

3

EPA 1990-0559

RWV 55594
SW

8-80
1. 65 No. 46

Thursday
March 8, 1990

Federal Register

APR 29 1997
em

EPA 1990, 0559

United States
Government
Printing Office
SUPERINTENDENT
OF DOCUMENTS
WASHINGTON, DC 20540
OFFICIAL BUSINESS
Penalty for private use, \$300

*****FIRM 87545
A FR LOS ANGELES CALIF 90
LOS ANGELES NATIONAL LAW
ATTN: LISA M. PACE
P O BOX 1663
LOS ANGELES CA 90008
87545

SECOND CLASS NEWSPAPER
Postage and Fees Paid
U.S. Government Printing Office
95000 0007-0000



7133

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3644-1]

RIN 2050-AA75

National Oil and Hazardous Substances Pollution Contingency Plan

AGENCY: Environmental Protection Agency

ACTION: Final rule

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating revisions to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The Superfund Amendments and Reauthorization Act of 1980 (SARA) amends existing provisions of and adds major new authorities to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Furthermore, SARA mandates that the NCP be revised to reflect these amendments. Today's revisions to the NCP are intended to implement regulatory changes necessitated by SARA, as well as to clarify existing NCP language and to reorganize the NCP to coincide more accurately with the sequence of response actions.

DATE: The final rule is effective April 9, 1990. CERCLA section 306 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, EPA will publish notice of clarification in the Federal Register. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of April 9, 1990.

ADDRESSES: The official record for this rulemaking is located in the Superfund Docket, located in Room 2427 at the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, telephone number 1-202-382-3046. The record is available for inspection, by appointment only, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Tod Gold, Policy and Analysis Staff, Office of Emergency and Remedial Response (OS-240), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, at 1-202-382-2182, or the RCRA/Superfund Hotline at 1-800-424-9346 (in Washington, DC, at 1-202-382-3000).

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

- I. Introduction
- II. Response to Comments on Each Subpart (a detailed index is set forth at the beginning of this section)
- III. Summary of Supporting Analyses

I. Introduction

Pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510 (CERCLA or Superfund or the Act), as amended by section 105 of the Superfund Amendments and Reauthorization Act of 1980, Pub. L. No. 96-496, and Executive Order (E.O.) No. 12580 (52 FR 2923, January 29, 1987), the Environmental Protection Agency (EPA), in consultation with the National Response Team, is today promulgating revisions to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300. Today's final rule is based on revisions proposed on December 21, 1989 at 53 FR 51294; approximately 100 commenters submitted specific comments on the Federal Register proposal in writing as well as in testimony at four public hearings held in January 1990. Revisions to the NCP were last promulgated on November 20, 1985 (53 FR 47822).

For the reader's convenience and because the section numbers are being changed, EPA is reprinting the entire NCP, except for Appendix A (Uncontrolled Hazardous Waste Site Ranking System: A Users Manual), which is the subject of a separate rulemaking (see 63 FR 51962, December 23, 1998); and Appendix B (National Priorities List), which undergoes frequent updates by rulemaking (see, e.g., 54 FR 29820, July 14, 1989); and Appendix C (Revised Standard Dispersal Effectiveness and Toxicity Tests), for which only minor technical corrections were proposed. Also the "Procedures for Planning and Implementing Off-Site Response Actions," 40 CFR 300.440, is the subject of a separate rulemaking and is not included in this notice. See proposed rule, 53 FR 48218 (November 22, 1988). Those sections of the NCP that are merely being repeated in this rule for

public convenience, but for which no changes were proposed or comment solicited, are not the subject of this rulemaking and are not subject to judicial review.

All existing subparts of the NCP have been revised and several new subparts have been added. Furthermore, because the NCP has been reorganized, many of the existing subparts have been redesignated with a different letter. The reorganization of NCP subparts is as follows.

- Subpart A—Introduction
- Subpart B—Responsibility and Organization for Response
- Subpart C—Planning and Preparedness
- Subpart D—Operational Response Phases for Oil Removal
- Subpart E—Hazardous Substance Response
- Subpart F—State Involvement in Hazardous Substance Response
- Subpart G—Trustees for Natural Resources
- Subpart H—Participation by Other Persons
- Subpart I—Administrative Record for Selection of Response Action
- Subpart J—Use of Dispersants and Other Chemicals
- Subpart K—Federal Facilities (Reserved)

Today's revisions to the NCP encompass a broad and comprehensive rulemaking to revise as well as restructure the NCP. The primary purpose of today's rule is to incorporate changes mandated by the Superfund Amendments and Reauthorization Act of 1980 (SARA) and to set forth EPA's approach for implementing SARA. SARA extensively revised existing provisions of and added new authorities to CERCLA. These changes to CERCLA necessitated revision of the NCP. In addition, EPA is making a number of changes to the NCP based on EPA's experience in managing the Superfund program.

The preamble to the December 21, 1989 proposed revisions to the NCP provided detailed explanations of changes to the existing (1985) NCP. The preamble to today's rule consists mainly of responses to comments received on the proposed revisions. Therefore, both preambles should be reviewed when summarise on the meaning or intent of today's rule. Unless directly contradicted or superseded by this preamble or rule, the preamble to the proposed rule reflects EPA's intent in promulgating today's revisions to the NCP.

The preamble to today's rule responds to the major comments received on the proposed revisions, except as noted in the following paragraphs. In general, a separate discussion is provided for each proposed section on which comments were received; the discussions are organized as follows: a description of

(ii) State governments, and their political subdivisions, unless they are potentially responsible parties covered by an order or consent decree pursuant to section 122 of CERCLA; and

(iii) Persons operating under a procurement contract or an assistance agreement with the United States with respect to matters covered by that contract or assistance agreement, unless specifically provided therein.

(2) In order to be reimbursed by the Fund, an eligible person must notify the Administrator of EPA or designee prior to taking a response action and receive prior approval, i.e., "preauthorization," for such action.

(3) Preauthorization is EPA's prior approval to submit a claim against the Fund for necessary response costs incurred as a result of carrying out the NCP. All applications for preauthorization will be reviewed to determine whether the request should receive priority for funding. EPA, in its discretion, may grant preauthorization of a claim. Preauthorization will be considered only for:

(i) Removal actions pursuant to § 300.415;

(ii) CERCLA section 104(b) activities; and

(iii) Remedial actions at National Priorities List sites pursuant to § 300.435.

(4) To receive EPA's prior approval, the eligible person must:

(i) Demonstrate technical and other capabilities to respond safely and effectively to releases of hazardous substances, pollutants, or contaminants; and

(ii) Establish that the action will be consistent with the NCP in accordance with the elements set forth in paragraphs (c)(9) through (8) of this section.

(5) EPA will grant preauthorization to a claim by a party it determines to be potentially liable under section 107 of CERCLA only in accordance with an order issued pursuant to section 108 of CERCLA, or a settlement with the federal government in accordance with section 122 of CERCLA.

(6) Preauthorization does not establish an enforceable contractual relationship between EPA and the claimant.

(7) Preauthorization represents EPA's commitment that if funds are appropriated for response actions, the response action is conducted in accordance with the preauthorization decision document, and costs are reasonable and necessary. Reimbursement will be made from the Superfund, up to the maximum amount provided in the preauthorization decision document.

(8) For a claim to be awarded under section 111 of CERCLA, EPA must certify that the costs were necessary and consistent with the preauthorization decision document.

(e) *Section 108(b) petition.* Subject to conditions specified in CERCLA section 108(b), any person who has complied with an order issued after October 10, 1980 pursuant to section 108(a) of CERCLA, may seek reimbursement for response costs incurred in complying with that order unless the person has waived that right.

(f) *Section 123 reimbursement to local governments.* Any general purpose unit of local government for a political subdivision that is affected by a release may receive reimbursement for the costs of temporary emergency measures necessary to prevent or mitigate injury to human health or the environment subject to the conditions set forth in 40 CFR part 310. Such reimbursement may not exceed \$25,000 for a single response.

(g) *Release from liability.* Implementation of response measures by potentially responsible parties or by any other person does not release those parties from liability under section 107(a) of CERCLA, except as provided in a settlement under section 123 of CERCLA or a federal court judgment.

Subpart 3—Administrative Records for Selection of Response Action

§ 300.300 Establishment of an administrative record.

(a) *General requirement.* The lead agency shall establish an administrative record that contains the documents that form the basis for the selection of a response action. The lead agency shall compile and maintain the administrative record in accordance with this subpart.

(b) *Administrative records for federal facilities.* (1) If a federal agency other than EPA is the lead agency for a federal facility, the federal agency shall compile and maintain the administrative record for the selection of the response action for that facility in accordance with this subpart. EPA may furnish documents which the federal agency shall place in the administrative record file to ensure that the administrative record includes all documents that form the basis for the selection of the response action.

(2) EPA or the U.S. Coast Guard shall compile and maintain the administrative record when it is the lead agency for a federal facility.

(3) If EPA is involved in the selection of the response action at a federal facility on the NPL, the federal agency acting as the lead agency shall provide EPA with a copy of the index of

documents included in the administrative record file, the RI/FS workplan, the RI/FS released for public comment, the proposed plan, any public comments received on the RI/FS and proposed plan, and any other documents EPA may request on a case-by-case basis.

(c) *Administrative record for state-lead sites.* If a state is the lead agency for a site, the state shall compile and maintain the administrative record for the selection of the response action for that site in accordance with this subpart. EPA may require the state to place additional documents in the administrative record file to ensure that the administrative record includes all documents which form the basis for the selection of the response action. The state shall provide EPA with a copy of the index of documents included in the administrative record file, the RI/FS workplan, the RI/FS released for public comment, the proposed plan, any public comments received on the RI/FS and proposed plan, and any other documents EPA may request on a case-by-case basis.

(d) *Applicability.* This subpart applies to all response actions taken under section 104 of CERCLA or sought, secured, or ordered administratively or judicially under section 106 of CERCLA, as follows:

(1) Remedial actions where the remedial investigation commenced after the promulgation of these regulations; and

(2) Removal actions where the action memorandum is signed after the promulgation of these regulations.

(e) For those response actions not included in paragraph (d) of this section, the lead agency shall comply with this subpart to the extent practicable.

§ 300.305 Location of the administrative record file.

(a) The lead agency shall establish a docket at an office of the lead agency or other central location at which documents included in the administrative record file shall be located and a copy of the documents included in the administrative record file shall also be made available for public inspection at or near the site at issue, except as provided below:

(1) Sampling and testing data, quality control and quality assurance documentation, and chain of custody forms, need not be located at or near the site at issue or at the central location, provided that the index to the administrative record file indicates the location and availability of this information.