



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

EPA 540-F-98-029
OSWER 9360.3-20
PB98-963243

MAY 29 1998

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Response Actions that Affect Residential or Commercial Structures

FROM: Timothy Fields, Jr. *Tim Fields*
Acting Assistant Administrator

TO: Superfund Program Managers, Regions I-X
Office of Regional Counsels, Regions I-X

We currently are assembling a team that will focus its attention on the development of a policy on how best to conduct a response action that affects a residential or commercial structure (i.e., the response action may result in significant damage or the need for complete demolition of the structure). As part of this effort, we plan to solicit assistance from all ten Regions in follow-up to the information that was obtained at the June 1997 Residential Cleanup Workshop. Our goal is to issue the policy by September 1999.

We recognize the need for a consistent approach in addressing these types of responses. Therefore, until a final policy is in place, before making any final decisions regarding this aspect of a removal or remedial site response, Regions should contact their OERR Regional Accelerated Response Center, who will coordinate with the Office of Solid Waste and Emergency Response for formal consultation and approval. We anticipate that the consultation and approval requirement will affect a very limited number of sites but the questions raised by several Regions in carrying out these types of responses coupled with recent OIG reports at the methyl parathion sites (E1SFB7-06-0020-7400069; "Results of Assessment of Controls over Emergency Removal Actions at Methyl Parathion Sites") and the Austin Avenue Site (E1SFF7-0300017-8100090; "Replacement Housing at the Austin Avenue Radiation Site," dated March 30, 1998), emphasized the need for EPA to put this Headquarters consultation requirement in place. We also are advising those considering these types of responses that it is our policy not to rebuild residential or commercial structures, except under the rarest of circumstances. Additional details will be fully expanded upon in the final policy.

Regions should use the established consultation and approval procedures described in OSWER Directive 9360.0-19, dated March 3, 1989, "Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent Setting Issues and OSWER Directive 9360.0-12,

dated August 12, 1993, "Response Action at Sites with Contamination Inside Buildings" (attached).

We appreciate your assistance on this matter. If you have any questions, please contact Terri Johnson or Jo Ann Griffith, of the Office of Emergency and Remedial Response at (703) 603-8718 and (703) 603-8774, respectively.

Attachment

cc:

Earl Salo, OGC
Peggy Schwebke, Reg 5
Steve Herman, OECA



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

MAR -3 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

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

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

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

Purpose:

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

Background:

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

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

Objective:

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

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

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

Implementation:**I. NATIONALLY SIGNIFICANT OR PRECEDENT-SETTING CATEGORIES**

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

- (a) whether Fund-financed response to a particular incident will establish a precedent for when or how future response actions must be taken; or
- (b) whether a response will commit EPA to a course of action that could have a significant impact on future resources, due to the widespread occurrence of a particular problem.

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

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

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

2. Removals involving pesticide contamination arising from:

- improper storage of pesticide products awaiting indemnification
- lawful application of pesticides, including special local use pesticides
- grain fumigation operations.

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

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

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

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

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

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

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

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

-4-

- substances excluded from Fund-financed response under the SARA section 101(14) definition of "hazardous substance" (e.g., petroleum products including crude oil, and natural gas or synthetic gas usable for fuel);
- releases excluded from Fund-financed response under the SARA section 101(22) definition of "release" (e.g., emissions from the engine exhaust of motor vehicles; releases of radioactive material from a nuclear incident; and releases caused by normally applied fertilizer);
- releases excluded from Fund-financed response under SARA section 104(a)(3) including releases of a naturally occurring substances; releases from products that are part of a structure and result in exposures within the structure; and releases in public or private drinking water supplies due to system deterioration from ordinary use.

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

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

Concurrence Procedures

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

-5-

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

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

Non-Emergency Removal Concurrence Procedures

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

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

Emergency Removal Concurrence Procedures

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

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

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

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

Special Dioxin Concurrence Procedures

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

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

II. REMOVAL ACTIONS SUBJECT TO SPECIAL PROCEDURAL REQUIREMENTS

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

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

1. Removals involving mining sites.

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

2. Removals involving Federal facilities.

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

3. Removals involving site-specific contracts.

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

4. Removals involving radiation sites.

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

5. Removals involving business relocations.

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

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

Attachment

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

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

From: Regional Administrator

To: Director
Office of Emergency and Remedial Response

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

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

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

Concur

Director, Office of Emergency and Remedial Response

Date

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

Non-Concur

Assistant Administrator for Solid Waste
and Emergency Response

Date

Concur

Assistant Administrator for Solid Waste
and Emergency Response

Date





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

AUG 12 1993

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive 9360.3-12

MEMORANDUM

SUBJECT: Response Actions at Sites with Contamination Inside Buildings

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

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

PURPOSE

This directive transmits guidance on the use of authority under §104(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, to conduct response actions to address releases of hazardous substances, pollutants, or contaminants that are found within buildings. Use of this guidance may assist Regional Decision Teams (RDTs) in implementing early actions under the Superfund Accelerated Cleanup Model (SACM).

BACKGROUND

CERCLA §104(a) provides EPA with the authority to conduct response actions whenever there is a release or threat of release of a hazardous substance, pollutant, or contaminant into the environment. Section 101(22) of CERCLA defines "release" to include "any spilling, leaking, pumping, pouring, emitting...or disposing into the environment..." CERCLA §101(8) defines "environment" to include "navigable waters,...any surface water, ground water, drinking water supply, land surface or subsurface

strata, or ambient air." A discharge of a hazardous substance, pollutant, or contaminant that remains entirely contained within a building is not a "release" under CERCLA unless it subsequently enters the environment. It may be a threatened release and, thus, subject to CERCLA response authority (50 FR 13462, April 4, 1985).

There are currently a number of sites throughout the nation where buildings are contaminated with hazardous substances, pollutants, or contaminants, and where the release or threat of release of these substances may pose a substantial threat to human health. However, CERCLA expressly limits, under §104(a)(3), any response actions taken in response to a release or threat of 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;
- from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or
- into public or private drinking water supplies due to deterioration of the system through ordinary use.

CERCLA §104(a)(3) therefore limits responses in certain situations, such as releases of radon or asbestos from building products or from in situ natural sources, but §104(a)(4), entitled Exception to Limitations, identifies specific circumstances that, if present, would allow CERCLA response in such situations.

Removal actions involving substances or releases that are subject to statutory exclusions or limitations in CERCLA are explicitly listed in OSWER Directive 9360.0-19, "Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent-Setting Issues" (March 3, 1989). A copy of the Guidance is attached to this directive. As noted in the Guidance, written concurrence must be received from Headquarters prior to formal approval of the Action Memorandum by the Regional Administrator (RA), except in situations where a response must be initiated within hours (i.e., except in true emergency situations).

¹Note that the statute defines the term "release" to mean a release of a substance "into the environment." However, for purposes of clarity, this memorandum distinguishes between a "release," which may be indoors or into the environment, and a "release into the environment."

Responses to indoor releases, such as at a contaminated chemical processing facility, are not expressly limited in CERCLA, and response actions may be appropriate in such situations where there is a release or threat of release into the environment.² Such responses, however, have the potential of being nationally significant or precedent-setting because response to indoor contamination is not the primary focus of CERCLA, and because it may be difficult to show that a release or threat of release from indoor contamination poses a threat to public health or welfare or the environment.

OBJECTIVE

This directive clarifies that CERCLA §104 authority should be used only when there is a release or threat of release of a hazardous substance (and, if there is also a finding of imminent and substantial endangerment, of a pollutant or contaminant) into the environment, and only when such a release or threat of release poses a hazard to public health or welfare or the environment. If it can be shown that there is a release or threat of release into the environment, a SACM early action responding to indoor contamination related to that release or threat of release may be taken under certain circumstances as defined below. Of course, any early actions undertaken pursuant to this directive must be conducted in accordance with the NCP.

IMPLEMENTATION

If the indoor contamination involves one of the three scenarios specified in CERCLA §104(a)(3), as identified above, a response action may be taken pursuant to the exceptions of §104(a)(4) only if all of the following three criteria are met:

- there must be a release or threat of release of a hazardous substance, pollutant, or contaminant into the environment;

²It should be clarified that in CERCLA §101(22) the phrase "release into the environment" refers to the location of the release itself; the phrase does not address the location of the hazard that the release poses. Thus, response actions under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) to remedy, for example, radium wastes that have been disposed of in subsoil, which may in turn cause indoor hazards from migration and accumulation of radon gas in nearby homes, are not excluded under CERCLA §104(a)(3), whereas radium wastes incorporated into building materials and used in a structure may be excluded.

- the release must constitute a public health or environmental emergency, and no other person with the authority and capability to respond to the emergency will do so in a timely manner; and
- Headquarters must assess the national significance and precedent-setting nature of the response and concur in the response action.

Regardless of whether or not a potential response action involving indoor contamination is addressed explicitly in CERCLA §104(a)(3), several steps should be followed by Regional response personnel prior to initiating a response action. These steps are summarized below and illustrated in Figure 1.

Determination of a Release or Threat of Release into the Environment

To appropriately use CERCLA authority, there must be adequate documentation to show that the indoor contamination results in a release, or a threat of release, of a hazardous substance, pollutant, or contaminant into the environment. (In addition, for releases involving pollutants or contaminants, there must also be a determination of an imminent and substantial endangerment.) The issue of whether a release or threat of release into the environment exists, however, can be ambiguous when addressing sites with indoor contamination or where contamination stems from the structure itself. Regardless of the nature of the indoor contamination, however, a release or threat of release must be substantiated prior to taking response action.

In general, authority to respond to a release or threat of release from a building exists if at least one person or the environment outside of the building may be exposed to the release. For example, if the hazardous substance, pollutant, or contaminant can migrate through a window or through the foundation or building structure into the soil, creating exposures to persons or hazards to the environment, a sufficient basis may exist to show that there is a threat of release into the environment requiring the cleanup of the interior of the building. It also may be possible to show that there is a threat that contaminated articles, clothing, or even parts of the structure itself may be inadvertently removed from the building and, thus, a release or threat of release of a hazardous substance, pollutant, or contaminant may exist.

Another situation involving indoor contamination may be contamination that is the direct result of a release into the environment from a non-natural source that migrates into a building or structure. For example, contamination in a yard may

be tracked into a building on the feet of the residents or workers, or may migrate into the building through an open window or basement walls. In this situation, a release into the environment is occurring and has caused a building to become contaminated with the hazardous substance, pollutant, or contaminant.

Determination of Need to Respond

Once it has been determined that there is a release or threat of release into the environment, the nature of the public health or environmental threat resulting from the release should be established. Depending upon whether the release situation is expressly limited in CERCLA §104(a)(3), the standard is slightly different.

- For responses to releases expressly limited in CERCLA §104(a)(3) (e.g., indoor releases of radon, asbestos, or a deteriorating drinking water system), there must be a finding that the release is causing a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.
- For response actions that are not specifically limited in CERCLA §104(a)(3), the release should pose a threat to public health or welfare or the environment; an emergency situation does not need to exist.

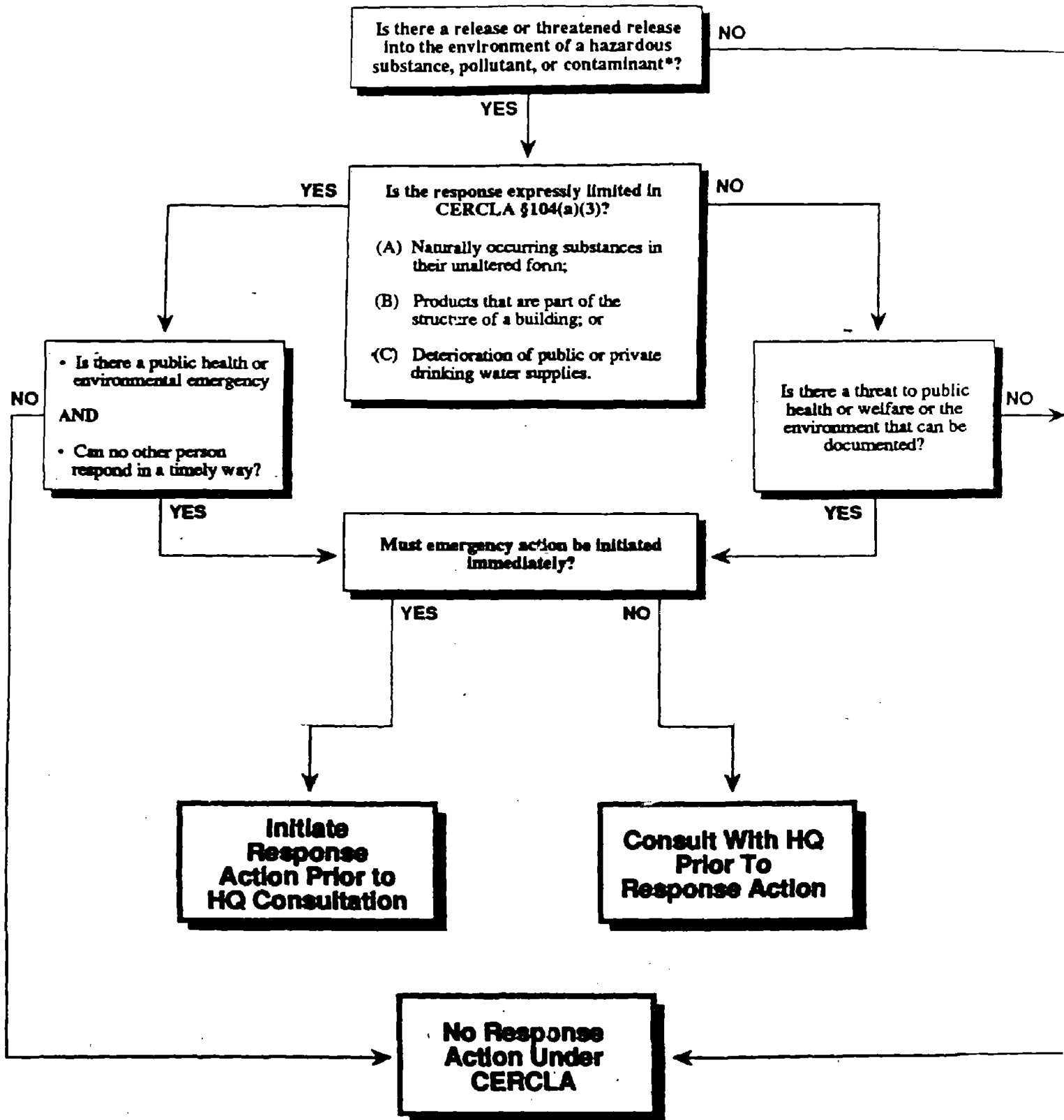
Consultation

Once it has been determined that a CERCLA response action may be necessary, in most cases, Regional offices should consult with Regional Coordinators at Headquarters (pursuant to OSWER Directive 9360.0-19, March 3, 1989) to determine whether CERCLA authority can and should be used to respond to the problem. Headquarters will assist the RDT in considering the national significance and precedent-setting nature of the problem. Generally, written concurrence from the Office Director, OERR, must be received prior to formal approval of the Action Memorandum by the RA.

The one exception to this rule is a situation where response action must be initiated immediately, and there is no time to discuss the situation with Headquarters. In such compelling cases, Regions may initiate a response action without Headquarters concurrence; however, only those actions that are necessary to mitigate the emergency or stabilize the site should be taken. The appropriate Regional Coordinator should then be informed of the response on the next working day following initiation of the emergency action.

Attachment

Figure 1
INDOOR CONTAMINATION: STEPS FOR ACTION



* If responding to a release of a pollutant or contaminant, there must be a showing of imminent and substantial danger to the public health or welfare.

