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☒ **DRAFT**

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Name of Contact Person Cheryl Hawkins	Mail Code WH-548/B	Office OERR/ERD
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9. Name and Title of Approving Official Timothy Fields, Jr., Director, Emergency Response Division		Date 11/13/86

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

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE
OSWER Directive 9360.0-11

MEMORANDUM

SUBJECT: Request for Comments on "Environmental Review Requirements for Removal Actions"

FROM: Timothy Fields, Jr., Director *John Riley, Acting*
Emergency Response Division (WH-548/B)

TO: Addressees

Attached is a final draft of the Emergency Response Division's (ERD's) proposed policy for addressing the requirements of the National Environmental Policy Act (NEPA) relative to Superfund removal actions. This paper has been developed through consultation with the Office of General Counsel and the Hazardous Site Control Division. Please review this document and forward your comments to Sherry Hawkins (WH-548/B), ERD (phone 382-5650) by COB November 20, 1986.

Attachment

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DRAFT

ENVIRONMENTAL REVIEW REQUIREMENTS FOR REMOVAL ACTIONS

ISSUE

Under the revised National Oil and Hazardous Substances Contingency Plan (NCP), the definition of removal has been expanded to include all activities formerly considered immediate and planned removals, as well as initial remedial measures (IRMs). In addition, removal actions may be taken in response to a "threat" rather than being limited to "immediate and significant" threats. As a result of these changes, removal actions may now be undertaken in less urgent situations than before. Because longer lead-time will be available for some removal actions, this extension of removal authority raises the question of whether certain removal actions should be subject to a formal environmental review and public comment period.

BACKGROUND

NEPA requires every Federal agency to incorporate the consideration of environmental factors into its decision-making process. Specifically, NEPA requires Federal agencies "to the fullest extent possible" to prepare an Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." The EIS must include consideration of alternative actions, analysis of the environmental impact of the proposed actions, and an opportunity for public comment.

An exemption for Federal agency actions has been recognized by the courts in situations where compliance with EIS requirements would result in a "clear and unavoidable conflict" with the purpose or procedures of the agency's authorizing statute. This exemption has been applied to cases where it would be impossible for an agency to adhere to the formal EIS process and at the same time comply with a requirement for prompt action, such as that mandated by EPA's removal authority under CERCLA.

Under the old NCP, removal actions were divided into two categories -- immediate removals and planned removals. Immediate removals were undertaken where immediate response was necessary to prevent significant harm to human health or the environment. Planned removals were undertaken where an expedited, although not necessarily immediate, response was necessary. Due to the focus of immediate and planned removals on emergency and near-emergency situations, removal actions were not subject to NEPA EIS requirements on the grounds that the CERCLA requirement for prompt action in such cases conflicted with the EIS process mandated by NEPA.

With the expanded removal authority in the new NCP, however, some removal actions may be undertaken in less urgent situations than was previously possible. For example, certain removal actions at NPL sites (Expedited Response Actions) may not be initiated until several months after the site is mobilized. In such situations, the exemption is EIS requirements based on a CERCLA mandate for prompt action would not be applicable. The removal program must therefore develop a policy to ensure that these types of actions are subject to an adequate environmental review and public comment period.

2. Generic Exclusions. EPA may determine that certain categories of removal actions do not require extensive environmental review if those actions do not individually, cumulatively over time or in conjunction with other Federal, State, local or private actions have a significant effect on the quality of the human environment. Removal actions would not be eligible for Generic Exclusions if any of the following are true:

- The action may involve serious local or environmental issues.
- The action will create a new or move an existing discharge to any environmental media.
- The action is known or expected to have a significant effect on the quality of the human environment.
- The action is known or expected to directly or indirectly affect cultural resource areas such as archaeological or historic sites; habitats of endangered or threatened species; environmentally important natural resources such as floodplains, wetlands, important farmlands or aquifer recharge zones.
- The action is known or expected not to be cost-effective or to cause significant public controversy.

New categories of Generic Exclusions may be created if :

- Actions in the proposed category seldom result in the effects described above.
- Based on previous environmental reviews, actions consistent with the proposed category have not required an EIS.
- Information adequate to determine if a potential action is consistent with the proposed category will be available when needed.

EPA fully supports the intent of NEPA and encourages public participation in the selection of actions at removal sites wherever time permits. There are, however, several categories of action where the need for the action is apparent, there are no reasonable alternatives, and there are seldom any of the environmental issues identified above related to the action. Examples of these kinds of actions include:

- Provision of fences, warning signs, or other site control precautions to prevent direct access.
- Drainage controls to prevent run-on, or run-off.
- Stabilization of berms or dikes where needed to maintain the integrity of the structure.

The purpose of this paper is to: 1) define which removal actions will require an environmental review and public comment period; 2) describe the mechanisms that may be used to provide an adequate review; and 3) recommend a strategy for implementation.

DEFINITIONS

For purposes of compliance with NEPA requirements, the following categories of removal action are proposed:

1. Classic Emergency Removal Actions are actions initiated in response to a release or threat of release that poses a risk to public health or welfare or the environment, such that cleanup or stabilization actions must be initiated within hours or days after completion of the preliminary assessment, regardless of cost or duration of the response. Such actions could include, but are not limited to, response to a fire in a chemical warehouse, response to a tanker truck accident that releases hazardous substances, or response to leaking drums that pose an explosion hazard.
2. Time-Critical Removal Actions are actions initiated in response to a release or threat of release that poses a risk to public health or welfare or the environment, such that cleanup or stabilization actions must be initiated within 6 months after completion of the preliminary assessment, regardless of cost or duration of the response (excluding Classic Emergencies). Examples include response to an industrial site in a residential area containing open tanks of hazardous substances and spilled materials, response to a facility containing eroding unlined waste lagoons, or response to an unregulated waste dump containing scattered piles of deteriorating drums.
3. Non-Time-Critical Removal Actions are actions initiated in response to a release or threat of release that poses a risk to public health or welfare or the environment, such that initiation of removal cleanup or stabilization actions may be delayed for 6 months or more after completion of the preliminary assessment, regardless of cost or duration of the response. An example of such an action might be response to an abandoned industrial dump, isolated from public access, which poses a potential threat to groundwater if not cleaned up. Cleanup may also be delayed in situations where hazardous substances have been abandoned on a site, but the substances are in stable containers and secured from public access. A final example might be an asbestos deposit that is currently stabilized. The two primary considerations in determining whether site response can be delayed are the stability of the wastes and the potential for public contact.

Application of Definitions: Classic Emergency and Time-Critical Removal Actions would be exempt from compliance with EIS requirements based on statutory conflict (i.e., the CERCLA directive for prompt action). Non-Time-Critical Removal Actions would require environmental review and public comment.

- Minor rehabilitation of existing treatment facilities or structures.
- Replacement of equipment.
- Temporary continuance of pumping, treatment, or disposal operations initiated by States or local governments and terminated for lack of State or local funding.

Such actions, where part of a Non-Time-Critical Removal Action, may be eligible for a Generic Exclusion if they meet the criteria described above.

Use of a Generic Exclusion would require that the public be informed that an action has been determined to be eligible for a Generic Exclusion. When the Action Memorandum is signed, such notice must be provided in a newspaper of general circulation in the area. The agency may not commence the action for at least 30 days after publication of the notice.

IMPLEMENTATION STRATEGY

As stated earlier, Classic Emergency and Time-Critical Removal Actions would be exempt from NEPA requirements based on statutory conflict. It should be noted, however, that an analysis of alternatives is part of the Action Memorandum for all removal actions, although it need not be extensive if time constraints preclude detailed analysis.

For Non-Time-Critical Removal Actions, adequate time would be available for a formal environmental review and public comment period. Six months lead-time is a sufficient period in which to conduct a detailed EE/CA and provide opportunity for public comment.

To fulfill environmental review requirements for Non-Time-Critical Removal Actions, ERD proposes the following:

1. After consultation with the Office of General Counsel (OGC), ERD will determine those classes of removal actions that would be eligible for Generic Exclusions. For these actions, OSCs/RPMs would give appropriate public notice that the proposed action has been determined to be eligible for a Generic Exclusion.
2. For all other Non-Time-Critical Removal Actions, OSCs/RPMs will be required to prepare a detailed EE/CA. The EE/CA should satisfy the functional equivalency test of NEPA and include an opportunity for public comment.

ENVIRONMENTAL REVIEW MECHANISMS

The removal program may use two mechanisms to provide an environmental review for Non-Time-Critical Removal Actions: 1) performing an environmental impact analysis as part of the Engineering Evaluation/Cost Analysis; and 2) declaring a Generic Exclusion for certain types of actions.

1. Engineering Evaluation/Cost Analysis. The courts have developed an exception to the EIS requirement for EPA where the agency achieves the NEPA objective of full consideration and disclosure of environmental effects through means comparable to an EIS. This exemption is commonly known as the "functional equivalency" exemption.

The Emergency Response Division (ERD) and Hazardous Site Control Division (HSCD) are currently developing procedures for conducting an Engineering Evaluation and Cost Analysis (EE/CA). Essentially, the EE/CA will be an analysis of alternatives that documents the reasons for choosing the proposed removal action. The level of detail in the EE/CA will vary, depending primarily on the time available before the response must be initiated. The project cost, project complexity, and the maturity of the removal technologies considered will also be factors in determining the extent of the analysis. The scope of the EE/CA will correspond to the scope of the project. Many removal actions are relatively simple and do not require extensive analysis.

For removal actions that can be deferred for 6 months or more, the EE/CA will include the following:

- Identification of site problems
- Identification of removal response alternatives
- Screening of alternatives based on two factors:
 - Is the option timely with respect to emergency mitigation and program goals?
 - Is the option fully protective of human health and the environment (i.e., does the option meet applicable or relevant and appropriate legal requirements)?
- Analysis of alternatives based on four selection criteria:
 - Reliability, technical feasibility
 - Reasonable cost
 - Administrative/managerial feasibility
 - Environmental impacts
- Opportunity for public comment.

Thus, for removal actions where sufficient time is available, an analysis of environmental impacts will be performed that is comparable to an EIS and in proportion to the scope of the project.