

U.S. Department  
of TransportationUnited States  
Coast Guard

# Memorandum

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

Date: 25 May 00  
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From: Commander, First Coast Guard District (dl)

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Reply to LTJG Katsenes  
Attn. of: 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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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.<sup>1</sup> This action is authorized whenever there is a release or threat of release into the environment of either:

(a) a hazardous substance;<sup>2</sup> or

<sup>1</sup> 42 U.S.C. §9604(a).

<sup>2</sup> 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 contaminant<sup>3</sup> which may present an imminent and substantial danger to the public health or welfare.<sup>4</sup>

Under the reference (c), the USCG is designated as the federal on scene coordinator (FOSC) for CERCLA releases in or threatening the coastal zone<sup>5</sup> and the EPA as the FOSC in inland zone.<sup>6</sup>

6. Once notified of a release that may require removal action under reference (c), the FOSC generally promptly initiates a removal site evaluation.<sup>7</sup> Removal authority is mainly used to respond to emergency and time-critical situations where long deliberation prior to response is not feasible.<sup>8</sup> The EPA or appropriate federal agency is authorized to enter any facility to conduct response actions, including investigations.<sup>9</sup> 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.<sup>10</sup> 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;

<sup>3</sup> 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).

<sup>4</sup> 42 U.S.C. § 9604 (a)(1).

<sup>5</sup> 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.

<sup>6</sup> 40 CFR § 300.120(a).

<sup>7</sup> 40 CFR § 300.410(b).

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

<sup>9</sup> 40 CFR § 300.400(d)(2)(A).

<sup>10</sup> 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.<sup>11</sup>

If removal action is considered appropriate, this action should begin as soon as possible.<sup>12</sup> 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."<sup>13</sup> 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.<sup>14</sup> 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

<sup>11</sup> 40 CFR § 300.415(b)(2).

<sup>12</sup> 40 CFR § 300.415(b)(3).

<sup>13</sup> 40 CFR § 300.130(c).

<sup>14</sup> 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.<sup>15</sup>

## 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

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<sup>15</sup> 40 CFR § 300.120(e)(2)