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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE
OSWER Directive 9280.0-0

MEMORANDUM

SUBJECT: Policy on Floodplains and Wetland Assessments
for CERCLA Actions

FROM: William N. Hedeman, Jr., Director
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TO: Toxic and Waste Management Division Directors
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Response to releases of hazardous substances is often affected by floodplain and wetland issues. Under this policy Superfund actions must meet the substantive requirements of the Floodplain Management Executive Order (E.O. 11988), and the Protection of Wetlands Executive Order (E.O. 11990) (see attached), and Appendix A of 40 CFR Part 6, entitled Statement of Procedures on Floodplain Management and Wetland Protection. The purpose of Appendix A of 40 CFR Part 6 is to set forth EPA's policy and guidance for carrying out the provisions of Executive Orders 11988 and 11990. This memo discusses situations that require preparation of a floodplains or wetlands assessment, and the factors which should be considered in preparing an assessment, for response actions undertaken pursuant to section 104 or 106 of CERCLA.

For removal actions, the on-scene coordinator (OSC) must consider, to the extent practicable, taking into account the exigencies of the situation, the effect the response action will have on floodplains and wetlands. For remedial actions, a floodplain/wetlands assessment must be incorporated into the analysis conducted during the planning of the remedial action.

I. BACKGROUND

A. Floodplains

Floodplains are relatively flat areas or lowlands adjoining the channel of a river, stream or water course which have been or may be covered by floodwater. A flood is a general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters and/or

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the unusual and rapid accumulation or runoff of surface waters from any source. A reference to a floodplain should be accompanied by a modifier indicating the level of flooding, e.g., 100-year floodplain (one percent chance of flooding in any year).

Executive Order 11988 - Floodplain Management

Executive Order 11988 requires Federal agencies carrying out their responsibilities to take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains. To do this, Federal agencies must evaluate the potential effects of any actions they may take in a floodplain to ensure that their planning programs and budget requests reflect consideration of flood hazards and floodplain management, including the restoration and preservation of such land areas as natural undeveloped floodplains. This order emphasizes the importance of evaluating alternatives to avoid effects and incompatible development in the floodplains, of minimizing the potential harm to floodplains if the only practicable alternative requires siting an action in a floodplain and providing early and adequate opportunities for public review of plans and proposals involving actions in floodplains.

B. Wetlands

Wetlands are land areas which, because of their frequent inundation by surface or ground water, can support vegetative or aquatic life that requires saturated soil conditions. Wetlands generally include but are not limited to swamps, marshes, bogs and similar areas such as sloughs, pot holes, wet meadows, river overflows, mud flats and natural ponds.

Executive Order 11990 - Protection of Wetlands

Executive Order 11990 requires Federal agencies in carrying out their responsibilities to take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands. The order emphasizes the importance of avoiding undertaking new construction located in wetlands unless there is no practicable alternative to that construction, minimizing the harm to wetlands if the only practicable alternative requires construction in the wetland, and providing early and adequate opportunities for public review of plans and proposals involving new construction in wetlands.

C. Statement of Procedures on Floodplain Management and Wetlands Protection - Appendix A to 40 CFR Part 6

EPA has promulgated regulations implementing procedures on the National Environmental Policy Act (NEPA) at 40 CFR Part 6. Appendix A of Part 6 (Appendix A) deals with procedures

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on Floodplain Management and Wetland Protection. The purpose of Appendix A is to set forth Agency policy and guidance for carrying out the provisions of Executive Orders 11988 and 11990.

Appendix A provides that it is the intent of these Executive orders that, wherever possible, Federal agencies implement the floodplains/wetlands requirements through existing procedures, such as those internal procedures established to implement NEPA. In those instances where the environmental impacts of a proposed action are not significant enough to require an environmental impact statement (EIS) pursuant to section 102(2)(C) of NEPA, or where programs are not subject to the requirements of NEPA, alternative but equivalent floodplain/wetlands evaluation and public comment and notice procedures must be established. Furthermore, Appendix A prescribes the requirements for floodplain/wetlands review of proposed EPA actions.

II. POLICY

A. Removal Actions

Removal actions are exempt from compliance with section 102(2)(C) of NEPA because there is a fundamental conflict in statutory purpose between EIS requirements and EPA's removal authority. This conflict arises from the fact that it would be virtually impossible for EPA to follow the lengthy EIS process and at the same time expeditiously undertake removal actions.

1. Floodplain/Wetland Assessment

However, a floodplains/wetlands evaluation required by Appendix A would not be as lengthy as the EIS process. Therefore, the OSC or lead Agency should attempt to incorporate a floodplains/wetlands assessment into the preliminary assessment for the removal action. The floodplains/wetlands assessment must consider the following: whether or not the action will be located in or affect a floodplain or wetland; the impact of the action on the floodplain or wetland; the alternatives available; and measures to minimize potential harm to the floodplain or wetland if there is no practicable alternative to locating in or affecting the floodplain or wetland [for a more detailed explanation of these factors see Section III, Remedial Actions, of this policy]. However, because removal actions often involve situations requiring expeditious action to protect public health, welfare or the environment, it may not always be feasible to perform a floodplains/wetlands assessment. In those circumstances where a floodplain/wetland assessment cannot be performed, the OSC report or other

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documents should specify the reasons. At the OSC's discretion, considering the exigencies of the situation, the OSC should consult with the Regional 404 Staff where wetlands/floodplains are involved or suspected to be involved.

For all lead agency removal actions where a floodplain/wetland assessment is performed and is proposed to be in or affecting a floodplain/wetland the OSC shall document the decision in the OSC report. The decision shall be accompanied by a Statement of Findings, not to exceed three pages that includes (i) the reasons why the proposed action must be located in or affects the floodplain/wetlands; (ii) a description of significant facts considered in making the decision to locate in or to affect the floodplain or wetland including alternative sites and actions; (iii) a statement indicating whether the proposed action conforms to applicable State or local floodplain/wetland protection standards; (iv) a description of the steps taken to design or modify the proposed action to minimize potential harm to or within the floodplain or wetland; and (v) a statement indicating how the proposed action affects the natural or beneficial values of the floodplain or wetland.

2. Opportunity for Citizen Comment

Appendix A has two public notice requirements. One is public notice when it is apparent that a proposed or potential agency action is likely to impact a floodplain or wetland and the other is public notice of the selected decision.

Because of the expeditious nature of removal actions extending 45 days or less, no formal community relations plan must be developed. Instead, a spokesperson will be designated by the lead agency to inform the community of actions being taken, to respond to inquiries and to provide information concerning the release. If the exigencies of the situation permit the performance of a floodplain/wetland assessment, the assessment must be included in the spokesperson's presentation. This will provide early public notice as required by Appendix A.

The OSC report, which contains the selected decision or the reasons why a floodplain/wetland assessment cannot be performed, must also be made available to the public. The OSC report will provide public notice of the selected decision as required by Appendix A.

If the required removal action extends over 45 days, a formal community relations plan must be developed. If the exigencies of the situation allow for a floodplain/wetland assessment, this assessment must be made available for a three week public comment period. This will provide early public notice and an opportunity for participation in the decisionmaking process as required by Appendix A.

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If it is known that a floodplain/wetland assessment will be conducted at the time of the preparation of the Community Relations Plan than the public comment period must be noted in the plan. The OSC report, which contains the selected decision or the reasons why a floodplain/wetland assessment cannot be done, is also required for the "longer" removals and must be made available to the public. This will provide public notice of the selected decision as required by Appendix A.

B. Remedial Actions

An EIS is unnecessary for remedial actions provided in that EPA meets the standards for a functional equivalent exception to the EIS requirements of section 102(2)(C) of NEPA. To comply with the functional equivalent exception, the agency must have expertise in environmental matters and meet the following criteria. First, the agency's authorizing statute must provide substantive and procedural standards that ensure full and adequate consideration of environmental issues. Second, the agency must afford an opportunity for public participation in the evaluation of environmental factors prior to arriving at a final decision.

1. Consideration of Environmental Issues

Remedial actions satisfy the first criterion for a functional equivalent exception because of the mandate for environmental assessment contained in section 104 of CERCLA and the procedural safeguards developed by EPA for the remedial planning process. The language in section 104, that directs that remedial actions be necessary to protect public health, welfare, and the environment, establishes a standard mandating consideration of environmental effects. Moreover, the procedures set forth in the National Contingency Plan (NCP) establish a process for conducting an analysis during the planning of remedial actions that is similar in content to the evaluation underlying an EIS. This analysis is contained in the remedial investigation/feasibility study (RI/FS). Therefore, for a remedial action to comply with the alternative but equivalent floodplain/wetland evaluation contained in Appendix A of 40 CFR Part 6, a floodplain/wetlands assessment must be incorporated into the analysis conducted during the planning of remedial actions which is established by the NCP.

During the scoping of remedial response actions, the Remedial Project Manager (RPM) or the lead Agency in conjunction with Regional 404 staff, should identify any floodplain or wetlands located within the site area or that could be affected by the response action. If the area is predominantly privately owned, the RPM or the lead agency shall consult with the Federal Insurance Administration of the Federal Emergency Management Agency which has two maps that will be useful in identifying floodplains. The Flood Insurance Rate Map shows the boundaries and elevations of the 100 and 500 years floodplains. The other map, Flood Hazard Boundary Map, shows the appropriate area of the 100 years

zone. A copy of these maps can be obtained by calling 1-800-638-6620. For areas predominately State or Federally owned, consult with the controlling Federal or State agency. Maps are available for some wetland areas from the Fish and Wildlife Service (National Wetlands Inventory Maps) or from local and State planning agencies. Also, the Regional 404 staff has access to the most up to date wetlands area information.

If there are no floodplains/wetlands located within the site area or that could be affected by a response action, the feasibility study should so state, and the response action may proceed without further consideration of the procedures set forth below. However, if the site is located within a floodplain/wetland or if the proposed remedial action would affect a floodplain/wetland, the RPM or the lead agency must conduct a floodplain/wetland assessment which will be integrated into the feasibility study. In the RPM's discretion, the RPM should consult with the Regional 404 staff in cases that require a floodplains/wetlands assessment. Floodplain/Wetland assessments shall consist of a description of the proposed action, a discussion of its effect on the floodplain/wetlands, a description of the alternatives considered and their effects on the floodplains and wetlands, and measures to minimize potential harm to the floodplain/ wetland if there is no practicable alternative to locating in or affecting floodplain/wetlands.

a. Floodplain Assessment Of Alternatives

In assessing the alternatives and their effects on the floodplain and floodplain protection, the RPM or lead agency should consider such factors as environmental effects, community welfare, cost and technology. All possible alternatives must be considered, including the no action alternative. If one or more of the alternatives will be located in a floodplain, those alternatives may not be selected unless a determination is made that no practicable alternatives exists outside the floodplain.

If no practicable alternatives exist outside the floodplain, and the RPM or lead agency has determined or proposes to allow a remedial action to be located in a floodplain, then the RPM or lead agency shall act to minimize potential harm or avoid adverse effects to the floodplain. This includes acting to restore and preserve the natural and beneficial values of floodplains. The benefits of preserving floodplains in their natural or relatively undisturbed state include not only reduction of flood hazards, but maintenance of water quality standards, replenishment of ground water, soil conservation, the fostering of fish, wildlife and plant resources and the provision of recreational areas.

The following are possible methods for minimizing potential harm to floodplains. This list, however, does not preclude the RPM or lead agency from using other measures that minimize potential harm or avoid adverse effects to floodplains.

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1. Use minimum grading requirements.
2. Return the site to natural contours.
3. Maintain floodplain vegetation to reduce sedimentation.
4. Regulate methods used for grading, filling, soil removal and replacement to reduce sedimentation.
5. Require topsoil protection program.
6. Raise the site above the floodplain.
7. Construct new structures or facilities in floodplains in accordance with accepted floodproofing and other flood protection measures and elevate structures above the base flood level rather than filling inland, wherever practicable.

b. Wetland Assessment Of Alternatives

In assessing the alternatives and their effects on wetlands, the RPM or lead agency in conjunction with the Regional 404 staff, should consider such factors as environmental effects, community welfare, cost and technology. All possible alternatives must be considered, including the no action alternative. If one or more of the alternatives will be located in a wetland, those alternatives may not be selected unless a determination is made that no practicable alternative exists outside the wetlands.

If no practicable alternative exists outside the wetlands, and the RPM or lead agency has determined or proposes to allow a remedial action to be located in a wetlands, then the RPM or lead agency shall act to minimize potential harm or to avoid adverse effects to the wetlands. This includes action to allow restoration and preservation of the natural and beneficial values of the wetlands. The benefits of preserving wetlands in their natural or relatively undisturbed state include the control of flood and storm hazards, maintenance of water quality standards and water supply, maintenance of natural systems, natural pollution abatement, conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber and food resources, and other uses of wetlands in the public interest including recreational, scientific and cultural uses. All impacts caused by an action occurring in a wetland must be evaluated and mitigated according to the EPA mitigation policy (under authority of the Clean Water Act section 404) in effect at the time of the proposed action, including the effects on the wetlands natural or beneficial value.

C. Documentation of Decision

For all lead agency response actions proposed to be in or affecting a floodplain/wetland the RPM or lead agency shall document their decision in the Record of Decision (ROD). The decision shall be accompanied by a Statement of Findings which may be included in the ROD support document or attached as a separate appendix. This statement will not exceed three pages and will include: (i) The reasons why the proposed action must be located in or affect the floodplain or wetlands; (ii) a description

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of significant facts considered in making the decision to locate in or affect the floodplain or wetlands including alternative sites and actions; (iii) a statement indicating whether the proposed action conforms to applicable State or local floodplain/wetland protection standards; (iv) a description of the steps taken to design or modify the proposed act to minimize potential harm to or within the floodplain or wetlands; and (v) a statement indicating how the proposed action affects the natural or beneficial values of the floodplain or wetlands.

2. Opportunity for Response to Citizen Concerns

Remedial actions satisfy the second criterion for a functional equivalent exception because current Agency procedures for public comment on remedial actions and the proposed amendments to the NCP afford the public an ample opportunity for participation in the evaluation of environmental factors prior to arriving at a final decision. The proposed amendments to the NCP and the current Superfund Community Relations Policy provide for a minimum 21-day comment period on the feasibility study which outlines alternative remedial measures prior to selection of the final remedial response. This public involvement in the remedial planning process would enable remedial actions to meet the public participation requirement for the functional equivalent exception to NEPA.

Appendix A, however, appears to require two further public notice requirements. One is any early public notice when it is apparent that a proposed or potential agency action is likely to impact a floodplain or wetlands and the other is public notice of the selected decision.

Current Agency policy suggests that a fact sheet summarizing the feasibility study response alternatives and other issues, be provided to the public 2 weeks prior to the minimum 3 week public comment period for the feasibility study. The fact sheet will include a statement explaining whether a proposed or potential remedial action is likely to impact a floodplain or wetlands. This will provide early public notice as required by Appendix A.

Concerning the public notice of a selected decision, the Agency suggests that a public notice and updated fact sheet summarizing the ROD be provided to the public. In addition, when the ROD is signed, it becomes a public document. The public notice, fact sheet and the availability of the signed ROD in the information repositories will provide public notice of the selected decision as required by Appendix A. The updated fact sheet will contain the alternative selected, any effects the response will have on floodplain/wetlands, and the Statement of Findings described in the Documentation of Decision Section above.

In addition, the Agency suggests that public meetings and other community relations activities be held as specified in the community relations plan.

D. Summary

1. Removal Actions

For removal actions, EPA's policy is to pursue actions that will meet applicable or relevant standards, and criteria of the other Federal environmental laws that deal with floodplains/wetlands to the maximum extent practicable, considering the exigencies of the situation.

2. Remedial Actions

For remedial actions, EPA's policy is to pursue remedies that attain or exceed applicable and relevant standards of other Federal environmental laws that deal with floodplains/wetlands, unless specific circumstances exist as referenced in section 300.68(i)(5) of the NCP. CERCLA procedural and administrative requirements will be modified to provide safeguards similar to those provided under other laws. Applications for and receipt of permits is not required for on-site response actions taken under the Fund-financed or enforcement authorities of CERCLA (i.e., Clean Water Act 404 permits are not required).

III. COMPLIANCE WITH OTHER FLOODPLAIN/WETLAND LAWS

The Agency has concluded that cleanups pursuant to sections 104 and 106 of CERCLA should comply with other Federal environmental standards, as a matter of policy, but not as a matter of law, except in a limited set of circumstances. For example, Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act apply to dredge and fill activities and must be complied with except in very limited circumstances such as fund balancing. (See "CERCLA Compliance with other Environmental Statutes" 50 FR 5928). However, permits are not required for these actions. This policy has also been proposed in amendments to the NCP (50 FR 5862). In addition, Federal public health and environmental criteria and advisories and State standards shall be considered, with appropriate adjustment, in determining the appropriate response action. Therefore, the Agency should also consider State and local floodplain/wetland protection standards and other Federal guidance. If the Agency does not use applicable State and local standards, the reason why should be documented in the Record of Decision or the Statement of Findings prepared by the OSC.

IV. IMPLEMENTATION

This policy will apply to all removals and remedial investigations and feasibility studies that are initiated after August 1, 1985.