 300.120(g)(1)]; (2) training community relations spokespersons so they can interact with appropriate state and local representatives and the public (Section 300.155); (3) preparing DOE Radiological Assistance Coordinating Offices so they can provide advise and assistance to other OSCs/RPMs for emergency actions to control immediate radiological hazards involving source, by-product, or special nuclear material or other ionizing radiation sources [Section 300.175(b)(5)]; and (4) designating and training personnel to perform natural resource trustee responsibilities (Section 300.615).

The EPA provides estimates of the cost of the proposed NCP regulatory impact assessment summary in the preamble (53 FR 51471). They estimate that the selection of remedy during the FY87 through FY91 period is \$0.9 billion to federal agencies, which is \$0.5 billion more than that imposed by the current NCP. The DOE will need to submit budget requests to Congress to finance DOE response actions and to provide assistance to other lead agencies (e.g., for the Radiological Coordinating Offices). Careful monitoring of both response and remedial action progress at all sites will be necessary to periodically update estimates of resource requirements.

What specific data bases or sets are necessary to perform the analyses or otherwise determine the impact of the rule on DOE? Are there data bases or sets presently available, and if so, where are they available and in what form?

The DOE should review RI/FS documents and RODs from past cleanups at both NPL and non-NPL sites. This would allow DOE to identify similarities among sites, remedial alternatives, and cleanup levels for soils and groundwater. Potential ARARs in states with DOE facilities should be compiled and updated regularly.

5. ACKNOWLEDGEMENT

This research was supported in part by an appointment for M.B. Levine to the U.S. Department of Energy Laboratory Cooperative Postgraduate Research Training Program administered by Oak Ridge Associated Universities.

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