

Pollutant or Contaminant

- Read: 3-D-1,2,3 pg. 3-8,9
- ‘a release or substantial threat of release ... of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare...’
- Such substances will or may reasonably be anticipated to cause certain specified harmful health effects

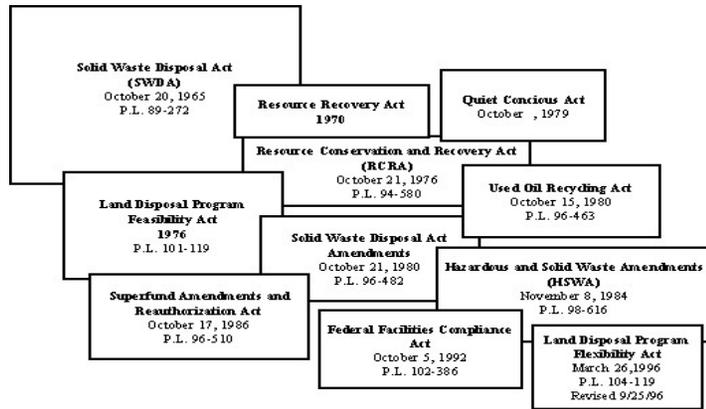
Removal Provisions

- Need for Prompt Action
- Harm Warranting Removal (4-A-2.a-c. pg. 4-1,2)
- Acting in Doubt (4-B): An OSC need not determine with certainty that a hazardous substance has been released before initiating removal measures

Documenting CERCLA Decisions

- Pollution Report
- Incident Specific Action Plan and Statement of Work
- Finding of Imminent and Substantial Endangerment
 - Responses projected to call less than \$50K
 - Simple documentation based on CERCLA and NCP
- Action Memorandum
 - Every EPA FOSC must do an action memo for removal activities
 - CG FOSC-R must do an Action Memo for any response over \$250K

RCRAs Origins



The Solid Waste Disposal Act of 1965 and its Amendments

RCRA Implementation

- RCRA is not a self-implementing statute
- Extensive regulation
 - 40 CFR 261-299
 - Divided into 10 subtitles A-J
- Major Regulatory programs:
 - Solid Waste (Subtitle D)
 - Hazardous Waste (Subtitle C)
 - Underground storage tanks (Subtitle I)

For Generators, RCRA...

- Defines hazardous wastes via
 - Listing specific hazardous wastes
 - Establishing characteristics of hazardous waste
- Requires generators of hazardous wastes to
 - Handle wastes properly
 - Prepare manifests to track shipments

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For Transporters, RCRA...

- Requires
 - All hazardous waste transportation companies obtain HW ID#
 - Hazardous Waste Manifest (initiated by generator)
 - Compliance with DOT hazardous materials transportation regulations

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Uniform Hazardous Waste Manifest



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Hazardous waste manifest, New York State Dept. of Environmental Conservation

80-1 (12/05)-08

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF HAZARDOUS SUBSTANCE CONTROL
HAZARDOUS WASTE MANIFEST
P.O. Box 12620, Albany, New York 12212 Form Approved OMB No. 2050-0030 Expires 9/30/01

1 Generator's US EPA No. (Mandatory) N Y D 1 2 3 4 5 6 7 8 9 3 1 8 7 9 1 2
2 Facility's Identification as the Shipper/Receiver (Mandatory) NY B 203875 2

3 Generator's Name and Mailing Address:
XYZ Corp
1234 Fifth Ave., NY, NY 13201
Generator's Phone (212) 555-1234

4 Generator's EPA ID Number N Y D 0 0 1 2 3 4 5 6 7
5 US EPA ID Number N Y D 0 0 1 2 3 4 5
6 US EPA ID Number N Y D 0 0 1 2 3 4 5
7 US EPA ID Number N Y D 0 0 1 2 3 4 5
8 US EPA ID Number N Y D 0 0 1 2 3 4 5
9 US EPA ID Number N Y D 0 0 1 2 3 4 5
10 US EPA ID Number N Y D 0 0 1 2 3 4 5
11 US EPA ID Number N Y D 0 0 1 2 3 4 5
12 US EPA ID Number N Y D 0 0 1 2 3 4 5
13 US EPA ID Number N Y D 0 0 1 2 3 4 5
14 US EPA ID Number N Y D 0 0 1 2 3 4 5
15 US EPA ID Number N Y D 0 0 1 2 3 4 5

16 Generator's Classification: I Facility (owner) and the contents of this manifest are used only for tracking hazardous waste and are not intended to be used for regulatory purposes. I Facility (owner) and the contents of this manifest are used only for tracking hazardous waste and are not intended to be used for regulatory purposes. I Facility (owner) and the contents of this manifest are used only for tracking hazardous waste and are not intended to be used for regulatory purposes.

17 Transporter 1 (Acknowledgement of Receipt of Materials)
John Smith, Agent for XYZ Corp
Signature: John Smith Date: 10/13/01

18 Transporter 2 (Acknowledgement of Receipt of Materials)
Signature: _____ Date: _____

19 Facility Operator (Certification of receipt of hazardous materials covered by this manifest except as noted in item 18)
Signature: _____ Date: _____

EPA Form 8700-22 (Rev. 9/98) Previous editions are obsolete.

COPY 1—Disposer State—Mailed by TSD Facility

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**DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

MAILING ADDRESS:
Commandant (G-WER-2)
U. S. Coast Guard
Washington, DC 20593
Phone: (202) 426-9568

COMDTINST M16465.29

25 MAY 1983

COMMANDANT INSTRUCTION M16465.29

Subj: CERCLA Response Authority and Associated Coast Guard Policies

1. PURPOSE. This instruction describes the pollution response authority created by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Coast Guard policies which influence the exercise of that authority. It also addresses delegation to field commands of certain authorities provided by CERCLA. It does not discuss funding support for removal activities or the enforcement of the statute's spill notification requirements.

2. DISCUSSION.

a. The topics addressed by this instruction - Federal response jurisdiction, associated policies, and new definitions - are relatively complex and do not lend themselves to short discussions. In an effort to improve the clarity of this directive, chapter 2 provides an outline of response authority and of policies which influence the exercise of that authority. Chapter 3 follows with descriptions of new definitions which are not self-explanatory. Chapters 4, 5, and 6 discuss specific response provisions of CERCLA and Coast Guard policy.

b. The terminology used by this directive requires some explanation.

(1) CERCLA is frequently called by the colloquial term "superfund" and by its public law number, 96-510. This directive refers to the statute as either CERCLA or the Act.

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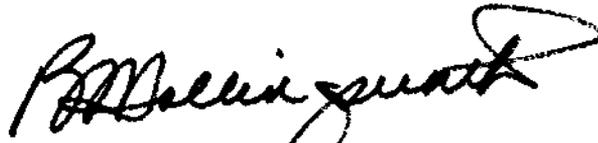
25 MAY 1983

- 2.b.(2) CERCLA provides a specific meaning for the term response, defining it as including removal actions and remedial actions. The definition of "removal" includes all of the response actions permitted under section 311 of the FWPCA plus certain additional actions. (See section F of Chapter 3.) Remedial actions are those operations that are "consistent with permanent remedy" and that may require considerable planning or a protracted commitment of resources (see section 101(24) of CERCLA). Obviously, removal and remedial action are not discrete concepts; there is considerable overlap both with regards to intent and to the kinds of response measures authorized. The term remedial action, however, does serve a purpose. It refers to response operations that are relatively costly or lengthy, but not of an urgent nature. As a consequence, remedial actions will most often be associated with the long-term cleanup of waste sites. Since the Coast Guard does not ordinarily participate in this category of pollution response, COTP personnel will infrequently have the need to conduct a remedial operation. Recognizing this, and to emphasize when an operation is remedial, this directive uses "removal" as the general term for a cleanup operation conducted by the Coast Guard and specifies remedial where necessary. When speaking to an actual, physical removal or treatment function, the directive uses the term "cleanup technique".
- c. To benefit best from the first review of this directive, two additional documents will be required: copies of the Act and of 40 CFR 261. Before proceeding with the instruction, a reading of sections 101 through 111 of the Act is essential. Particular attention should be paid to the definitions "environment", "facility", "hazardous substance", "release", "removal", and "response" and to sections 104(a), 104(b), 104(c)(1), 106(a), 106(b), 107(a), 107(b), and 107(c)(3). It is not necessary to read 40 CFR 261 before reviewing the directive. However, this publication will be needed for reference in the Chapter 3 discussion of "hazardous substance". In addition, key points throughout the text have been highlighted or underlined to indicate their importance.
- d. This instruction may require modification subsequent to its promulgation. Several of the policies it expresses are complex and untested; future court decisions and actual on-scene implementation may alter some aspects of this interpretation of CERCLA authority. The Commandant actively encourages Marine Safety units, COTP's, and district(m) staffs to submit proposed amendments to more effectively implement Coast Guard responsibilities under CERCLA.

25 MAY 1983

3. ACTION.

- a. District commanders shall ensure that the on-scene coordinators within their respective commands are familiar with the provisions of this directive, in particular the delegations of authority in section D of the first chapter.
- b. On-scene coordinators shall implement the guidance contained herein as policy to be followed during pollution response efforts conducted under the authority of CERCLA.



B. F. HOLLINGSWORTH
Chief, Office of Marine
Environment and Systems



CERCLA Response Authority and Associated Coast Guard Policies



U.S. Coast Guard

Pollution
Response

Washington, DC

COMDTINST M16465.29

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- (1) Executive Order 12316
 - (2) Instrument of Delegation
 - (3) Comprehensive Listing of Hazardous Substances
 - (4) Subpart C - Characteristics of Hazardous Waste
 - (5) Sample Administrative Order

CHAPTER 1. DERIVATION OF COAST GUARD RESPONSE AUTHORITY UNDER CERCLA

- A. Statute. The 1970's witnessed increasing national concern over the problems arising from the introduction of hazardous chemicals into the environment. Several well-publicized incidents, such as the Love Canal waste site and the Kepone contamination of the James River, focused much of this concern on improper waste disposal practices and, to a lesser extent, on spills. These kinds of releases were all the more troublesome because of an inadequate Federal capability, and in some cases authority, to deal with them. During this time the primary Federal authority for response to hazardous chemical releases resided in two provisions of the Federal Water Pollution Control Act (FWPCA): section 504 and section 311. Section 504 authorized the EPA to abate and remedy threats to the public health and welfare arising from a "pollution source". However, Congress has not appropriated funds to the emergency fund established to support those actions. Section 311 proved to be an inadequate basis for government action due to jurisdictional limitations. It recognized only discharges and substantial threats of discharges into certain surface waters. Also, after a decade of regulatory development and initiatives, the number of substances designated as hazardous for possible section 311 action was a modest 297. During the years 1978, '79, and '80, Congress considered an assortment of bills proposed as remedies to this situation; and, on 11 December 1980, it enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).
- B. Executive Order. On 14 August 1981, President Reagan signed E.O. 12316, delegating authorities created by CERCLA. E.O. 12316 assigns the Secretary of the Department in which the Coast Guard is operating the response authorities of the Act (section 104) and the authority to issue administrative orders (section 106(a)) for releases and threatened releases involving the coastal zone, Great Lakes waters, ports, and harbors. The executive order, however, does except three CERCLA functions from this delegation: it designates DOD as OSC for releases originating from DOD facilities and vessels, assigns FEMA exclusive authority to conduct temporary and permanent evacuations, and designates the Public Health Service as the agency responsible for investigating complaints of illnesses that might be attributable to exposures to hazardous substance releases. Enclosure (1) is a copy of E.O. 12316. The Secretary of Transportation has redelegated certain of these response functions to the Commandant of the Coast Guard in 49 CFR 1.46(gg), and others to the Administrator of the Environmental Protection Agency through an Instrument of Redefinition. The DOT/EPA Redefinition Instrument and the functions delegated to the Coast Guard are discussed in section 1. C. below.
- C. Redefinition Instrument. In 1980, the Coast Guard established an internal policy of limited involvement in hazardous waste site removal activities. Consistent with that policy, the Coast Guard proposed to the EPA that certain response functions assigned to it

1-C (Cont'd) by E.O. 12316 be redelegated to the EPA. EPA and DOT reached agreement and formalized a transfer of responsibilities in October, 1981. Enclosure (2) is a copy of the "Instrument of Redelegation". The provisions of that document have caused some confusion due to the use of the term "immediate removal". Immediate removal is a concept established in Part 300.65 of the National Oil and Hazardous Substances Contingency Plan. Its meaning has changed since the preparation of the redelegation instrument. The Coast Guard interprets the Instrument of Redelegation as follows: (Note that the redelegation instrument applies only to the areas of responsibility assigned to the Coast Guard by E.O. 12316 - the coastal zone, Great Lakes waters, ports, and harbors. The Coast Guard has no CERCLA authority in any other area.)

1. The Coast Guard retains all CERCLA response authorities for releases and threats of releases originating from vessels.
2. The Coast Guard retains the authority to respond to releases and threats of releases originating from facilities, other than hazardous waste management facilities, when such releases require "immediate removal" action. The EPA is responsible for conducting a response when the preliminary assessment indicates no need for immediate removal actions, or when the "immediate removal" is completed and the remaining cleanup involves planned removal or remedial action. (See 4.F.)
3. The Coast Guard retains emergency response authority for releases and threats of releases originating from hazardous waste management facilities but will only exercise that authority when two conditions are met. These conditions are (1) immediate action is required pending arrival on scene of the EPA OSC, and (2) unless otherwise agreed upon by the EPA and Coast Guard, the EPA OSC is scheduled to arrive on scene within 48 hours of notification of the release or threat of a release.
4. Sections b. and c. of the Instrument of Redelegation use the term "hazardous waste management facility". This term includes (1) any hazardous waste management facility as defined in 40 CFR 122.3; or (2) any other site or area where a hazardous substance, pollutant, or contaminant has been deposited, dumped, discarded, disposed of, or otherwise come to be located in violation of the RCRA regulations by a party responsible for its proper disposal. Questions concerning the scope of this redelegation should be referred to Commandant (G-WER) on a case-by-case basis.

D. Delegations.

1. Subject to the provisions of Executive Order 12316 and the Instrument of Redelegation, the functions which have been delegated to the Commandant have been redelegated as follows:

1-D-1 a. District Commanders:

- (1) Contract authority for the purposes of carrying out response actions pursuant to CERCLA Sections 104(a), 104(b), 104(f), and 104(g) and consistent with any MOU's in effect between the Coast Guard and EPA regarding CERCLA funding mechanisms.
- (2) Authority, pursuant to CERCLA Section 106(a), to determine an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, and to secure such relief as may be necessary to abate such danger or threat through the U.S. Attorney of the District in which the threat occurs.

b. On-Scene Coordinators predesignated by the applicable Regional Contingency Plan:

- (1) Authority, pursuant to CERCLA Sections 104(a), 104(b), and 104(c), consistent with the National Contingency Plan, to remove or arrange for the removal of releases and threatened releases of (A) hazardous substances, and (B) pollutants or contaminants which may present an imminent and substantial endangerment to the public health or welfare. This does not include actions that involve the destruction of a vessel.
- (2) Authority, pursuant to CERCLA Section 106(a), to issue orders to protect the public health and welfare and the environment whenever they determine that a release or threatened release of a hazardous substance from a facility may present an imminent and substantial endangerment to the public health or welfare or the environment.
- (3) Authority, pursuant to CERCLA Section 104(e), except for Section 104(e)(2)(C), to enter establishments or other places where hazardous substances are or have been generated, stored, treated, disposed of, or transported from to inspect and obtain records, reports, samples, and information in support of the response actions delegated in subparagraphs D.1.b.(1) and the issuance of orders delegated in D.1.b.(2) above.

2. Each Coast Guard official to whom authority is delegated above may redelegate and authorize successive redelegations of that authority within the command under their jurisdiction with the following exceptions:

- 1-D-2-a. The authorities granted in subparagraphs D.1.a.(2) and D.1.b.(1) above shall not be redelegated.
- b. The authority granted in subparagraph D.1.b.(2) shall only be redelegated to commissioned officers and warrant officers.

CHAPTER 2. OUTLINE OF COAST GUARD REMOVAL AUTHORITY

A. Comparison of CERCLA with Section 311 of FWPCA. The response provisions of CERCLA in many respects parallel those of section 311 of the FWPCA. Both statutes require notification by the responsible party of a hazardous substance release, authorize a Federal response which is not dependent on the cause or quantity of a release, utilize the National Contingency Plan (NCP) as the blueprint of the Federal response organization, create a special fund to support government response costs, and establish liability for government response costs subject to certain defenses. There are, however, major differences between section 311 of the FWPCA and CERCLA; and these are associated primarily with the scope of the response jurisdiction each statute provides. The FWPCA recognizes discharges of oils and of hazardous substances designated under section 311(b)(2)(A) - presently, 297 chemicals. CERCLA provides no authority for response to releases of oils, but it adopts without exception hundreds of substances listed or characterized as hazardous under four other environmental statutes and creates a broad generic category, "pollutants or contaminants", to deal with hazardous chemicals not formally designated as hazardous. The FWPCA permits response only to discharges which threaten certain surface waters; CERCLA jurisdiction encompasses all environmental media - air, land, groundwater, and all surface waters. In addition to establishing broader response jurisdiction, CERCLA provides the OSC with a wider array of tools to deal with pollution incidents than does section 311. Primarily, it relies, as does section 311, on the spectre of potential liability to motivate removal by responsible parties; but, for certain classes of releases, it also empowers the OSC to issue administrative orders compelling corrective measures by the responsible party.

B. Elements of Jurisdiction sec. 104(a). Section 104 of the Act authorizes a federal removal for a pollution incident when the following conditions exist. (Chapter 3 includes specific discussions of the underlined terms.)

1. The pollutant is a hazardous substance, or it is a pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.
2. The pollutant is released or there is a substantial threat of such a release into the environment.
3. The responsible party is not taking proper removal actions.

An OSC must determine that each of the elements of jurisdiction exists before initiating a removal. Where doubt exists on the identity of a substance, initiating action under the pollutant or contaminant authority should be considered. Section 4. B. discusses this.

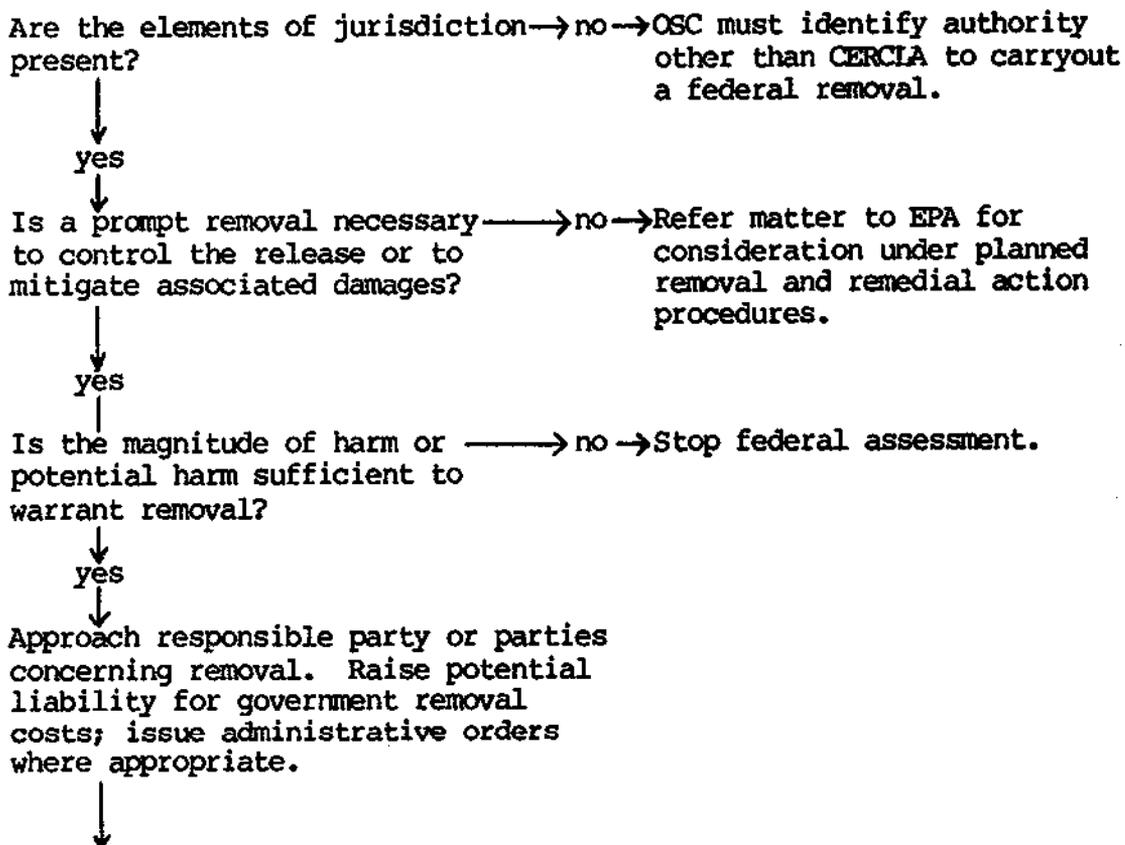
2-C. Exercise of Removal Authority.

1. The exercise of the federal response authority provided by section 104 of the Act is discretionary. The statute reads, "the President is authorized to act...to remove". Consequently, the OSC should not view the elements of jurisdiction as some manner of formula which, if complete, requires Federal action. There are, in fact, three considerations in addition to the matter of jurisdiction which should influence a decision regarding the need for federal removal. The first of these is a determination (by the OSC) that the harm or potential harm posed by the release is significant. (See 4. A. 2.) The use of this criterion is consistent with FWPCA response guidelines. The other two considerations are peculiar to CERCLA. One is derived from the broad scope of the Act which encompasses incidents ranging from classic spills to low level chronic problems not requiring immediate attention. As a matter of policy, the Coast Guard will only conduct removal operations for those releases which demand prompt action if they are to be controlled and their associated damages mitigated. (See 4. A. 1.) When the OSC judges that a release does not require prompt removal, the matter should be referred to the EPA for consideration under two more deliberate response mechanisms known as planned removal and remedial action.¹ The final consideration is the appropriateness of utilizing an administrative order to compel removal by the responsible party in lieu of initiating a government operation. Section 106(a) of the Act provides the government with extensive authority to issue such orders whenever the release, or threat of a release, of a hazardous substance (but not a pollutant or contaminant) may pose an imminent and substantial endangerment to the public health or welfare or to the environment. Incidents which are characterized by the two considerations noted above - significant harm and the need for prompt action - typically meet this imminent and substantial endangerment constraint. (See 5. A.) Section 106(a) provisions apply only to actual or threatened releases which originate from facilities.
2. The OSC's determination of the appropriate extent of a Coast Guard removal is guided by considerations and requirements similar, but not identical, to those which apply to initiating a removal. As a general rule, the OSC should pursue a cleanup until all environmental and public health and welfare concerns have been addressed; that is, the magnitude of the harm posed by the release has been reduced to insignificant levels. (See 4. D. 1.) There are, however, two exceptions to this rule. One concerns those infrequent Coast Guard operations which will eventually require the employment of cleanup techniques which demand extensive planning or the protracted commitment of

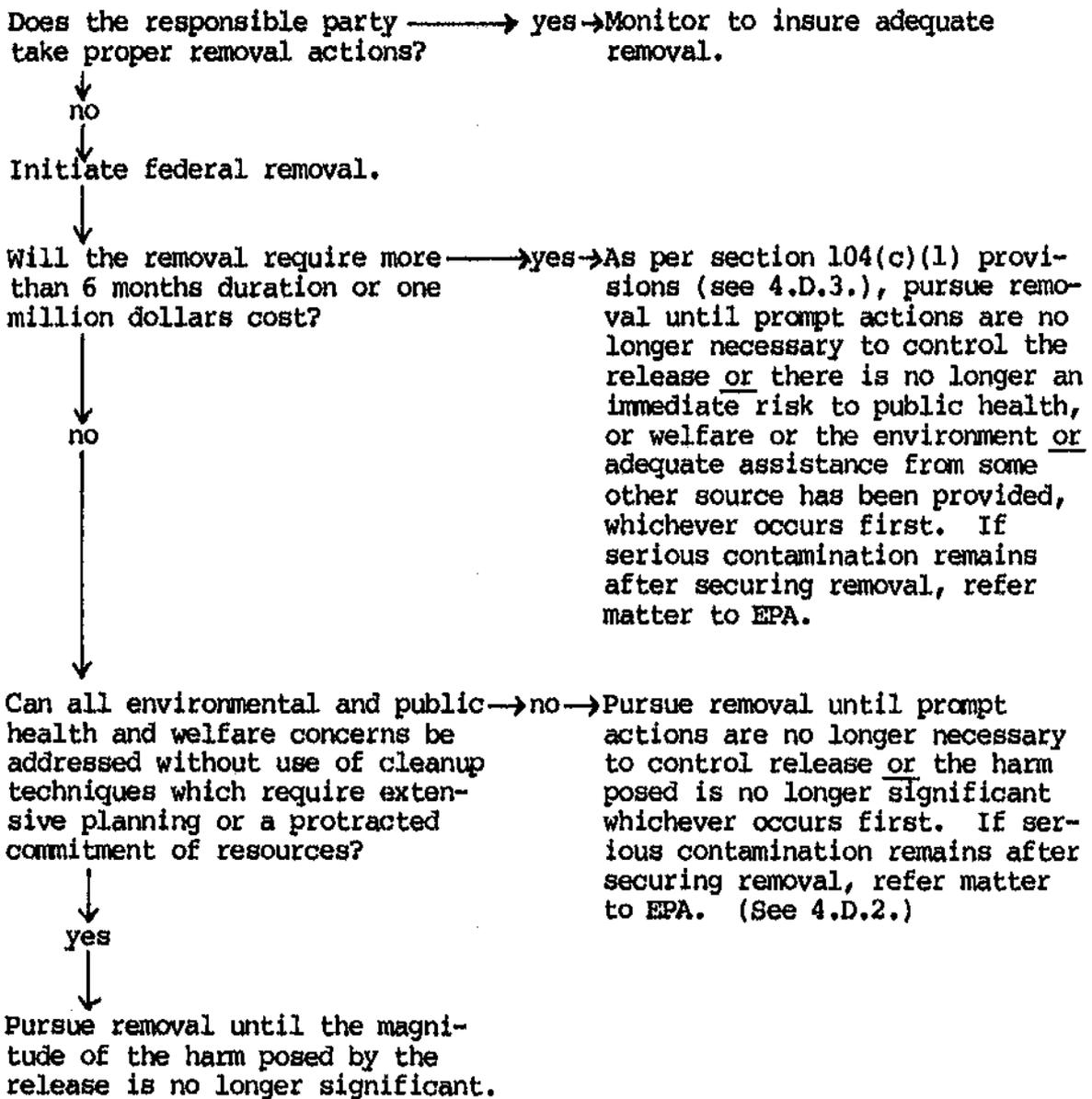
¹ The response policies and authority described here, paragraph 2. C. 1., are equivalent to the response mechanism referred to as immediate removal in the revised National Contingency Plan.

2-C-2. (Cont'd) resources. With such incidents the Coast Guard will proceed with the removal until prompt action is no longer necessary and, upon reaching that point, refer the residual contamination problem to the EPA for possible planned removal or remedial action. (See 4. F.) Section 104(c)(1) of the Act is the source of the other exception. That provision prohibits continued response actions beyond six months duration or \$1,000,000 expense unless (a) action is immediately required to prevent or mitigate an emergency, there is an immediate risk to the public health or welfare or to the environment, and the necessary assistance will not otherwise be provided on a timely basis; or (b) further action is a state-supported remedial operation consistent with sections 104(c)(2) and (3). Should the constraints of section 104(c)(1) require the OSC to stop a removal and a serious contamination problem remains, the initiation of a state-supported remedial action should be pursued with EPA. (See 4. D. 3.)

3. The following is an outline of the various determinations, cited above, which an OSC must make in judging the appropriateness of a federal removal. The sequence is deliberate. For those releases not requiring prompt attention, the Coast Guard OSC is not the responsible federal official for determining whether a planned removal or remedial action should be initiated. Also, the OSC will not issue administrative orders requiring corrective measures for such releases.



2-C-3. (Cont'd)



CHAPTER 3. DISCUSSION OF TERMS

A. Release sec. 101(22) .

1. The basic definition is a simple list of various kinds of emissions and includes a specification that the emission be into the "environment", a term defined by the Act and discussed in section 3. B. It does not require that the release originate from any particular source or that it be the result of any type of occurrence. The definition does contain four exclusions, two of which need clarification.
 - a. Workplace Exposure Exclusion sec. 101(22)(A) : The intent of this section is to exclude from compensation through the Response Trust Fund and from liability under section 107 an injury which is compensated through worker's compensation law. It has no function with respect to Coast Guard response authority.²
 - b. Exclusion for the Normal Application of Fertilizer sec. 101(22)(D) : This is limited to the addition of fertilizer to crops and cropland and does not include any dumping or spilling, whether accidental or intentional, in any other place or in significantly greater concentrations or amounts than are beneficial to crops.³
2. Two other matters - consumer products in consumer use and pesticides - warrant special discussion.
 - a. The definition of "facility", section 101(9), excludes consumer products in consumer use, thus exempting releases originating from this source from the response authority of the Act.⁴
 - b. Section 103(e) exempts the application of pesticide products registered under the Federal Insecticide, Fungicide, and

² Senate Report 96-848, 11 JUL 1980, p. 94

³ Senate Report 96-848, 11 JUL 1980, p. 46

⁴ CERCLA does not define the term consumer product in consumer use. For the purposes of sections 104 and 106 of the Act, the Coast Guard adopts the following definition:

The term "consumer product in consumer use" means any article serving a personal, family, or household use while being used for that purpose in a manner which diminishes or destroys its utility.

Practical examples of releases recognized by this definition are the domestic use of pesticide products, fertilizers, and detergents.

3-A-2-b. (cont'd) Rodenticide Act from CERCLA notification requirements.⁵ Section 107(i) provides a complementary exemption for liability provisions. Neither of these exemptions extend to the response provisions of the Act. The legislative history establishes that Congress intended to preserve the Federal response authority of the Act to address problems arising from the routine use of pesticides.⁶ The Commandant does not expect OSCs to routinely investigate the application of pesticides. However, in the unlikely event that OSCs become aware of a serious problem caused by routine and legal use of pesticides, they may respond to that incident under the authority of the Act and utilize the Response Trust Fund to support corrective measures. OSCs shall, of course, treat non-routine releases of pesticides, such as those resulting from tank failures, transportation accidents, deliberate dumping, and other typical spill events, as they would other releases.

3. The Act defines "federally permitted release" in section 101(10). For the purposes of this directive, this term requires no discussion except to note that CERCLA does authorize response to federally permitted releases. The Response Trust Fund supports federal removal costs for such operations, even though no liability exists under section 107 of the Act for those costs. However, since no liability exists, administrative orders of the sort referred to in 5. B. 1. b. and c. and 5. B. 2. may not be issued.

B. Environment sec. 101(8). As defined by the Act, "environment" includes the following:

1. navigable waters: The applicable definition, provided by section 502(7) of the FWPCA, is "the waters of the United States, including the territorial seas.". The Coast Guard has described the phrase "waters of the U.S." in 33 CFR 2.05-25(b); the EPA in 40 CFR 117.1(i). Consistent with past interpretations made in relation to FWPCA operations, sewers, culverts, and drainage piping are "waters of the U.S." when there exists a continuous flow of water to a natural, flowing tributary and the particular pollutant responded to is not removed by any fixed treatment facility which may be in place.
2. the waters of the contiguous zone: 33 CFR 2.05-15 defines the contiguous zone as "the belt of high seas, 9 nautical miles wide, that is adjacent to and seaward of the territorial seas of the United States and that was declared to exist in Department

⁵ Congress intended that the notification and penalty exemptions for pesticide products be limited to "routine field application". (S. Rep. 96-848 at p. 50)

⁶ Senate Report No. 96-848, 11 JUL 1980, p. 44

3. the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act (FCMA) of 1976: Section 102 of Title I to the FCMA (P.L. 94-265) describes the natural resources recognized by that statute.
4. any other surface waters: Essentially, these are any surface waters within the U.S. or under the jurisdiction of the U.S. which are not "waters of the U.S.". The term surface water does not refer to the upper layer of a particular body of water. Rather, it refers to waters, at any depth, of lakes, streams, rivers, and the ocean as opposed to ground waters.
5. any ground water: Section 101(12) of the Act sufficiently defines "ground water".
6. any drinking water supply: Section 101(7) of the Act defines this as "any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act) or as drinking water by one or more individuals". This definition recognizes virtually all water sources which may be used by humans for drinking.
7. any land surface: This includes artificial surfaces external to buildings.
8. any subsurface strata: The Act does not define subsurface strata, and the Coast Guard places no restrictions on interpretations made by the OSC during a response.
9. any ambient air: The Act does not define ambient air, nor does it adopt a definition by reference. The Coast Guard interprets "ambient air" to mean that portion of the atmosphere which is external to enclosed spaces (i.e., buildings and vessels).

1, 2, and 3 above comprise the same breadth of jurisdiction as that provided by section 311 of the FWPCA, with the exception that releases originating from outer continental shelf and deepwater port activities are not specifically recognized by CERCLA. See section 4. C. concerning response to releases occurring within buildings and onto artificial surfaces such as highways and parking lots.

- C. Hazardous Substance. CERCLA provides for the identification of hazardous substances in two ways: it empowers the Administrator of the EPA to designate substances as hazardous (sec. 102(a)), and it includes substances listed or characterized as hazardous under four other environmental statutes (sec. 101(14)). With regards to the hazardous substances included in the four statutes, enclosure (3) provides a list of pertinent chemical compounds. Unfortunately, this list is not all inclusive. The difficulty is that two of the statutes recognized by the Act for the identification of hazardous substances, section 307(a) of the FWPCA and section 3001 of the

3-C. (Cont'd) Solid Waste Disposal Act (SWDA)⁷ characterize substances as hazardous in such broad ways that it is not practical to list all of the chemicals of interest. The following discussions outline how response personnel should deal with this circumstance.

1. Toxic Pollutants Listed Under Section 307(a), FWPCA: The reference to section 307(a), FWPCA, incorporates 65 specific compounds and classes of compounds, known as the Consent Decree Pollutants, into the definition of hazardous substances.⁸ Enclosure (3) includes the section 307(a) compounds, but not all chemical compounds belonging to the various generic classes. That would have involved the addition of a prohibitive number of substances. Instead, it lists the 126 substances, derived from the Consent Decree Pollutants, for which the EPA has developed effluent standards under its permitted discharge program. (These 126 substances are commonly referred to by the EPA and by industry as the "priority pollutants".) OSCs should recognize that this does not comprise a comprehensive listing of those section 307(a) substances that can present a pollution hazard. When they encounter a release of a substance which is not specifically listed in enclosure (3), they should investigate whether the section 307(a) reference provides jurisdiction. That effort would not involve laboratory analysis, but simply a determination through the use of a chemical information source of the generic class to which the pollutant belongs. Enclosure (3) lists and notes the section 307(a) generic classes.
2. Hazardous Wastes Having the Characteristics Identified Under or Listed Pursuant to Section 3001, SWDA:
 - a. 40 CFR 261, a regulation promulgated under the authority of section 3001 of the SWDA, describes the substances to which this reference extends jurisdiction. These fall into two different groups. The first comprises those solid wastes listed as hazardous wastes in subpart D of 40 CFR 261. When reviewing 40 CFR 261, note that subpart D actually provides four discrete lists. Two of these, 40 CFR 261.31 and

⁷ The Resource Conservation and Recovery Act (RCRA) is the 1976 amendment to the SWDA.

⁸ The purpose of section 307(a) of the FWPCA is to provide the EPA with authority to promulgate effluent standards for toxic pollutants. In the mid-70's, various environmental organizations brought suit against the EPA in an effort to force the Agency to take action under section 307(a). A settlement agreement was reached on 7 June 1976; and, as part of that settlement, the EPA agreed to develop standards for 65 specific compounds and classes of compounds. It is these substances, known as the Consent Decree Pollutants, which are incorporated by the CERCLA reference to "any toxic pollutant listed under section 307(a) of the FWPCA". 40 CFR 401.15 lists the Consent Decree Pollutants, referring to them as "toxic pollutants".

3-C-2-a. (Cont'd) 261.32, include only process wastes. The other two, 40 CFR 261.33(e) and 261.33(f), contain chemical products and manufacturing intermediates which are considered hazardous wastes when spilled or discarded. Enclosure (3) includes the chemical products and manufacturing intermediates identified in subpart D; concerning the process wastes, response personnel should refer to the lists in 40 CFR 261.31 and 261.32. The second group of substances to which section 3001 extends jurisdiction is those hazardous wastes exhibiting one or more of the four hazard characteristics identified in Subpart C to 40 CFR 261. Subpart C does not list any hazardous wastes. It only describes the hazard characteristics by which a waste is judged hazardous under that subpart. Enclosure (3) also does not list all hazardous wastes exhibiting subpart C characteristics; the hazard criteria are so broad that the preparation of even a representative listing would be a very substantial undertaking. As a consequence, the OSC will have to determine, on a case by case basis, whether or not a pollutant is a hazardous waste according to the subpart C criteria. Enclosure (4) provides some basic guidelines which OSCs may find useful in that effort.⁹

- b. One aspect of the CERCLA reference to section 3001 of the SWDA which may cause confusion is the specification that the pollutant be a hazardous waste. CERCLA does not use "hazardous waste" in the general sense but adopts the SWDA definition for that term.¹⁰ This definition specifies that

⁹ There is some overlap between subpart C and subpart D hazardous wastes. The EPA uses three criteria for listing wastes in subpart D, and one of these is possession of a subpart C hazard characteristic. However, at the present time only a very small percentage of the waste materials that exhibit subpart C hazard characteristics are listed in subpart D.

¹⁰ Section 1004 of the Solid Waste Disposal Act (P.L. 94-580) defines "hazardous waste" as:

The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may -

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

3-C-2-b. (Cont'd) hazardous waste must first be a "solid waste", which the SWDA also defines.¹¹ For the purposes of this directive, two elements of the solid waste definition require discussion. First, a solid waste may be solid, semisolid, liquid, or gaseous. Second, a material becomes a solid waste when it is "discarded". Consistent with RCRA regulatory requirements, the Coast Guard considers a material to be discarded when it is released. As a consequence, a chemical product, feedstock, or manufacturing intermediate (non-waste) becomes a solid waste upon being released into the environment; and, if that released substance can be judged a hazardous waste according to 40 CFR 261, it has become a CERCLA hazardous substance upon release.

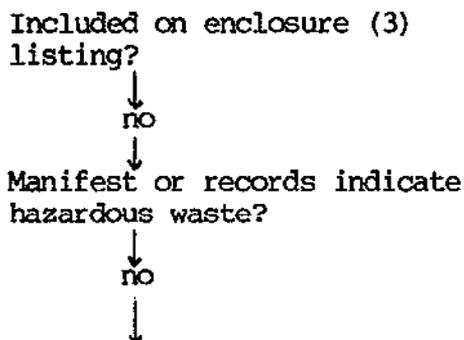
- c. The matter of chemicals becoming hazardous substances only upon release indirectly raises the question of substantial threats. Consider a substantial threat of the release of a non-waste that exhibits a subpart C characteristic and that is not a hazardous substance under any other provision of CERCLA. Does the Coast Guard have response jurisdiction? (Is there a substantial threat of a release of a hazardous substance?) The answer is dependent upon the OSC's judgement of the circumstances that would result from the release of the non-waste. For instance, if the release occurred, any migration of the spilled material, including volatilization, from the original point of release would constitute the release of a hazardous substance. Thus, if there is a reasonable possibility that the above scenario would occur, then the OSC may judge that a substantial threat of a release of a hazardous substance exists. Admittedly, this is an extended line of reasoning; and a simpler approach would be to treat such an incident as a substantial threat of a release of a "pollutant or contaminant", should that authority be available. However, as is discussed in section 3. D., the "pollutant or contaminant" removal authority is not as extensive as that for hazardous substances; and, on occasion, the OSC may have need to pursue removal based on a determination that a

¹¹ Section 1004 of the SWDA defines "solid waste" as: The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

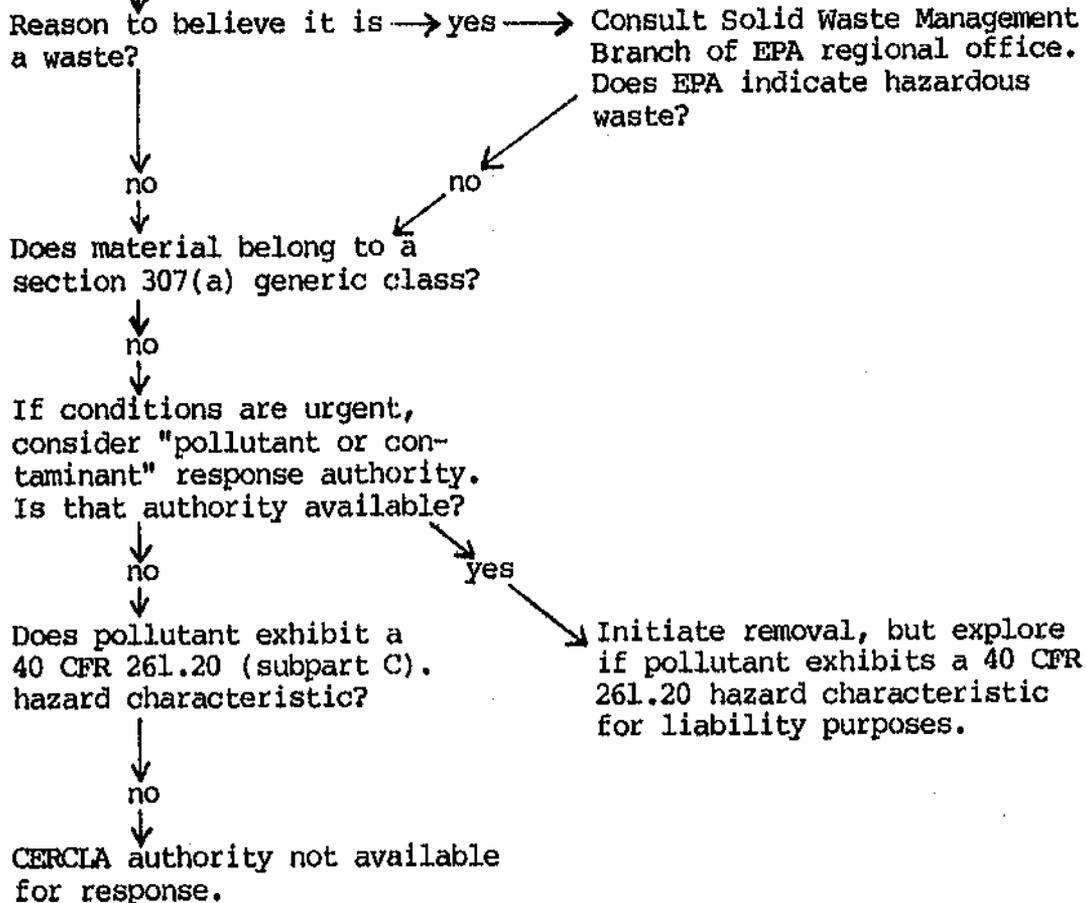
3-C-2-c. (Cont'd) substantial threat of a release of a hazardous substance exists.

d. The requirement that the released material be a hazardous waste, if it is to be considered a hazardous substance, may often be the pivotal factor in the determination of response jurisdiction for a material that exhibits a subpart C hazard characteristic. The magnitude of several of the subpart C hazard characteristics, in particular flammability and corrosivity, will change when the release results in dilution with water or mixture with soil. Consequently, when determining jurisdiction, the OSC must consider whether or not a released substance had been a waste prior to its release into the environment. If it had not, then subpart C hazard criteria must be applied to samples of the spilled material, and this may require chemical analysis. If, on the other hand, it had been a waste before its release into the environment, then the task is much simpler. For the purpose of providing jurisdiction, a waste need only exhibit a specified hazardous characteristic at the time of release. Loss of a pre-existing hazardous characteristic subsequent to release may influence an OSC's decision regarding the need for a removal operation, but it does not alter authority to conduct that operation. In most cases the OSC will easily be able to determine if, before release, the material had been a waste exhibiting a subpart C characteristic. The hazardous waste management regulations, commonly referred to as the RCRA regs, establish manifesting and record keeping requirements for the transport, storage, and disposal of wastes exhibiting any of the subpart C characteristics. See 40 CFR 262.20, 263.20, and 265.70; also exceptions, 40 CFR 261.5. (These same requirements apply to wastes listed in subpart D.)

3. The above discussion sequentially reviews the pertinent provisions of the various authorities referenced by the hazardous substance definition. This is the least confusing for introduction to the topic, but is not an efficient method for determining if response jurisdiction exists for a release. Ideally, the OSC will first explore the criteria which require the least amount of time and funding and, failing there, proceed to the more involved criteria. Along that line, the following is a suggested approach.



3-C-3. (Cont'd)



In those instances in which the OSC cannot readily determine if the pollutant is a hazardous substance, the OSC may conduct response operations in accordance with the guidelines provided in sections 3. D. and 4. B.

4. When new chemicals are added to the various lists incorporated by the hazardous substance definition, they automatically become hazardous substances. OSCs therefore must keep abreast of additions as notice is given in the Federal Register. This exercise will become simpler in the future; the EPA intends to eventually publish in a common regulation a comprehensive listing of the substances adopted by the definition (101(14)) and the substances designated under section 102 of the Act. Until such time as that occurs, Commandant will annually update the enclosure (3) list of hazardous substances.

D. Pollutants or Contaminants sec. 104(a)(2) .

1. During the 1970's the designation of recognized hazardous substances pursuant to section 311(b)(2)(A) of the FWPCA proved to be a lengthy and uncertain process. Allowing for possibility of a similar occurrence concerning CERCLA designations, Congress

3-D-1. (Cont'd) provided response authority in section 104(a) of the Act for a broad category of substances, known as pollutants or contaminants which need not be designated as hazardous substances. Section 104(a)(2) describes a pollutant or contaminant in a detailed but open ended manner. It may not be petroleum, natural gas, etc. However, it includes, but is not limited to:

- (1) any element, substance, compound, or mixture including disease-causing agents which, after release, and upon
- (2) exposure, ingestion, inhalation, or assimilation into any organism, either directly or indirectly (by ingestion) through the food chain, will cause or may reasonably be anticipated to cause
- (3) death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformities in that organism or its offspring.

For practical purposes this concept of "pollutant or contaminant" is limited by another provision of CERCLA. Section 104(a)(1)(B) allows Federal action only for those pollutants or contaminants which may present an imminent and substantial danger to the public health or welfare. Thus, the pollutant must be one which could harm human health or the health of organisms which contribute to the public welfare, such as livestock, fishery resources, or wildlife populations associated with a recreational activity.

2. Note the way in which section 104(a)(1)(B) refers to releases of pollutants or contaminants. The phrase "which may present an imminent and substantial danger to the public health or welfare" modifies "pollutant or contaminant", not the release. This is significant. While the pollutant must be a substance which may be harmful to the public health or welfare, response jurisdiction exists independent of whether the release itself poses such a threat. For example, consider a substance which is (or may be) acutely toxic to humans but is not a designated hazardous substance. Federal removal authority would exist for a release of that substance, as a pollutant or contaminant, even if the release occurred in a remote area and the only concern was for possible environmental damage.¹²
3. Subject to the limitation of section 104(a)(1)(B), the "pollutant or contaminant" provisions of CERCLA provide the OSC

¹² This response authority framework parallels that for hazardous substances. Generally, a substance is designated as hazardous on the basis of a single, narrow criterion (e.g., aquatic toxicity for section 311, FWPCA, hazardous substances). However, the OSC judges the need for removal of a released hazardous substance according to the magnitude of whatever harm may be posed to the environment or to the public health or welfare. The OSC does not narrow deliberations to only consider the specific hazard which led to the pollutant being designated as a hazardous substance.

3-D-3. (Cont'd) with the authority to respond to releases and threats of releases of substances that are not designated as hazardous but which are recognized as being harmful. To a lesser extent they also allow him to deal with releases and potential releases when the pollutant is unidentified and immediate action is required. In exercising this authority, the Commandant does not intend for OSCs to conduct extensive investigations of released chemicals in an effort to discover if they pose some manner of subtle threat to the public welfare. If there is a release or potential release of an unidentified substance and that incident poses an obvious threat to the public welfare, the OSC should utilize the section 104(a)(1)(B) authority to deal with the incident. If the identity of the pollutant is known and the substance is not a "hazardous substance", then the OSC should proceed in the following manner. First, using standard information sources, the OSC should consider whether the pollutant is hazardous because of possible acute or latent toxicity to humans. Second, the NRC should be requested to check if the substance is a known or suspected human carcinogen, mutagen, teratogen, or a substance which causes neoplasms (abnormal cell growth), four health hazards poorly covered in common references. The NRC has access to several computer data base systems which contain this information. If this effort provides little information concerning the hazardous nature (or lack thereof) of the substance, then the OSC should consult with the manufacturer, the ERT, and local sources of expert information.

4. The Response Trust Fund is available to support government removal costs incurred for releases of pollutants or contaminants; however, the responsible party is not liable for those costs. Consequently, the OSC must fully explore the possibility that the pollutant may be a hazardous substance when conducting a government removal under the pollutant or contaminant response provisions. That investigation should not delay initiation of necessary removal actions, but it should be accomplished as quickly as circumstances permit.

E. Substantial Threat. The term substantial threat, as it is used with respect to releases, means that the threat is real: that there is a reasonable probability a release will occur, and that it will occur in the near future. It does not refer to the magnitude of the effect of a release. The OSC alone may make the determination that a substantial threat exists. Typically, that entails a judgement of the material condition of a storage/transport container; but, on rare occasions, the OSC may find that the likelihood of a fire or explosion which threatens to cause a release is a substantial threat. Under this concept of "substantial threat" (the same as that employed by the FWPCA), the "threat of a release" judgement is the critical element in the determination. For example, if a designated hazardous substance is contained in a storage tank, the proximity of a sensitive habitat or of local residences is not sufficient justification for concluding that a substantial threat is present. The OSC must first determine that the integrity of the tank, due to deterioration or some other factor, is such that its

3-E (Cont'd) failure resulting in a release is likely.

F. Removal sec. 101(23) . The definition of removal is essentially a synthesis of the two general categories of response actions which OSCs routinely carry out under the FWPCA: containment, recovery, and disposal of the pollutant; and mitigation measures. In addition, it includes a response action not authorized under other Federal environmental statutes, the temporary evacuation and housing of threatened individuals. For the purposes of this directive, three types of removal actions require specific discussion.

1. **Temporary Evacuation and Housing:** Although included within the definition of removal, this action is not one which Coast Guard OSCs may undertake when responding under the Act; E.O. 12316 delegates the authority to temporarily evacuate and house threatened individuals exclusively to the Federal Emergency Management Agency (FEMA). When, during a response, an OSC decides that the evacuation of local residents would be prudent, the OSC shall so notify the appropriate local agency and the FEMA member of the RRT in accordance with the provisions of the Regional Contingency Plan. Under the authority of the Port & Tanker Safety Act, a COTP may carry out a broad range of activities, including evacuation of the general public from coastal waters, navigable waters, and the immediate waterfront. However, because no funds are programmed to support such actions, COTPs will, if time permits, request FEMA to undertake all evacuations in these areas necessitated by releases of hazardous substances or of pollutants or contaminants. This guidance in no way is meant to prohibit a COTP from providing whatever general assistance can be offered to local authorities in the event of an emergency in a port area or on a navigable waterway.
2. **Damage Assessment & Restoration Activities:** The Coast Guard does not conduct damage assessment for the purpose of preparing a claim for damages against the Response Trust Fund, and it does not carry out restoration activities for damages to natural resources caused by releases. CERCLA authorizes such activities, but not under the statute's response provisions. Within the context of the removal, however, response personnel may conduct activities of a similar nature. The OSC may carry out limited damage assessment actions to establish priorities for cleanup in the event that numerous areas are impacted by a large release. The OSC may also conduct damage assessment in support of efforts to determine the appropriate extent of a removal. With regards to restoration, the OSC may repair unavoidable damages to natural resources and to private property when those damages result from necessary removal actions. For example, if an OSC judges an area of soil contaminated by a release to be a threat to the environment or to the the public welfare, the OSC may remove it and then add clean soil and sod the area, as necessary, to prevent erosion that otherwise would result from the OSC's actions. However, if the OSC decides that an area of contaminated soil does not pose a threat warranting

3-F-2. (Cont'd) removal, the OSC may not replace the soil and sod the area even though the release has damaged vegetation and an erosion problem is likely.

3. Although the provisions of the Act do not specifically address it, the Federal government may exercise some control over non-Federal activities and property at the scene of a release. Chapter 6 discusses the nature and extent of this authority.

CHAPTER 4. RESPONSE OPERATIONS

A. Initiating a Federal Removal. E.O. 12316 defines the Coast Guard geographic area of responsibility for pollution response as the coastal zone (specified in the Regional Contingency Plan), Great Lakes waters, ports, and harbors. Assuming jurisdiction exists, a Coast Guard OSC should initiate a Federal removal within this area whenever it is determined that the following conditions exist: (1) prompt action is required to control a release or to mitigate associated damages; (2) the magnitude of the harm which may be presented by the release warrants removal; and (3) use of an administrative order to require removal by the responsible party is inappropriate, or, if appropriate, proves unsuccessful. (Regarding this last condition the OSC may also initiate action if an order is stayed pending appeal.) The following paragraphs address conditions (1) and (2). Chapter 5 discusses administrative orders.

1. Need for Prompt Action: Coast Guard policy is that OSCs shall only respond under the extensive authority of CERCLA to those releases and threatened releases which require "prompt" removal action if they are to be controlled and their associated damages mitigated. Note that under this criterion for response the trigger is not the immediacy of the effect of the release, but the time required to initiate an effective removal or to prevent harm. For example, when responding to a grounded tank vessel, the OSC should allow for the lead time necessary to obtain a lightering vessel and not delay removal efforts until a breakup is imminent. In like manner, if a hazardous substance spills upon the ground and the hydrogeology of the area is such that it will contaminate the groundwater, the OSC should initiate a removal promptly. The OSC should not delay removal efforts until groundwater contamination has occurred. When an OSC judges that removal of the release may be feasible but that "prompt" removal is not necessary, the incident should be referred to EPA for action. (See 4. F.)
2. Harm Warranting Removal: Environmental conditions vary widely among spill incidents, and this circumstance has prevented the development of absolute measures of harm for use in cleanup operations. Paragraph 4. D. 1. discusses several standards and guidelines, prepared for other purposes, which have been employed in the past to determine the extent of removal. In theory these same "yardsticks" could be used as criteria for estimating the need for cleanup. As a practical matter, though, most of these "yardsticks" are of limited use in determining harm or potential harm unless the OSC has considerable knowledge of the extent and magnitude of the release. During the initial hours (sometimes days) of most incidents, this is often not the case. As a consequence, in the event of a release of the type described in paragraph 4. A. 1. above, the OSC is most often limited to the following course of action: (1) review the hazard characteristics of the substance released; (2) judge if a material presenting such hazards might cause harm to the environment or to the public health or welfare in the location

4-A-2. (Cont'd) of the release; and (3), based upon the OSC's experience and training, and upon the counsel of Special Forces and of representatives of state and local response organizations, determine if the initiation of a removal is warranted. The following are several basic rules which apply to the OSC's evaluation of the harm presented by a release.

- a. Use of CERCLA authorities to prevent harm to the environment is not restricted to easily identified components such as wildlife refuges or parks, but extends to the environment in general.
- b. The potential for latent harm to the environment or to the public health or welfare warrants removal as much as the potential for acute harm. For example, the release of a carcinogen or of a toxin that is persistent in the environment and bio-accumulative may be considerably more serious than the release of a flammable substance.
- c. A particular quantity of a substance cannot be employed as a strict criterion for evaluating the need for cleanup. A 1000 gallon release in coastal waters may have a smaller impact than a release of a similar quantity into a small stream. In any case, the environment affected by a release must be considered along with the quantity.

B. Acting in Doubt: An OSC need not determine with certainty that a hazardous substance has been released before initiating removal measures under the authority of the Act. In drafting CERCLA, Congress intended, as they did for FWPCA operations, that the Federal government act promptly to control releases and, in cases where the identification of the substance is not readily apparent, respond conservatively in favor of the environment and the public health and welfare.¹³ They provided for this by including the pollutant or contaminant provisions as described in Chapter 3.D. When confronted with an incident where the involved material has not been identified as a hazardous substance and prompt action is indicated, an OSC should consider the information available and determine that there is or is not a reasonable basis for believing that a release or substantial threat of a release of a pollutant or contaminant exists. For example, if a release of an unidentified pollutant has resulted in a fish kill, the OSC may respond if he determines that this pollutant may present an imminent and substantial danger to the public health or welfare. (See 3.D.) In making such determinations, OSC's should not be reluctant to use their own best judgement, whether based upon training, experience, or common sense. Should response action be initiated, however, it should be followed up as soon as possible with the necessary analyses, tests, or surveys to determine if the material could be classified as a hazardous substance.

¹³ Senate Report No. 96-848, 11 JUL 1980, p. 56

- C. Releases within Buildings, onto Highways, etc: The definition of environment includes land surfaces, which the Coast Guard interprets to include natural surfaces and artificial surfaces external to buildings. When an OSC encounters a release onto a highway, parking lot, etc., it should be dealt with in the same manner as releases onto ground. It has yet to be determined whether the interior spaces of buildings and vessels are included within the concept of "environment". Regardless of the ultimate interpretation, however, Coast Guard policy is that an OSC shall only respond to a release within a building or vessel when that release is the source of an actual or potential release to the exterior. For example, consider a warehouse containing chemical products which has been destroyed by fire. If the contaminated debris resulting from the fire poses a contact hazard to the general public, the OSC should respond, restricting access and initiating a cleanup operation, as necessary.
- D. Appropriate Extent of Removal. As a general rule, the OSC should complete any removal operation once initiated. That is, cleanup should be pursued until such time as the presence of the released material has been reduced to a level where the harm or potential harm posed becomes insignificant. There are two exceptions to this guideline: one established by policy, the other by section 104(c)(1) of the Act. The following paragraphs discuss the degree of harm criterion for determining the extent of removal and the two exceptions concerning its use.
1. Degree of Harm: In judging the appropriate extent of a cleanup, a Coast Guard OSC will rarely have occasion to target the operation at some threshold concentration at which the pollutant no longer presents a hazard. The nature of several common kinds of incidents (e.g., the release of a soluble substance directly to surface waters) prevent that approach. Also, targeting removal at a particular contaminant level is usually not necessary for cleanups of small quantity releases because of the straightforward techniques and modest dimensions of such operations. On infrequent occasions, though, a non-waste site release results in extensive contamination of soil or of bottom sediments and poses a hazard either in place or as a source of secondary releases to surface waters, ground water, or the atmosphere. In such an instance, the OSC is not obliged to remove all presence of the pollutant; at some point in the cleanup, the magnitude of the harm posed by remaining contamination will no longer justify continued removal. No guidelines have ever been specifically developed to answer the question of "how clean is clean?". The OSC must make do with standards developed for other purposes and, where no credible standard exists, resolve the matter on a case-by-case basis according to their best judgement and the counsel of Special Forces, the affected state, and the RRT. The following are standards and guidelines that have been employed in the past to determine the appropriate extent of removal.

4-D-1-a. Air: For practical purposes the Threshold Limit Values (TLVs) promulgated by the American Conference of Governmental Industrial Hygienists and the parallel Permissible Exposure Limits (PELs) established by OSHA are the only available measures of air contamination which can be applied to spill situations. These values, however, are intended for application to the workplace, and they assume two conditions which rarely exist under spill circumstances. One assumption is that the length of exposure does not exceed 40 hours per week; the other is that the target population consists solely of adult males. Because of these assumptions, the OSC must apply safety factors to any TLV or PEL value employed as a measure of the adequacy of cleanup. Coast Guard OSCs should consult state officials, RRT members, the EPA ERT, or NIOSH concerning the magnitude of these safety factors.

b. Surface Waters: In determining the extent of cleanup, the OSC should, as a general rule, select and apply guidelines or standards according to the primary use of the resource. Where an impacted water body serves as a water source for a public or private drinking water system, use the maximum contaminant level (MCL) recognized by the agency with the primary drinking water enforcement authority (or any other guideline recommended by that agency should no MCL exist).¹⁴ If such an agency cannot assist, there are other possible sources of guidance concerning drinking water. A water quality standard, developed under section 303 of the FWPCA (see below), may exist. Also, through the ERT, support can be requested from the Health Effects Branch of the EPA Office of Drinking Water. In applying any of these values, the OSC may consider the capacity of existing water treatment facilities to remove the pollutant. Where the water body supports agriculture, recreation, industry, or wildlife conservation, the applicable state water quality

¹⁴ The Safe Drinking Water Act (P.L. 95-190) requires the EPA to develop "primary drinking water regulations" specifying maximum contaminant levels (MCLs) for certain substances in public drinking water. Primary enforcement authority has been awarded to those states that have adopted regulations no less stringent than those prepared by the EPA. (At this time the EPA retains primary enforcement authority in the District of Columbia and in the states of Pennsylvania, Iowa, and Indiana.) There are presently 17 Federal MCLs for specific chemicals; the number varies among the states. In addition to the MCLs, enforcement agencies are familiar with the water health effects advisories which the EPA has prepared over the course of the program. These advisories, entitled "Suggested No Adverse Response Levels" (SNARLs), are specific as to substance, and they recommend a level at which no adverse health effects would be anticipated in drinking water.

- 4-D-1-b. (Cont'd) standard is the most credible guideline.¹⁵ When employing these standards, however, the OSC should be aware that they are goals and that some, particularly those developed for carcinogens, may be extremely low and not achievable with existing technology. If no standard or criteria exists, the OSC may find that EPA R&D facilities have developed useful data during the preparation of the RCRA regulations and of the reportable quantity values under the FWPCA and CERCLA. In general, the OSC should deal with contaminated sediment as a real or potential source of a release. The OSC should consider taking action when that circumstance results in or threatens a release directly to the water column or in contamination of the food chain.
- c. Ground Water: Where there is rapid interchange between ground water and surface waters, the OSC shall deal with the occurrence of contaminated ground water as a source of a release to surface waters. Accordingly, the OSC shall pursue cleanup of the contaminated ground water to the point where surface waters are not adversely affected. (See 4. D. 1. b. above.) When an impacted aquifer supplies water for an industrial or agricultural purpose, or when it is a water source for a public or private drinking water system, the OSC shall deal with the release in the manner described above for surface water incidents. If the impacted aquifer does not fall into any of these categories, the state should supply justification, if any, for a Coast Guard removal and the guidelines for determining the endpoint of that operation. In such instances the OSC should confer with the RRT and Special Forces concerning the need for and extent of removal.
- d. Soil: When a release onto land migrates (or may migrate) to contaminate surface waters, groundwaters, or the atmosphere,

¹⁵ Section 303 of the FWPCA requires that water quality standards be developed for all surface waters. These standards, all of which are presently prepared by the states, are used in the establishment of the pollutant effluent limitations specified in permits for routine, point-source discharges. A water quality standard consists of two parts. One part is the designated use for which the particular water body is to be protected (e.g., "agriculture" or "fish and wildlife"). The other is either a numerical concentration limit or a narrative statement for the ambient level of the pollutant which must not be exceeded if the designated use of the stream is to be preserved or achieved. Historically, this element of the standard has been derived from the water quality criteria published by the EPA. (Water quality standards are state regulations; water quality criteria are non-binding, technical guidance prepared by the EPA to support development of the standards.) With regards to specific chemical pollutants, water quality standards and criteria exist for the Consent Decree Pollutants and for several other substances.

4-D-1-d. (Cont'd) the OSC shall deal with it as a source of such contamination, employing the removal guidelines for the particular medium impacted. Regarding contact hazards, the proper approach is dependent upon the location of the release. If the incident occurs on property which is not owned by the owner or operator of the source facility and the OSC believes that the release may present a contact hazard, a risk assessment by the EPA ERT should be requested to determine the appropriate extent of removal. When a release which may be a contact hazard does occur on property owned by the owner or operator of the source, the OSC shall do two things: ensure measures are taken to minimize chance contact by the general public and refer the matter to the Solid Waste Management Branch of the appropriate EPA Regional Office for RCRA enforcement action.

e. Reportable Quantities: The reportable quantity values established by regulation and by statute provide the OSC with the option to respond. They do not influence response jurisdiction. Furthermore, they may not be an accurate indicator for judging if removal is necessary or, when initiated, complete.

2. Policy on Employment of Substantial Cleanup Techniques: As long as a release poses a significant degree of harm, a Coast Guard removal shall always proceed at least to the point where prompt removal actions are no longer necessary. Once that point is reached, however, further action is dependent upon the nature of the cleanup techniques that would be employed to completely eliminate any remaining threat of harm warranting removal. As a matter of policy, Coast Guard removals requiring the use of "substantial cleanup techniques" shall be secured once the OSC judges that the immediate and significant risk to human health or to the environment has been abated or until the Coast Guard can no longer dedicate the required resources. For the purpose of this discussion, "substantial cleanup techniques" are those infrequent incidents requiring extensive pre-planning or a protracted commitment of resources. Examples of this would include soil sampling, analysis, and removal and extensive groundwater sampling, monitoring, and cleanup. When, as a result of this policy, an OSC intends to secure a removal operation, the Regional EPA OSC shall be contacted to arrange for assumption of control over the removal operation. (See 4. F.) This policy notwithstanding, the OSC should properly dispose of all collected wastes prior to the curtailment of a removal. (But see 4. E. 2. below.) In like manner, the OSC should not secure a cleanup if conditions requiring a renewed Coast Guard operation would likely reoccur as a result of the termination.

3. Section 104(c)(1) Provisions:

a. Section 104(c)(1) of the Act prohibits the continuation of a Fund supported response operation beyond \$1,000,000 expense

4-D-3-a. (Cont'd) or six months duration unless (A) it is found that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or to the environment, and (iii) such assistance will not otherwise be provided on a timely basis; or (B) it has been determined the appropriate remedial action pursuant to CERCLA section 104(c)(2) and the State or States in which the source of the release is located have complied with the requirements of CERCLA section 104(c)(3).¹⁶ The \$1,000,000 limit applies not just to response costs incurred by the OSC, but also to response costs incurred by other Federal agencies involved in the response, such as NOAA SSC activities and temporary evacuations and relocations conducted by FEMA. Section 104(c)(1) should not have a significant impact on Coast Guard operations. The majority of the chemical releases that Coast Guard OSC's respond to do not involve removal operations exceeding six months duration or \$1,000,000 cost. And even on those infrequent occasions when they do, section 104(c)(1) will not likely cause any radical redirection of the OSC's efforts since immediate risk will probably still remain a factor. These subjective judgements are not dissimilar to those which Coast Guard policy directs the OSC to make before any removal is initiated. They do require, however, that an OSC secure a removal operation when the need for prompt or immediate action has been relieved. When this occurs and there remains a serious residual contamination problem, the OSC shall refer the case to EPA for consideration under the remedial action mechanism.

- b. Section 104(c)(1) requirements do not apply to investigation, information collection, surveys, testing, monitoring, and other such activities authorized by section 104(b) of the Act for the identification of the extent, source, and nature of a release and of the magnitude of the threat posed by it. Thus, these activities are not chargeable against the funding or time limitations.
- c. It is the responsibility of the OSC to determine whether or not the requirements of section 104(c)(1) affect the continuation of a removal operation and to initiate an exemption request to the Administrator of the CERCLA Fund if the situation warrants continuation of the immediate removal past the 6 month/\$1,000,000 limit.

¹⁶ Congress incorporated this provision in an effort to channel lengthy and costly cleanups of uncontrolled waste sites into joint Federal/State remedial actions. Note, however, that the provision applies to releases in general, not just to those which originate from waste sites.

4-E. Removal Techniques.

1. As a general rule a Coast Guard OSC's operation should ultimately remove the pollutant from the environment as opposed to isolating or containing it in place. This is to prevent, where possible, the need for a subsequent planned removal or remedial action, the cost of which would be exasperated by failure to continue, and possible reoccurrence of conditions requiring a renewed "prompt" removal operation by the Coast Guard. When, due to policy (4. D. 2.) or statutory (4. D. 3.) requirements, the OSC must secure removal and leave a serious residual contamination problem, containment is appropriate as a goal of the operation to firmly stabilize the conditions at the scene of the release.
2. For facilities, if removal occurs on property owned or leased by the responsible party and the operation generates sizable quantities of containerized wastes which cannot be readily disposed of, the OSC does not necessarily have to pursue disposal of that waste material as part of the Coast Guard removal operation. The OSC should first attempt to compel disposal by the responsible party through use of an administrative order. Should that effort fail or the use of an administrative order be inappropriate (see 5. A.), the OSC should consider if the containerized waste in itself poses a substantial threat of a release. If it does not, then the OSC should refer the matter to the Regional EPA Solid Waste Management Branch for enforcement action.

F. Referring Releases to EPA. There are four occasions on which it is proper for a Coast Guard OSC to refer a release to the EPA for action.

1. Releases Originating from Hazardous Waste Management Facilities: Consistent with the redelegation instrument (enclosure 2), a Coast Guard OSC refers hazardous waste management facility releases not demanding immediate attention to the appropriate EPA Regional Office. When immediate action is required, the OSC may initiate removal (usually containment) pending arrival of the EPA OSC on scene subject to certain conditions. (See 1. C.) As a practical matter, should a small quantity of a hazardous substance falling within the definition of a hazardous waste management facility be contained in a limited area, such as might occur in a "midnight dump", the Coast Guard OSC is authorized to pursue the removal action to completion. In any case the OSC will document by message or letter POLREP, as appropriate, the referral of the release or the transfer of management of the cleanup to EPA.
2. Releases Not Requiring Initiation of an Immediate Removal Action: As discussed in paragraph 4. A. 1., the Coast Guard OSC will only initiate removal for releases that require prompt action. Where prompt action is not required and removal may be feasible, the OSC will refer releases to the EPA Regional Office

4-F-2 (Cont'd) for possible planned removal or remedial action. The OSC will document the referral by POLREP. The Coast Guard OSC should be aware that the administrative procedures for planned removal and remedial action will require that these referred releases compete for funding against the multitude of uncontrolled waste sites existing across the country. It should be noted that EPA can only take remedial actions at those sites included on the National Priorities List. As a consequence, it is unlikely that the EPA will respond to a referred release which impacts a limited area. This is significant. A Coast Guard OSC must deal with a referred release if, because of deteriorating conditions, an immediate removal action becomes necessary before a planned removal or remedial action is initiated. Coast Guard OSCs should recognize this circumstance when they refer releases to the EPA for action.

3. Removals Secured Due to Sec. 104(c)(1) Requirements: On rare occasions section 104(c)(1) provisions will require a Coast Guard OSC to secure removal before all serious contamination has been addressed. In such instances, the OSC should confer as early as possible with appropriate state and EPA Regional personnel to explore the possibility of ranking and listing the site on the National Priorities List to facilitate the immediate removal operation evolving directly into a joint federal/state remedial action. If this is feasible, the transfer of agency responsibility for the cleanup need not be delayed until the \$1,000,000 or six month thresholds have been reached.
4. Removals Secured According to Coast Guard Policy: The Coast Guard policy expressed in paragraph 4. D. 2. requires that removal be secured when prompt action is no longer necessary and substantial cleanup methods must be employed to complete the removal of remaining contamination. The guidelines of paragraph 4. F. 3. above also apply in this circumstance. Early consultation with state and EPA Regional personnel is necessary to determine if the goal of the Coast Guard operation should be stabilization of the release or transition to follow-on planned removal or remedial action.

CHAPTER 5. ADMINISTRATIVE ORDERS

A. Conditions for Issuance. Section 106(a) of the Act authorizes the Federal government to issue administrative orders requiring corrective measures for certain categories of releases and threats of releases. The EPA is concerned that monies appropriated to the Response Trust Fund may never be sufficient to support all necessary government responses and has requested that, wherever possible, the Coast Guard utilize section 106(a) authority in lieu of a government removal. The Coast Guard will comply with this request subject to certain qualifications. The following paragraphs discuss these and the extent of section 106(a) authority.

1. Scope of Section 106(a) Authority: Section 106(a) authorizes issuance of administrative orders for hazardous substance releases and threats of releases which originate from a facility and which may create an imminent and substantial endangerment to the environment or to the public health and welfare. This authority does not extend to releases from vessels. The definition of facility, section 101(9), is self-explanatory. Section 3. C. of this directive describes the hazardous substances recognized by the Act. The term "imminent and substantial endangerment" is not a novel one but is used in five major environmental statutes other than CERCLA. From the legislative histories of these statutes and several related court decisions has evolved the interpretation that "endangerment" does not mean harm, but risk of harm, and that the term "imminent and substantial" modifies risk. The OSC may consider the two prerequisites for Coast Guard action under CERCLA - the need for prompt action to control the release or to mitigate damages and the possibility of significant harm - as falling within the confines of the recognized meaning of "imminent and substantial endangerment".
2. Policy on Issuance of Section 106(a) Administrative Orders: Subject to the following qualifications, the OSC will routinely utilize section 106(a) authority in lieu of initiating a removal.
 - a. Section 106(a) does not specify to whom the OSC may issue an administrative order. As a matter of policy, the OSC may issue any of the administrative orders described in section 5. B. below to those persons identified in section 107(a) of the Act ("responsible party"). The OSC may issue to any other person only those orders the type of which are described in subparagraph 5. B. 1. a. The OSC must be reasonably certain that the party to whom the order is issued is in fact a person who may appropriately be issued an administrative order before the OSC issues that order.
 - b. The chapter 4 discussion of significant harm recognizes releases which might not be considered harmful individually but which could be a problem when the affected area is one exhibiting a high spill frequency. Issuance of

5-A-2-b. (Cont'd) administrative orders requiring removal is not appropriate for such releases. This policy derives from the limited contribution of the responsible party to the circumstances warranting removal.

3. Notice to States: Note that section 106(a) requires that the affected state be notified of the intent to issue an administrative order prior to its actual issuance. Except for this notification, which may be made to the appropriate state representative on the RRT, no particular consultation is required.

B. Scope of Administrative Orders. The statute does not limit the kinds of response measures which the OSC may require by administrative order. However, for the purposes of Coast Guard policy, the use of administrative orders has been divided into two categories: measures of an immediate nature and measures of a non-immediate nature.

1. The kinds of response measures which may be required immediately by administrative order are the following:

- a. the cessation of activities which interfere with a Federal removal operation or with a private removal that the OSC is monitoring: This includes curtailment of activities such as plant traffic or use of a railway line when those activities inhibit the progress of a removal operation or endanger cleanup personnel.
- b. corrective measures by the responsible party respecting facilities which are the source of a release or which present a substantial threat of a release: This includes the movement (or non-movement) of a mobile facility, the patching/plugging of a leaking container, the emptying of a container which the OSC judges to pose a substantial threat of a release, etc.
- c. the following removal measures by the responsible party when the release or substantial threat of a release occurs on property owned or leased by the responsible party: actions to limit access to the scene of the incident (fencing); and the use of available equipment owned by the responsible party when the OSC cannot readily obtain comparable equipment from other sources.

2. To allow the responsible party sufficient time for appeal, the OSC will delay for 48 hours the effect of those administrative orders of a non-immediate nature requiring the following response measures:

- a. the complete removal of a release, and
- b. the assumption of any removal initiated by the Coast Guard.

5-B-2 (Cont'd) When an OSC issues an administrative order for these kinds of removal actions, the responsible party should be informed that the Coast Guard will take any response measures necessary during the 48 hour period before the order takes effect and that the affected party may be liable under section 107(a) of CERCLA for the actual costs of those government actions.

C. Format. Administrative orders should include, at a minimum, the following information:

1. reference to Coast Guard authority to issue the order;
2. the person(s) to whom the order applies (the order should be issued to a company or corporation as opposed to an individual when that is possible);
3. a brief recitation of the circumstances of the release or release threat;
4. a brief statement of the basis for the finding that an imminent and substantial endangerment to the public health or welfare or to the environment may exist;
5. a description of the required corrective measures sufficiently detailed to permit the recipient to judge their scope and magnitude, including any safeguards (the description may be expressed in terms of objectives or cleanup techniques);
6. date and time the order becomes effective (which may be "upon receipt" for orders other than those specified in paragraph 5. B. 2.);
7. appeal procedures (see 5. D. below);
8. penalties that may be incurred for non-compliance (see 5. E. below);
9. notice of possible liability for government removal costs if the OSC has initiated a Federal removal;
10. signature of the OSC or their representative with a statement of the representative's authority to issue the order; and
11. written acknowledgment of receipt by party to whom the order has been delivered (where an order is directed to a corporation, the position of the person to whom the order is delivered should be stated in the acknowledgement), or certification by the officer delivering the order that the order has been delivered to the party.

Administrative orders may be either oral or written. However, if the OSC or their representative issues an oral order, it must be followed up, within the same working day if at all possible, with a

5-C. (Cont'd) written notice confirming the oral order. The written confirmation should include the information required under items 1. through 11. above. When an OSC issues an administrative order early in the response, the separate issuance of a "Notice of Federal Interest in a Pollution Incident" or of a "Notice of Federal Assumption of Response Activities" may be avoided by incorporating the essential elements of those documents in the administrative order. Enclosure 5 is a sample administrative order. Only commissioned officers and warrant officers may issue administrative orders. Commanding officers shall provide a letter of authorization to those officers in their commands who are authorized to issue administrative orders.

D. Administrative Appeals.

1. **Opportunities for Appeal:** Any person directly affected by an administrative order may request, in writing or orally, reconsideration by the OSC. Such requests should be made within 48 hours of the issuance of the administrative order. If not satisfied with the decision of the OSC, that person may appeal in writing to the appropriate District Commander. If the delay in presenting a written appeal would have a significant adverse impact on the appellant, the party may initially present an oral appeal to the office of the District Commander. Such an appeal, however, must be followed within five days by a written appeal which, at a minimum, summarizes the oral presentation. All appeals to the District Commander should be made within 15 days of the issuance of the administrative order. The act of requesting reconsideration or placing an appeal does not stay an administrative order, but an OSC or District Commander may stay an order in whole or in part at any point in the review process if circumstances warrant it. Reviewing authorities, including the OSC, should document any appeals, whether oral or written, and their action on those appeals. The taping or transcription of oral appeals is not required. The Chief of the Marine Safety Division processes appeals to the District Commander, whose decision shall be final.
2. **Bases of Appeal:** Reviewing authorities may rescind or alter an administrative order on the basis of any reasonable appeal. However, as a matter of policy, they shall observe certain guidelines when considering two kinds of assertions. If the appellant asserts that the release or substantial threat of a release was caused by an act of God, act of war, or act of a third party, the reviewing authority shall consider the provisions cited in section 107(b) of the Act in judging the merit of that assertion. An assertion that the magnitude of the harm posed to the environment or to the public health and welfare does not warrant the expense of a required removal action is not a ground upon which an order may be vacated, but the reviewing authority may modify or vacate an order upon a determination that the required action would not be effective or that alternative and less expensive actions would accomplish the same objectives.

5-D-3. Headquarters' Review: District Commanders shall submit to Commandant (G-WER) copies of appeals and the records documenting action on appeals. This is to provide the program manager with an opportunity to determine if further guidance is necessary to insure consistency within the program. Documentation of a request for reconsideration from the OSC need only be forwarded to Commandant when the particular request is followed by an appeal to the District Commander.

E. Processing Violations. The Act provides two sanctions for non-compliance with an administrative order: at section 106(b) and section 107(c)(3). Under section 106(b) the Department of Justice may seek in district court a penalty of up to \$5,000 per day for each day of non-compliance. Under section 107(c)(3) the Federal government may recover punitive damages in an amount up to three times the government removal costs incurred due to the failure to comply with the administrative order. Only those persons identified in section 107(a) are subject to this sanction.

1. To support section 106(b) enforcement action, the OSC shall forward necessary documentation to district(dl) for processing and referral to the appropriate U.S. Attorney. The OSC will supply district(dl) with the following:
 - a. a summary of the pertinent circumstances surrounding the incident and of the actions of the Coast Guard and the affected party;
 - b. information substantiating jurisdiction for issuing the administrative order (e.g., statements of witnesses, report of sample analyses, photographs, copy of shipping papers, etc.);
 - c. copy of administrative order (or written confirmation);
 - d. any documents provided by persons appealing the administrative order;
 - e. documentation by the OSC and the District Commander of any appeals and their action on those appeals;
 - f. a recommendation by the OSC on the value of seeking a penalty action under section 106(b).

Item a. need not include a detailed description of the Federal response or the associated cost documentation.

2. To support the recovery of section 107(c)(3) punitive damages by the EPA, the OSC should submit the same information specified in paragraph 5. E. 1. together with the cost documentation report for the Federal removal. The OSC should forward this to the EPA Regional Office via the District Commander. In their endorsement, the District Commander shall note the status of any action under section 106(b).

CHAPTER 6. AUTHORITY OF OSC AT SCENE OF RELEASE

A. Entry onto Private Property. The following paragraphs provide guidelines for entry onto private property by Coast Guard personnel.

1. **Response Activities-Owner Provides Authorization for Access:**
In carrying out activities pursuant to a hazardous substance release or threat of release where access to private property is authorized by the owner, personnel shall insure that measures are taken to minimize and mitigate any damage which may result from such access, and to exercise good sense while on the property.
2. **Response Activities-Owner Absent:**
Due to the emergency nature of activities in response to a hazardous substance release or threat of release, a situation may arise where access to private property is necessary and the owner is not present to give their consent to access. In this case, no warrant is required and access to the property should be gained by the most expeditious means possible, taking all precautions to minimize damages caused in the process of gaining access. Generally, local law enforcement personnel should be contacted if at all possible to assist in the entry. Continuing efforts should be made to locate the owner. When the owner is located or arrives on-scene, the OSC should explain the nature of the situation, the reason for the entrance to the property, and the means used to gain access. Also, the owner should be advised that every effort will be made to ensure the safety of their property.
3. **Response Activity-Owner Refuses Entry:**
If, when contacted by the OSC, the owner refuses entry to the property, the OSC shall attempt to persuade the owner to permit access through discussion regarding Coast Guard duties and obligations, public necessity, and penalty provisions of the law. If the owner still refuses, it may be necessary to contact the district legal officer for assistance in obtaining court orders from Federal or local enforcement authorities. In addition, the presence of local law enforcement officials may be beneficial for more immediately gaining entry. Using force to gain entry is permissible if the urgency of the situation warrants such action; however all reasonable alternatives should first be exhausted. Force should not be used to the extent that it would amount to a breach of peace or cause personal injury. The use of force by Coast Guard personnel is generally discouraged.
4. **Initial Investigation Incidental to Hazardous Substance Release Response Activities:**
An integral part of the removal process is the preliminary assessment to determine the severity of the release, the source, and possible courses of action. Since this assessment is a part of the response activity, entry to private property is to be carried out as described above.

6-B. Coordination and Direction of Response Activities.

1. **Federal Activities:** Under the authority of the Act and E.O. 12316, the OSC may coordinate and direct all Federal activities associated with an actual or potential release except:
 - a. the evacuation and housing of threatened individuals (E.O. 12316 assigns that function exclusively to FEMA.);
 - b. responses to releases originating from DOD vessels and facilities (E.O. 12316 identifies DOD as the OSC for all such releases.);
 - c. damage assessment and restoration activities associated with damages to natural resources caused by releases (When these activities are related to damage caused by a release, not by Federal response actions, they are not part of the Federal response; and the OSC has no responsibility or authority for seeing that they are carried out.); and
 - d. investigations by the Coast Guard, NTSB, or other agency looking into the underlying cause of the incident.
2. **Non-Federal Response Activities:** Under the authority of Section 104(a) of CERCLA, the Federal government may direct state, local government, and private response actions.¹⁷ As a matter of policy, the Coast Guard will only take such action in the event of an actual or potential release that poses an imminent threat of substantial harm to the environment or to the public welfare. It is anticipated that this authority will be rarely used. In any case, there must be substantial justification for the assumption of control of a state or local government operation.

C. Control of Private Activities and Property. CERCLA and common law authorize the Federal government to control private property and private activities at the scene of a release. The Coast Guard shall exercise this authority according to the following guidelines.

1. For all actual or potential releases, the OSC may:
 - a. curtail or prohibit private activities, such as near-by plant operations or use of a railway line, when those activities threaten the safety of response personnel or interfere with progress of a response operation; and
 - b. control the movement, or use, of the source of a release, or potential release, and undertake any corrective measures - patching, offloading, etc.

¹⁷ This is consistent with the Coast Guard's interpretation of the authority provided by the parallel language of section 311(c) of the FWPCA.

- 6-C-2. If a release or threatened release poses an imminent threat of substantial harm, the OSC may:
- a. requisition private property (belonging to the responsible party or otherwise) for use in response actions; and
 - b. destroy the facility or vessel which is the source of the release or threatened release when that action will significantly lessen real or potential harm to the public welfare or to the environment. Authorization for destruction of a vessel must be obtained from Commandant (G-C) on a case-by-case basis.
3. When it becomes necessary for an OSC to direct or require private activities or to use private property, such action must be in accordance with the following principles and constraints.
- a. The OSC should seek voluntary compliance to use private property wherever and whenever possible.
 - b. The OSC should use administrative orders to direct private activities where use of such orders is appropriate and it is necessary to compel compliance. Use of administrative orders is appropriate when the activity to be directed and the circumstances at the scene of the removal give rise to the authority conferred by subsection (a) of section 106 of the Act. (See Chapter 5.)
 - c. In those cases where there is a low probability that an administrative order will be promptly complied with, the OSC should request the district commander, in accordance with subsection (a) to section 106 of the Act, to seek relief from the appropriate district court to abate a threat to the public health and welfare or to the environment. The OSC should work with the district legal office in preparing such requests.
 - d. The assistance of local authorities should be utilized where available to limit and otherwise control access and traffic in the vicinity of the removal operation. Such assistance should be employed in lieu of issuance of administrative orders where an equal or greater degree of protection is provided.
 - e. Under common law, the OSC may seize and press into service private property when a release poses an imminent threat of substantial harm to the public health and welfare or to the environment. Under such circumstances the OSC may also destroy private property which is the source of the release or threat of a release. In neither instance is the consent of the person or persons owning the property required. However, since the authority is contingent upon the emergency which exists, the OSC must be able to show the

6-C-3-e. (Cont'd) nature of that emergency and to demonstrate that no alternative courses of action were available. In any case, the requirements of 6.C.2.b. apply regarding destruction of property.

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Presidential Documents

Executive Order 12316 of August 14, 1981

Responses to Environmental Damage

By the authority vested in me as President of the United States of America by Section 115 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (94 Stat. 2796, 42 U.S.C. 9615), it is hereby ordered as follows:

Section 1. National Contingency Plan. (a) The National Contingency Plan, hereinafter referred to as the NCP and which was originally published pursuant to Section 311 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321), shall be amended to contain the implementing procedures for the coordination of response actions to releases of hazardous substances into the environment.

(b) The NCP shall contain a concept of a national response team composed of representatives of appropriate Executive agencies for the coordination of response actions. The national response team shall, in addition to representatives of other appropriate agencies, include representatives of the following: Department of State, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Transportation, Department of Energy, Environmental Protection Agency, Federal Emergency Management Agency, and United States Coast Guard.

(c) The responsibility for the amendment of the NCP and all of the other functions vested in the President by Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, hereinafter referred to as the Act (42 U.S.C. 9605), is delegated to the Administrator of the Environmental Protection Agency.

(d) In accord with Section 111(h)(1) of the Act and Section 311(f)(5) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(f)(5)), the following shall be among those designated in the NCP as Federal trustees for natural resources:

- (1) Secretary of Defense.
- (2) Secretary of the Interior.
- (3) Secretary of Agriculture.
- (4) Secretary of Commerce.

(e) Amendments to the NCP shall be coordinated with members of the national response team prior to publication for notice and comment. Amendments shall also be coordinated with the Federal Emergency Management Agency and the Nuclear Regulatory Commission in order to avoid inconsistent or duplicative requirements in the emergency planning responsibilities of those agencies.

(f) All amendments to the NCP, whether in proposed or final form, shall be subject to review and approval by the Director of the Office of Management and Budget.

Sec. 2. Response Authorities. (a) The functions vested in the President by the first sentence of Section 104(b) of the Act relating to "illness, disease, or

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complaints thereof" are delegated to the Secretary of Health and Human Services who shall, in accord with Section 104(i) of the Act, perform those functions through the Public Health Service

(b)(1) The functions vested in the President by Section 101(24) of the Act, to the extent they require a determination by the President that "permanent relocation of residents and businesses and community facilities" is included within the terms "remedy" or "remedial action" as defined in Section 101(24) of the Act, are delegated to the Director of the Federal Emergency Management Agency.

(2) The functions vested in the President by Section 104(a) of the Act, to the extent they require permanent relocation of residents, businesses, and community facilities or temporary evacuation and housing of threatened individuals not otherwise provided for, are delegated to the Director of the Federal Emergency Management Agency.

(c) The functions vested in the President by Section 104 (a) and (b) of the Act are delegated to the Secretary of Defense with respect to releases from Department of Defense facilities or vessels, including vessels owned or bareboat chartered and operated.

(d) Subject to subsections (a), (b), and (c) of this Section, the functions vested in the President by Sections 101(24) and 104 (a) and (b) of the Act are delegated to the Secretary of the Department in which the Coast Guard is operating, hereinafter referred to as the Coast Guard, with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(e) Subject to subsections (a), (b), (c), and (d) of this Section, the functions vested in the President by Sections 101(24) and 104 (a) and (b) of the Act are delegated to the Administrator of the Environmental Protection Agency, hereinafter referred to as the Administrator.

(f) The functions vested in the President by Section 104 (c), (d), (f), (g), and (h) of the Act are delegated to the Coast Guard, the Secretary of Health and Human Services, the Director of the Federal Emergency Management Agency, and the Administrator in order to carry out the functions delegated to them by subsections (a), (b), (d), and (e) of this Section. The exercise of authority under Section 104(h) of the Act shall be subject to the approval of the Administrator of the Office of Federal Procurement Policy.

(g) The functions vested in the President by Section 104(e)(2)(C) of the Act are delegated to the Administrator; all other functions vested in the President by Section 104(e) of the Act are delegated to the Secretary of Defense, the Secretary of Health and Human Services, the Coast Guard, the Director of the Federal Emergency Management Agency, and the Administrator of the Environmental Protection Agency, in order to carry out the functions delegated to them by this Section.

Sec. 3. Abatement Action. (a) The functions vested in the President by Section 106(a) of the Act are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(b) Subject to subsection (a) of this Section, the functions vested in the President by Section 106(a) of the Act are delegated to the Administrator.

Sec. 4. Liability. (a) The function vested in the President by Section 107(c)(1)(C) of the Act is delegated to the Secretary of Transportation.

(b) The functions vested in the President by Section 107(c)(3) of the Act are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(c) Subject to subsection (b) of this Section, the functions vested in the President by Section 107(c)(3) of the Act are delegated to the Administrator.

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(d) The functions vested in the President by Section 107(f) of the Act are delegated to each of the Federal trustees for natural resources set forth in Section 1(d) of this Order for resources under their trusteeship.

Sec. 5. Financial Responsibility. (a) The functions vested in the President by Section 107(k)(4)(B) of the Act are delegated to the Secretary of the Treasury. The Administrator will provide the Secretary with such technical information and assistance as the Administrator may have available.

(b) The functions vested in the President by Section 108(a) of the Act are delegated to the Federal Maritime Commission. Notwithstanding Section 1(d) of Executive Order No. 12291, the regulations issued pursuant to this authority shall be issued in accordance with that Order. The Commission shall be responsible, in accord with Section 109 of the Act, for the enforcement of civil penalties for violations of the regulations issued under Section 108(a) of the Act.

(c) The functions vested in the President by Section 108(b) of the Act are delegated to the Secretary of Transportation with respect to all transportation related facilities, including any pipeline, motor vehicle, rolling stock, or aircraft.

(d) Subject to subsection (c) of this Section, the functions vested in the President by Section 108(b) of the Act are delegated to the Administrator.

Sec. 6. Employee Protection and Notice to Injured. (a) The functions vested in the President by Section 110(e) of the Act are delegated to the Secretary of Labor.

(b) The functions vested in the President by Section 111(g) of the Act are delegated to the Secretary of Defense with respect to releases from Department of Defense facilities or vessels, including vessels owned or bare-boat chartered and operated.

(c) Subject to subsection (b) of this Section, the functions vested in the President by Section 111(g) of the Act are delegated to the Administrator.

Sec. 7. Management of the Hazardous Substance Response Trust Fund and Claims. (a) The functions vested in the President by Section 111(a) of the Act are delegated to the Administrator, subject to the provisions of this Section and applicable provisions of this Order.

(b) The Administrator shall transfer, to transfer appropriation accounts for other agencies, from the Hazardous Substance Response Trust Fund, out of sums appropriated, such amounts as the Administrator may determine necessary to carry out the purposes of the Act. These allocations shall be consistent with the President's Budget, within the amounts approved by the Congress, unless a revised allocation is approved by the Director of the Office of Management and Budget.

(c) The Administrator shall chair a budget task force composed of representatives of agencies having responsibilities under this Order or the Act. The Administrator shall also, as part of the budget request for the Environmental Protection Agency, submit a budget for the Hazardous Substance Response Trust Fund which is based on recommended allocations developed by the budget task force. The Administrator may prescribe reporting and other forms, procedures, and guidelines to be used by the agencies of the Task Force in preparing the budget request.

(d) The Administrator and each agency head to whom funds are allocated pursuant to this Section, with respect to funds allocated to them, are authorized in accordance with Section 111(f) of the Act to designate Federal officials who may obligate such funds.

(e) The functions vested in the President by Section 112 of the Act are delegated to the Administrator for all claims presented pursuant to Section 111.

25 MAY 1983

42240 Federal Register / Vol. 46, No. 161 / Thursday, August 20, 1981 / Presidential Documents

Sec. 8. General Provisions. (a) Notwithstanding any other provision of this Order, any representation pursuant to or under this Order in any judicial or quasi-judicial proceedings shall be by or through the Attorney General. The conduct and control of all litigation arising under the Act shall be the responsibility of the Attorney General.

(b) Notwithstanding any other provision of this Order, the President's authority under the Act to require the Attorney General to commence litigation is retained by the President.

(c) The functions vested in the President by Section 301 of the Act are delegated as follows:

(1) With respect to subsection (a), to the Administrator in consultation with the Secretary of the Treasury.

(2) With respect to subsection (b), to the Secretary of the Treasury.

(3) With respect to subsection (c), to the Secretary of the Interior.

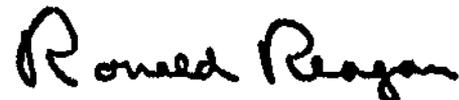
(4) With respect to subsection (f), to the Administrator.

(d) The Attorney General shall manage and coordinate the study provided for in Section 301(e) of the Act.

(e) The performance of any function under this Order shall be done in consultation with interested agencies represented on the national response team, as well as with any other interested agency.

(f) Certain functions vested in the President by the Act which have been delegated or assigned by this Order may be redelegated to the head of any agency with his consent; those functions which may be redelegated are those set forth in Sections 2, 3, 4(b), 4(c), and 5(c) of this Order.

(g) Executive Order No. 12286 of January 19, 1981, is revoked.



THE WHITE HOUSE,

August 14, 1981.

INSTRUMENT OF REDELEGATION

*Text
Section 13 V... EPA
has the hell
Fred*

1. Except as provided in paragraph 2 below, in accordance with Section 11(g) of Executive Order 12580 of January 23, 1987, the Secretary of the Department in which the Coast Guard is operating hereby delegates to the Administrator, Environmental Protection Agency (EPA), subject to the Administrator's consent:

- a. all functions specified in Sections 2(f), 4(c), and 5(b) of that Executive Order; and
- b. the functions specified in Sections 2(i), 2(j)(2), 2(k), and 6(c) of that Executive Order to the extent that those functions relate to the functions specified in Section 2(f) of that Executive Order.

2. The functions redelegated under this Instrument of Redelegation do not include;

- a. functions related to responses to releases or threats of releases from vessels;
- b. functions related to emergency action concerning releases or threats of releases at facilities other than active or inactive "hazardous waste management facilities" (as defined in 40 CFR 270.2); and
- c. functions related to emergency action concerning releases or threats of releases at active or inactive "hazardous waste management facilities" when the Coast Guard On-Scene Coordinator (OSC) determines that such action must be taken pending the arrival on scene of an EPA OSC. Unless otherwise agreed upon by the EPA and Coast Guard, this authority will not be exercised unless the EPA OSC is scheduled to arrive on scene within 48 hours of notification of the release or threat of release.

ENCLOSURE(1)

Reproduced at Government Expense

Reproduced at Government Expense

3. For purposes of this Instrument, the term "emergency action" includes any removal action which, in the view of the Coast Guard OSC, must be taken immediately to prevent or mitigate immediate and significant danger to the public health, welfare or the environment. Situations in which such actions may be taken include, but are not limited to, fire, explosions, and other sudden releases; human, animal, or food chain exposure to acutely toxic substance, and the contamination of a drinking water supply.

4. All functions described in this document, whether redelegated or retained, include the authority to contract for, obligate monies for, and otherwise arrange for and coordinate the responses included within such functions.

Jim Brunley 11/29/87
(Acting) Date

Secretary of Transportation

I hereby consent to the redelegation as set forth in this instrument.

Jim Thomas 5/27/88
Date

Administrator, Environmental Protection Agency

CERCLA* INCIDENT RESPONSE CONTINUUM



Emergency Response Operations (29CFR 1910.120)

Post-Emergency Response Operations

Emergency Response

Emergency Action Phase/ Removal Action

Time Critical Removal Action

Enforcement/Cost Recovery/ Litigation

Example Actions:
Establishment of safety/
security zones, evacuation,
shelter in place orders, mass
casualty/triage, firefighting
operations

Example Actions:
Berms, air monitoring, soil/water
sampling, drum over-packing,
segregation of chemicals,
specialized teams to temporarily
stop release, or to eliminate
IMMEDIATE threat of release &
environmental contamination.

Example Actions:
Continuous air monitoring &
soil/water sampling, actions
begin within 6 months and last
less than 12 months. Full PA/
SI required, part of a NPL site,
and/or include non-time critical
removal action.

Example Actions:
Documentation review,
search warrants, cost
recovery proceedings,
sworn testimony, trial
preparation, and technical
briefings.

OSHA Guidelines & CG/EPA Recommendations

CG Training:
24 Hour FRA/FRO

EPA/External Training:
24-40+ Hour HAZWOPER

EPA/External Training:
40-80+ Hour HAZWOPER

No OSHA Training Required

Government/Agency Jurisdiction:

PRIMARY: Local/State
SECONDARY: Federal

PRIMARY: Federal/State/RP
SECONDARY: Local/State

PRIMARY: Federal/State/RP
SECONDARY: State

PRIMARY: Federal/State
SECONDARY: State

*Based upon response authorities found in CERCLA §104(a) and the NCP 40 CFR §300.400.

U.S. Department
of TransportationUnited States
Coast Guard

Memorandum

MOR

Subject: AUTHORITY OF COAST GUARD FOSC TO RESPOND TO A
RELEASE OR THREAT OF RELEASE UNDER CERCLADate: 25 May 00
16465

From: Commander, First Coast Guard District (dl)

Reply to: dl
Attn. of: LTJG Katsenes
X8500

To: Commanding Officer, Marine Safety Office Boston

- Ref:
- (a) Your e-mail of 18 May 00
 - (b) Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*
 - (c) National Contingency Plan, 40 CFR Part 300
 - (d) Executive Order 12580
 - (e) 49 CFR §§1.46 (ff)-(gg)
 - (f) Instrument of Redelegation, DOT/EPA dtd 27 May 1988

1. In reference (a), you requested clarification regarding what constitutes an imminent and substantial danger to the public health and welfare. In addition, you asked whether the facts enumerated in reference (a), outlined in paragraph 4, below, constitute an emergency. The following outlines the Coast Guard on-scene coordinator's basic authority and responsibilities under CERCLA and provides guidance for determining whether an emergency response action is required by MSO Boston at Quincy Shipyard and in future similar circumstances.

Brief Answer:

2. The Coast Guard federal on-scene coordinator (FOSC) is authorized to take emergency action at non-DOD or DOE facilities in the coastal zone. When notified of a release at a facility in the coastal zone, and the need for emergency action is not clear, the Coast Guard FOSC may undertake an investigation necessary to determine the extent of danger to public health, welfare or the environment. The FOSC must determine whether there has been a release of either a hazardous substance or a pollutant or contaminant that is governed by CERCLA. Based on knowledge and experience, the FOSC must determine whether the pollutant or contaminant presents an imminent and substantial danger to the public health or welfare of the United States. An "imminent and substantial" danger determination does not require immediate risk to public health or the environment, but a showing that there is a reasonable cause for concern due to the nature of the risk on the site. After determining whether CERCLA regulated substance has been released, the Coast Guard FOSC may only take removal action emergency action is warranted. Emergency action requires that the release or threat of release poses an immediate threat to human health or the environment, requiring prompt removal. The Coast Guard FOSC may order the responsible party to take emergency removal action. If the responsible party does not comply, the Coast Guard FOSC may take action to remove the threat to public health. Once the emergency has been abated, the Environmental Protection Agency (EPA) is responsible for any additional response actions that may be necessary at the site. If the Coast Guard FOSC determines that there is not an immediate threat, and removal at a later time or remediation is appropriate, the EPA or a federal agency having jurisdiction, custody or control of that site must provide an OSC for response actions.

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AUTHORITY OF COAST GUARD FOSC TO RESPOND TO A RELEASE OR THREAT OF RELEASE UNDER CERCLA

3. If the Coast Guard FOSC determines that the seepage from drums in a warehouse at the Quincy Shipyard warrants emergency action requiring immediate necessity to act, he may take such action to abate the immediate danger to public health and the environment. If not, response at the Quincy shipyard site is the responsibility of the EPA. If there is subsequent determination that this property is in the jurisdiction, custody or control of a non-DOD or DOE federal agency, namely MARAD, that agency will be responsible for providing an FOSC for response actions. However, even if under the jurisdiction, custody or control of a non-DOD or DOE federal agency, if the release at Quincy Shipyard requires emergency action, the Coast Guard is the FOSC until emergency action is no longer required.

40 CFR
- 300.12(c)
NCP

Facts:

4. The facts as conveyed in reference (a) are as follows: Approximately seventy-five 55-gallon drums are located in a warehouse at Quincy Shipyard, Quincy, Massachusetts. Most contain unknown substances; three of the drums are labeled "xylene." Most drums are damaged, bulging, weeping, overflowing and several show evidence of leakage. The drums are stored in an unorganized pile. There are eight pallets of battery casings and small (five gallons) plastic receptacles labeled "corrosive." In addition there are nine large transformers which may contain PCB's. There are four-foot high piles of oil and paint covered drop cloths in close proximity to the drums, presenting a potential fire hazard due to the leaking 55-gallon drums (unknown contents) and the xylene labeled drums. In addition, there is no segregation of the drums or products, creating a potential hazard if the substances are incompatible. Due to the poor condition of the various containers and equipment, MSO Boston personnel believe that there is and will be a continued threat of release in the warehouse from the drums. The Atlantic Strike Team was requested to assess the release at Quincy Shipyard and began conducted an assessment on the site on May 24 and May 25, 2000.

Legal Basis for a CERCLA response:

5. Reference (b) creates a structure and authority to regulate hazardous substances, pollutants and contaminants. Reference (b) authorizes the President to act, consistent with the national contingency plan, to *remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time* (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.¹ This action is authorized whenever there is a release or threat of release into the environment of either:

(a) a hazardous substance;² or

¹ 42 U.S.C. §9604(a).

² Hazardous substances are defined in 42 U.S.C. § 9601(14) as: (a) those designated pursuant to 33 U.S.C. 1321(b)(2)(A); (b) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act, 42 U.S.C. § 9602; (c) Characteristic hazardous wastes identified or listed pursuant to 42 U.S.C. 6901(Solid Waste Disposal Act); (d) toxic pollutants under 33 U.S.C. 1317(a); (e) hazardous air pollutants under 42 U.S.C. §7412; (f) any imminently hazardous chemical substance or mixture the Administrator has taken action with pursuant to 15 U.S.C. 2606.

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(b) any pollutant or contaminant³ which may present an imminent and substantial danger to the public health or welfare.⁴

Under the reference (c), the USCG is designated as the federal on scene coordinator (FOSC) for CERCLA releases in or threatening the coastal zone⁵ and the EPA as the FOSC in inland zone.⁶

6. Once notified of a release that may require removal action under reference (c), the FOSC generally promptly initiates a removal site evaluation.⁷ Removal authority is mainly used to respond to emergency and time-critical situations where long deliberation prior to response is not feasible.⁸ The EPA or appropriate federal agency is authorized to enter any facility to conduct response actions, including investigations.⁹ A removal site evaluation includes identification of the source and nature of the release or threat of release, evaluation of the threat to public health evaluation of the magnitude of the threat, and evaluation of factors necessary to make the determination of whether a removal is necessary.¹⁰ The following factors must be considered in determining the appropriateness of a removal action:

- (a) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;
- (b) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
- (c) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

³ Pollutant or contaminant is defined under 42 U.S.C. § 9601 as follows:

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

⁴ 42 U.S.C. § 9604 (a)(1).

⁵ Coastal zone as defined for the purpose of the NCP, means all United States waters subject to the tide, United States waters of the Great Lakes, specified ports and harbors on inland rivers, waters of the contiguous zone, other waters of the high seas subject to the NCP, and the land surface or land substrata, ground waters, and ambient air proximal to those waters. The term coastal zone delineates an area of federal responsibility for response action. Precise boundaries are determined by EPA/USCG agreements and identified in federal regional contingency plans. 40 CFR §300.5.

⁶ 40 CFR § 300.120(a).

⁷ 40 CFR § 300.410(b).

⁸ Final Rule, National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 3666 (March 8, 1990).

⁹ 40 CFR § 300.400(d)(2)(A).

¹⁰ 40 CFR § 410.

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- (d) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;
- (e) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;
- (f) Threat of fire or explosion;
- (g) The availability of other appropriate federal or state response mechanisms to respond to the release; and
- (h) Other situations or factors that may pose threats to public health or welfare of the United States or the environment.¹¹

If removal action is considered appropriate, this action should begin as soon as possible.¹² However, the appropriate response agency will be determined by the immediacy of the threat to the public health, welfare or the environment.

7. The Administrator of the EPA ("Administrator") or the Secretary of the Department in which the Coast Guard is operating ("Secretary") is authorized to initiate appropriate response activities when the Administrator or Secretary determines that, "any hazardous substance is released or there is a threat of such a release into the environment, or there is a release or threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare of the United States."¹³ In reference (d), the Secretary is specifically authorized to take action for CERCLA responses for releases or threats of release in the coastal zone. In reference (e), the Secretary of Transportation delegated to the Commandant the authority to respond to releases or threats of releases in the coastal zone insofar as they relate to: (1) responses to releases or threats of releases from vessels; or (2) where emergency action concerning releases or threats of releases at facilities is required. The Secretary of Transportation subsequently delegated to the EPA the responsibility to act under the authorization granted in reference (d) in all cases except those involving releases or threats of releases from vessels or where emergency action concerning releases or threats of releases occur at facilities. If emergency action is deemed necessary, the Coast Guard FOSC is authorized to issue administrative orders to the responsible party to take removal action.¹⁴ If emergency action is not required, the EPA would be responsible for response actions, and any administrative orders arising therefrom.

8. Emergency action is defined in references (e) and (f) and includes, "any removal action which, in the view of the Coast Guard OSC, must be taken immediately to prevent or mitigate immediate and

¹¹ 40 CFR § 300.415(b)(2).

¹² 40 CFR § 300.415(b)(3).

¹³ 40 CFR § 300.130(c).

¹⁴ 49 CFR § 1.46(gg).

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significant danger to the public health, welfare, or the environment. Situations in which such actions may be taken include, but are not limited to, fire explosions, and other sudden releases; human, animal, or food chain exposure to acutely toxic substance, and the contamination of a drinking water supply."

* Emergency action is that action necessary in acute situations that present direct and significant danger to the public health, welfare or the environment. A determination that there is a release warranting removal does not dictate that emergency action is necessary. Emergency action is necessary if the Coast Guard FOSC determines that there is an immediate and significant danger to public health, welfare or the environment, and any delay in removal of the release would cause immediate harm. Federal agencies are required to provide OSCs for all removal actions that are not emergencies where the release is from a facility under the jurisdiction, custody or control of a federal agency.¹⁵

Conclusion:

9. The Coast Guard FOSC should evaluate, based on knowledge, experience dealing with similar circumstances, the facts of the case and the assessment of the AST, whether the release of unknown substances at Quincy Shipyard presents an acute threat to the public health or welfare, or the environment requiring immediate removal. If emergency action is deemed necessary, the Coast Guard FOSC may take removal action to abate or remove the threat. If the Coast Guard FOSC merely determines that response action, removal or remedial, is necessary at the, but that there is no immediate threat, the Coast Guard FOSC should refer the matter to the EPA or federal entity with jurisdiction, custody or control of the site. If you have any questions regarding the above, please contact LTJG Andrea Katsenes of my staff.


J. ASTLEY

Copy: m

¹⁵ 40 CFR § 300.120(e)(2)

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