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02/28/89

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

FEB 28 1989

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Notice of Environmental Restoration Activities at Department of Defense Facilities

FROM: Christopher Grundler, Director
Federal Facilities Hazardous Waste Compliance Office

TO: Superfund Enforcement Branch Chiefs
Regions I-X

Regional Counsel Hazardous Waste Branch Chiefs
Regions I-X

The purpose of this memo is to draw your attention to the notice provision of Section 211 of the Superfund Amendments and Reauthorization Act of 1986. Section 211 describes the Secretary of Defense's responsibilities under the Department of Defense's (DoD) Environmental Restoration Program. In particular, Section 2705 outlines the Secretary of Defense's responsibility to provide notice and opportunity to comment to EPA and the states on proposals for response activities at Federal facilities to address releases or threatened releases of hazardous substances at a Federal facility.

BACKGROUND

During the EPA workshop on CERCLA Section 120 Federal Facility Agreements held in September 1988, there was a great deal of discussion on the use of removal authorities at Federal facilities. Specifically, many Regions wanted to know how these activities should be incorporated into the overall remediation plan for a Federal facility since Executive Order 12580 delegates the authority to conduct on-site non-emergency removal actions to the Federal agencies. [The responsibility to conduct on-site emergency removal actions has only been delegated to the Department of Defense and the Department of Energy (DOE)].

The Regions expressed concern about cases where Federal agencies were not notifying EPA of removal actions before or at the time they were taken. Since removal activities can have a significant impact on the overall facility clean-up plan, the Regions wanted to know how EPA could compel Federal agencies to coordinate the removal actions with EPA prior to implementation to assure consistency with the final remedial action.

STATUTORY REQUIREMENT FOR NOTIFICATION AND CONSULTATION

Subsection 2705(a) of Section 211 of SARA requires the Secretary of Defense to notify EPA and appropriate State and local authorities of each of the following situations:

(1) The discovery of releases or threatened releases of hazardous substances at the facility.
(2) The extent of the threat to public health and the environment which may be associated with any such release or threatened release.
(3) Proposals made by the Secretary to carry out response actions with respect to any such release or threatened release.
(4) The initiation of any response action with respect to such release or threatened release and the commencement of each distinct phase of such activities.

In addition, subsection 2705(b)(1) requires that the Secretary of Defense ensure that EPA and State and local authorities have an adequate opportunity to comment on release notices under (1) and (2) listed above. Pursuant to subsection 2705(b)(2), EPA and the states must have adequate opportunity for timely review and comment on proposals for all response actions referred to in (3) and (4) above and before undertaking any activity or action referred to in (4). The opportunity for review and comment is required unless the action is an emergency removal taken because of imminent and substantial endangerment to human health or the environment and consultation would be impractical. We construe this to mean time-critical emergency response actions.

It is important to note that Section 2705 applies to non-NPL as well as NPL sites. It also applies to all response actions, though only removal actions are highlighted in this memorandum. Regions and states may use this authority to review and comment on response actions being taken at non or pre-NPL (i.e., in the NPL scoring pipeline) facilities that EPA or the states consider significant.

INCORPORATION INTO FFAs

In conclusion, Section 2705 makes it clear that EPA has a statutory basis for requiring review of proposed removal actions prior to implementation of these actions at DoD facilities. Although EPA Headquarters has no plans to negotiate model language for removal actions with DoD, Regions should include removal

provisions in Federal Facility Agreements. The actual language for the removal provision can be worked out in the context of site-specific negotiations.

To clarify the EPA and state oversight role for removal actions at Federal facilities, some Regions are including a special provision on removal actions in site-specific Federal Facility Agreements. (See Attachments 1 and 2).

REMOVAL ACTIONS AT NON-DOD FACILITIES

As Section 2705 of SARA was written specifically for DOD, EPA and the states have a narrower legal basis for seeking a role in the review process for non-emergency removals at non-DOD facilities. CERCLA Section 120(c) requires that information submitted under Section 3016 of RCRA be supplemented by "notice of each subsequent action taken under this Act with respect to the facility." Although this authority requires Federal agencies to give notice of activities, it does not give EPA the authority to intervene to prevent an inappropriate response.

The best argument for EPA and the states to use for carving out a role for the regulators in the review process of non-emergency removals at non-DOD facilities is that of consistency. It can be argued that all proposed actions at a NPL facility must be reviewed by EPA and the state to ensure consistency with the final remedial action.

CONTACTS

If you have any questions or comments, please feel free to call me at FTS-475-9801 or contact your regional coordinator in the Federal Facilities Hazardous Waste Compliance Office.

Attachments

cc: CERCLA Federal Facility Contacts
Ivy Main, OGC
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ROUTING AND TRANSMITTAL SLIP

Date: 14 Nov 91

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REMARKS

Betty,
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Col.

SUBJECT: U.S. EPA Guidance

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OPTIONAL FORM 41 (Rev. 7-76)
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