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White Oak Creek Embayment Time-Critical CERCLA Removal Action Regulatory Compliance Study

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ORNL/ER/Sub/91-KA931/3

Energy Systems Environmental Restoration Program
ORNL Environmental Restoration Program

White Oak Creek Embayment Time-Critical CERCLA Removal Action Regulatory Compliance Study

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B. L. Kimmel

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ACRONYMS AND ABBREVIATIONS

ARAR	applicable or relevant and appropriate requirement
BMP	best management plan
CDM	CDM Federal Programs Corporation
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
COE	U.S. Army Corps of Engineers
Cs	cesium
CX	categorical exclusion
DOE	Department of Energy
EA	environmental assessment
EE/CA	engineering evaluation/cost analysis
EIS	environmental impact statement
EMA	Emergency Management Agency
EPA	Environmental Protection Agency
ER	Environmental Restoration
FEMA	Federal Emergency Management Agency
FR	*Federal Register*
FRERP	Federal Radiological Emergency Response Plan
IAG	interagency agreement
NCP	National Contingency Plan
NEPA	National Environmental Policy Act
ORNL	Oak Ridge National Laboratory
ORR	Oak Ridge Reservation
OSC	on-scene coordinator
RCRA	Resource Conservation and Recovery Act
SARA	Superfund Amendments and Reauthorization Act
TDEC	Tennessee Department of Environment and Conservation
TEMA	Tennessee Emergency Management Agency
TVA	Tennessee Valley Authority
WOC	White Oak Creek
WOCE	White Oak Creek Embayment
WOL	White Oak Lake

1. INTRODUCTION

CDM Federal Programs Corporation was asked by Martin Marietta Energy Systems, Inc., under Subcontract No. 28K-KA931C to prepare a regulatory compliance study of the proposed time-critical removal action at White Oak Creek Embayment (WOCE). The time-critical removal action will be performed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended by the Superfund Amendments and Reauthorization Act (SARA) and by provisions of the latest version of the National Contingency Plan (NCP), 40 CFR Part 300, March 8, 1990.

The scope of work of this task includes reviewing relevant federal and state laws and regulations to identify and describe actions, events, notification and permit requirements, and the associated schedules required for complete compliance with all relevant regulations pertaining to a time-critical removal action. Appropriate federal and state regulatory agency personnel were identified and contacted specifically to verify and discuss the scope of the relevant or potentially applicable regulations. A list of agency contacts is provided in Appendix A. All of the individuals contacted had prior knowledge of the proposed removal action from meetings or contacts directly with Energy Systems Environmental Restoration (ER) Division personnel. In addition, several national information centers (hotlines) were contacted to verify the applicability of some reporting requirements to a Department of Energy (DOE) on-site response. These contacts are also listed in Appendix A.

2. SITE BACKGROUND

The information presented in Sects. 2.1, 2.2, and 2.3 was taken from a functional requirements document on the WOCE project prepared and provided by the Energy Systems ER Division.

2.1 DISCOVERY OF CONTAMINATED SURFACE SEDIMENT IN WHITE OAK CREEK EMBAYMENT

In fulfilling the requirements of the Clinch River Resource Conservation and Recovery Act (RCRA) Facility Investigation Phase 1 sampling plan, Energy Systems personnel collected a sediment core in late June 1990 from the lower portion of WOCE, ~50 yd upstream from the mouth of White Oak Creek (WOC). It was analyzed for ^{137}Cs activity. Examination of the analytical data revealed that this core sample contained 45,000 pCi/g dry wt of ^{137}Cs at the sediment surface. This level of activity was rechecked to verify its accuracy. Subsequently, 31 surface-sediment grab samples were collected on August 30, 1990, and were analyzed for ^{137}Cs activity to determine the spatial extent of the contamination in the lower WOCE. Results of these analyses confirmed that relatively high levels of ^{137}Cs activity exist in the surface sediments of the lower embayment.

DOE originally notified the Environmental Protection Agency (EPA) in 1982 of the historical release of contaminants, including ^{137}Cs, to White Oak Lake (WOL) under CERCLA Sect. 103(c). The presence of contaminants in the sediments is not a new area of concern. The focus of concern is the changed distribution of contaminants in the sediments from a relatively stable setting to a readily transportable setting.

High levels of ^{137}Cs activity at the sediment surface produced immediate concern because surface sediments in the WOCE are uncontrolled; that is, surface sediments can be readily eroded from the embayment and transported downstream into the Clinch River. On September 7, 1990, an occurrence report was filed and regulatory agencies were subsequently notified of the occurrence of contaminated surface sediment near the mouth of WOC. Additional surface sediment grab samples were collected from the WOCE by Energy Systems personnel on September 18, 1990, and were analyzed for ^{137}Cs activity.

2.2 BACKGROUND INFORMATION ON WHITE OAK LAKE AND WHITE OAK CREEK EMBAYMENT

The WOC watershed is the primary drainage source for the Oak Ridge National Laboratory (ORNL) area. WOL, a small impoundment on lower WOC, has served as the final settling basin for low-level radioactive effluents from ORNL since 1943. The contaminated sediment layer that occurs in the WOCE, in the Clinch River, and in Watts Bar Reservoir is the result of large releases of ^{137}Cs-contaminated sediments from WOL that occurred in the mid to late 1950s.

The WOCE extends 0.6 miles downstream from the WOL Dam and empties into the Clinch River at Clinch River Mile 20.8. The depth of water in the embayment is determined by the regulated summer and winter water levels of Watts Bar Reservoir. The mouth of

WOCE is ~120 ft. wide at the summer pool water level. The area of the embayment at the summer pool level is ~33,569 m^2 (8.5 acres). At winter pool level, the water level decreases by about 3 ft, and the upper portion of the WOCE becomes an exposed mud flat. The sediments in the lower, deeper portion of the WOCE are inundated throughout the year.

Core samples collected in 1978-1979 showed the highest concentrations of ^{137}Cs in sediments at a depth of 63 cm. In 1984, a core sample taken from within a short distance of the previous core samples showed the highest concentration of ^{137}Cs at a depth of 30 cm. These core samples were taken from the lower portion of WOCE just upstream from the confluence of WOC and the Clinch River. During this time, concentrations of ^{137}Cs in the surface sediments were approximately two orders of magnitude lower than the highest concentrations measured at depth. These previous data had indicated that the relatively high concentrations of ^{137}Cs were located well below the sediment surface in WOCE and were unlikely to be transported downstream in the near future. However, data collected in August and September 1990 indicate that the distribution of ^{137}Cs in the sediments of WOCE has changed dramatically and that high concentrations of ^{137}Cs are now present at the sediment surface and are subject to off-site transport to the Clinch River and Watts Bar Reservoir.

2.3 MECHANISMS OF SEDIMENT EROSION AND TRANSPORT IN THE WHITE OAK CREEK EMBAYMENT

The available data indicate that at least three mechanisms of sediment erosion and transport are operating in the WOCE: (1) the normal upstream-to-downstream erosion and transport of particles from the upper WOCE to lower WOCE, (2) sediment focusing from shallower (upper WOCE) to deeper (lower WOCE) areas, and (3) sediment erosion and transport from lower WOCE enhanced by the movement of water in and out of the WOCE. The available data indicate that the layer of less-contaminated sediment, which had previously overlain the highly contaminated stratum, has gradually been removed by erosion and transport. In this case, normal erosion and sediment transport have been accelerated by the cyclic surging of flow that occurs twice daily in the lower WOCE as a result of operation of the Melton Hill Dam.

Melton Hill Dam, a Tennessee Valley Authority (TVA) hydroelectric-power dam, is located on the Clinch River just upstream from the mouth of WOC. This dam, which began operations in 1963, is used as a peaking-power unit and usually generates twice each day for 1 to 2 hours. Generation of electricity at the dam results in the release of water downstream that increases the water level at the mouth of WOCE by about 2 ft and results in an upstream surge of water into the lower WOCE. When peaking power production ceases, the water level again drops, and water rapidly drains from the lower WOCE into the Clinch River. The ^{137}Cs analysis of sediment samples obtained in depositional areas in the Clinch River downstream of the mouth of WOC indicate that little transport of highly contaminated sediment from the WOCE has occurred thus far. However, there is concern that the contaminated surface sediments located in the lower WOCE could be readily transported from the embayment into the Clinch River. Furthermore, results of analyses of the Phase 1 sediment core indicate that other contaminants (metals, organics, and other radionuclides) are also present in the lower WOCE sediments, emphasizing the need to stabilize the situation.

2.4 CHRONOLOGY OF MAJOR EVENTS

The following is a synopsis of major events associated with the WOCE time-critical removal action from discovery through completion of construction.

Mid-August 1990: Results of analyses of core samples collected near the mouth of WOCE indicated that high levels of ^{137}Cs were present at the sediment surface.

August 30, 1990: Additional samples were collected to verify the high ^{137}Cs results in surface sediment.

September 6, 1990: Confirmational data were received that verified that high levels of ^{137}Cs were present in surface sediments near the mouth of WOCE.

September 7, 1990: Energy Systems filed an occurrence report on the presence of high levels of ^{137}Cs in surface sediments of WOCE. The report was transmitted to the standard ORNL Occurrence Report distribution list.

September 10, 1990: Energy Systems ER Division personnel conducted an initial planning meeting concerning an appropriate course of action. ER contacted Army Corps of Engineers (COE) Waterways Experiment Station personnel and scheduled a site visit to assist in the initial assessment of the problem.

September 20, 1990: Energy Systems met with EPA at the Tennessee Department of Environment and Conservation (TDEC) where discovery of the cesium problem in WOCE was discussed.

September 24, 1990: Representatives from the COE Waterways Experiment Station and the COE Nashville District Office conducted a site visit and met with ER Division personnel.

September 24, 1990: Energy Systems issued a press release concerning the discovery of surface sediment contamination in WOCE (to the *Oak Ridger* newspaper and other local news media).

Late September 1990: Energy Systems installed cables with warning signs across the mouth of WOC to prevent boat access from the Clinch River and posted new warning signs on the fence around the perimeter of the property.

October 1, 1990: DOE conducted a conference call with EPA and TDEC to discuss conducting a time-critical removal action at WOCE.

October 17, 1990: A meeting was held at the TDEC Knoxville office, including representatives of EPA, DOE, COE, TVA, Energy Systems, and TDEC to discuss the status of the issue. Agency representatives present at this meeting concurred that the project should be conducted as a time-critical removal action and that stream disturbance permits would not be required. This date constituted the initiation of the planning period.

October 26–December 17, 1990: COE performed an engineering alternatives evaluation of potential corrective measures at WOCE.

November 9, 1990: DOE (R.E. Sleeman) issued guidance to Energy Systems to proceed with the time-critical removal action.

November 11–21, 1990: Energy Systems conducted a geotechnical investigation at WOCE for the engineering design/analysis.

November 14, 1990: Energy Systems issued a press release on the WOCE project.

November 19, 1990: An interagency agreement (IAG) was executed between DOE and the COE on the design of the proposed sediment retention structure. This IAG was subsequently amended.

November 21, 1990: DOE received a letter from EPA (Scarborough) indicating EPA's full support of and agreement with DOE's decision to construct a sediment retention structure in WOCE.

Late November 1990: Energy Systems/DOE prepared and submitted a categorical exclusion (CX) determination under the National Environmental Policy Act (NEPA) for the WOCE time-critical removal consistent with the exemption provisions of CERCLA Sect. 121(e)(1) and the NEPA regulations (40 CFR 1500-1508). The CX was approved in June 1991.

December 5, 1990: Technical review of the COE alternatives analysis was completed.

December 17, 1990: Energy Systems and COE personnel presented a project status briefing at the DOE/regulator working group meeting in Chattanooga (EPA, TDEC, DOE, Energy Systems, and TVA). The COE presented the results of the alternatives analysis and Energy Systems presented the results of the geotechnical site characterization.

December 17, 1990–February 15, 1991: COE proceeded with Titles I and II engineering of a sheet pile coffer cell structure to contain sediments in WOCE; the 50% design review was completed on January 15, 1991, and the 90% design review was completed on February 21-22, 1991.

February 22–March 27, 1991: Energy Systems prepared plans and specifications for pile driving and general construction; bids were due April 30, 1991.

February 22–April 30, 1991: Energy Systems prepared, reviewed, and finalized plans and specifications for jet grouting; bids were due in early June 1991.

March 4, 1991: Initial site preparation activities began.

May 15, 1991: The initial construction subcontract was awarded.

June 25, 1991: Energy Systems issued a press release with an update on the WOCE project.

July 26, 1991: Sheet pile installation and cell closure was completed.

September 1991: Rock armor placement was completed.

November 1991: Jet grout testing was performed.

February 1992: Jet grouting to be completed.

March 19, 1992: Rock anchor installation to be completed.

March 30, 1992: Coffer cell construction to be completed; gabion placement will occur as soon as possible following the completion of coffer cell construction.

3. REGULATORY ANALYSIS

To evaluate thoroughly the statutory authority for conducting a time-critical removal action at WOCE and the areas for compliance with relevant state and federal environmental laws and regulations, a sizable collection of pertinent documents was assembled and reviewed in appropriate detail. In addition, specific telephone inquiries and verifications with the regulatory agency personnel (a list of contacts is provided in Appendix A) were conducted as needed to clarify ambiguities and assist in interpreting the laws or regulations. Pertinent sections and quotations from the various documents will be presented and discussed herein to provide a framework for identifying specific, substantive requirements for the time-critical removal action.

The primary products of this analysis are an identification of the substantive requirements of the applicable regulations and a schedule for compliance. Regulatory authority for each requirement is provided, along with the scope of the action or requirement.

Note that the greater part of this analysis is based on the NCP, which was written primarily to guide EPA Superfund-financed removal and remedial actions. Many NCP requirements concern removal actions related to maintaining strict control over the expenditure of and accounting for the use of money from the Superfund. In general, these types of requirements are not strictly applicable to this proposed removal action, which is being financed by DOE, although the basis for the statutory financial limits for removal actions is considered relevant and appropriate.

3.1 APPLICABLE REGULATIONS REVIEWED

The following is a list of documents reviewed or considered applicable or relevant to this regulatory analysis:

- National Contingency Plan 40 CFR Part 300 (March 1990)
- Superfund Removal Procedures Revision Number Three—OSWER Directive 9360.0-03B, February 1988
- State of Tennessee, Division of Superfund Chapter 46, Part 2—Hazardous Waste Management Act of 1983, effective May 1989 (Sect. 68-46-201, et seq.)
- Clean Water Act, Section 404, Permits for Dredged or Fill Material (33 CFR Parts 320-330)
- Federal Facilities Hazardous Waste Compliance Manual, EPA-PB-90-188749, January 1990
- Tennessee Department of Environment and Conservation, The Safe Dams Act of 1973, as amended May 1984, TCA (Sect. 69-12-102, et seq.)
- Rules of the Tennessee Department of Environment and Conservation Division of Water Supply, Chap. 1200-5-7 Rules and Regulations Applied to the Safe Dam Act of 1973

- Federal Radiological Emergency Response Plan, *Federal Register* Vol. 50. No. 217, November 8, 1985

- Executive Order 12580, Superfund Implementation, January 1987

- The Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act

- The Tennessee Water Quality Control Act of 1977, amended May 1984 (69-3-100 et seq.)

- Rules of Tennessee Department of Environment and Conservation, Division of Water Pollution Control, Chap. 1200-4-3, General Water Quality Criteria and Chap. 1200-4-4, Stream Use Classification for Interstate and Intrastate Streams, February 1987

- Tennessee Valley Authority Act 48 Statutes 58, May 1933, as amended; TVA Rules Sect. 26A

- The National Environmental Policy Act of 1969, as amended, and numerous DOE orders and policies

- Federal Facilities Compliance Strategy, EPA/130/4-89/003.

3.2 PROPOSED APPROACH AND REGULATORY REQUIREMENTS

DOE is in the process of constructing a coffer cell sediment retention structure across the mouth of WOCE as a time-critical removal action under the NCP (40 CFR Part 300) to contain surface sediments contaminated with high levels of ^{137}Cs. According to provisions contained in Executive Order 12580 (Superfund Implementation), Sect. (2)(d), the President has delegated authority to the Secretary of Energy for functions vested in the President by CERCLA Sects. 104, 121, and others. This delegated authority is specific with respect to a release or threatened release on DOE facilities. DOE has been delegated authority to conduct "emergency" and "non-emergency" removal actions at facilities under its jurisdiction. In accordance with Executive Order 12580, federal agencies are also responsible for funding response actions taken at facilities under their jurisdiction.

3.2.1. Limits on Removals

According to Sect. 300.415 (b)(5) of the NCP, Superfund-financed removal actions must be terminated after the obligation of $2 million or after 12 months have elapsed from the date that removal activities began on site, unless (1) there is an immediate risk to the public health or welfare or (2) continued response is otherwise appropriate and consistent with the remedial action to be taken. With regard to removals at federal facilities, "even in instances where NCP requirements are not strictly applicable, such as the statutory time and dollar limits for removal actions, federal agencies should consider the intent of, and reasoning behind the NCP provisions when conducting response actions at their own facilities." Regarding the statutory limits, Congress intended that removal actions continue to be limited in scope. "Federal agencies should comply with the removal statutory limits or meet the requirements for one of the two statutory exemptions from the limits." (OSWER Directive 9360.0-03B-IV-A).

In this case, the project should be completed within 12 months of the date that construction was initiated; however, the estimated cost of the project is $5 million. This project does, however, specifically meet the requirements for continued response under Sect. 300.415 (b)(5)(i) and (ii) described above. Construction of the sediment retention structure is being conducted to control downstream migration of contaminated sediments and thereby prevent risk to the public health and welfare. Further, sediment control will be required for final remediation of contaminated sediments in the embayment. In addition, the sediment retention structure will provide for containment of both in-place contaminated sediments and contaminated sediments that may be mobilized from the watershed during remediation of other solid waste management units.

3.2.2 Substantive Requirements of the NCP

CERCLA (42 U.S.C. 9605) as Amended by SARA (PL. 99-499) and the NCP (40 CFR Part 300)

This section presents an analysis of portions of the NCP applicable to the proposed time-critical removal action at WOCE. The section begins with site discovery and identifies applicable requirements through completion of the removal action and thereafter. Some definitions are included to facilitate understanding of the NCP terminology.

3.2.2.1 Discovery

Cesium-137 contamination of the sediments of WOCE resulted from releases that occurred in the 1950s. This contamination has been generally recognized since the releases occurred, but it was officially reported under CERCLA Sect. 103 (c) in 1982. Previous observations showed peak ^{137}Cs concentrations (45,000–80,000 pCi/g) occurring at sediment depths of about 60 to 80 cm. The occurrence of relatively high ^{137}Cs concentrations in surficial sediments was only recently discovered incidental to another investigation. Under this scenario, NCP Sect. 300.405 (a)(5) best describes this mode of discovery as "inventory or survey efforts or random or incidental observation reported by government agencies or the public."

3.2.2.2 Notification

The discovery of a release of hazardous substances triggers notification requirements. Section 300.170(c) of the NCP states that "all federal agencies are responsible for reporting releases of hazardous substances . . . in accordance with Sect. 103 of CERCLA." The original release(s) of ^{137}Cs was previously reported in accordance with CERCLA Sect. 103(c) requirements. A release equal to or greater than the "reportable quantity" for cesium (one curie) has not occurred, and therefore the notification requirements of CERCLA Sect. 103(a) are not strictly applicable. The "potential" for a release of a reportable quantity creates the urgency for taking action to stabilize the sediments. DOE/Energy Systems prepared and filed an occurrence report of the discovery of ^{137}Cs in surface sediments in WOCE and promptly notified EPA, TDEC, and TVA.

The NCP contains language throughout concerning requirements for notification of the National Response Center, EPA, the U.S. Coast Guard, the National Response Team, the Regional Response Team, and, in cases involving releases of radioactive materials, the Radiological Assistance Team and Federal Emergency Management Agency (FEMA) under

the Federal Radiological Emergency Response Plan (FRERP) [NCP Section 300.130(f)]. These agencies and personnel are considered resources that are available to an EPA on-scene coordinator (OSC) or other federal agency and are activated generally if the release exceeds the response capability available to an OSC in the place where it occurs. This interpretation was verified directly by calling FEMA concerning notification of FEMA under the FRERP. Assistance from FEMA under the FRERP is available if needed, but it is not required.

3.2.2.3 SARA Title III

According to Sect. 300.405(g), federal agencies are not legally obligated to comply with some requirements of Title III of SARA (Emergency Planning and Community Right-To-Know). Apparently, the definition of a person in these regulations does not specifically include government agencies and therefore may not apply. However, federal agencies do generally comply voluntarily with the SARA Title III requirements. The Tennessee Emergency Management Agency (TEMA) is the designated local SARA Title III Emergency Management Agency (EMA). TEMA should be notified in writing in advance of initiation of on-site activities to allow time for it to contact other appropriate local EMAs.

3.2.2.4 Removal Tracking Systems

EPA does maintain several data bases of information on removal actions, in particular the Emergency Response Notification System. Notification of the EPA Region IV Federal Facilities (DOE) Coordinator should be adequate to provide historical information on the response action in the absence of a need for outside assistance.

3.2.2.5 Notification of Natural Resources Trustees

NCP Sect. 300.410(g) indicates that if natural resources are or may be impacted by the release, the lead agency should notify state and federal trustees of the affected natural resources so that they may initiate appropriate action. The appropriate trustees in this case are the Department of the Interior, the U.S. Fish and Wildlife Service, the Tennessee Wildlife Resources Agency, TVA, and TDEC. The trustees were notified of the situation at a briefing in Nashville in September 1991.

3.2.2.6 Removal Site Evaluation

Following appropriate notifications, a removal site evaluation is performed. A removal site evaluation includes a removal preliminary assessment and, if warranted, a removal site inspection [Sect. 300.410(a)]. In this case, discovery was based on review of analytical data from the site followed by subsequent re-sampling and analysis for confirmation. These data and activities generally fulfill the requirements of the removal site evaluation (Sect. 300.410). Because the Oak Ridge Reservation is a National Priorities List site and the original release was reported under CERCLA 103(c), there should be no need to prepare an official preliminary assessment or site inspection report for submission to EPA.

The results of the removal site evaluation are used to determine the appropriate extent of action to be taken by the lead agency. Where the lead agency determines that there is a threat to public health or welfare or to the environment, the lead agency may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the

release or the threat of release [Sect. 300.415 (b)(1)]. Once the lead agency determines that a removal action is appropriate, it must initiate the action or determine the length of the required planning period. The urgency of a removal action is classified as one of the following:

- Classic emergency: On-site activities are initiated within hours of the lead agency's determination that a removal action is appropriate.

- Time-critical removal: On-site activities are initiated within 6 months of the determination that a removal action is appropriate.

- Non-time-critical removal: A planning period of more than 6 months is available before on-site activities begin.

To ensure that as much of the limited time period as possible is available for and devoted to cleanup activities, investigating and planning activities are not included in the time limitations for the removal. EPA has defined the start of the 12-month time limit to be the date when on-site cleanup activities begin or the date on which the contractor mobilizes at the site [OSWER Directive 9360.0-03B III (D)]. Project completion is defined as the date on which actions are completed and the contractor and the OSC have completely demobilized (OSWER Directive 9360.0-03B III-H.1).

3.2.2.7 Conducting the Removal

The WOCE removal action is classified as a time-critical removal primarily due to the need to perform construction to stabilize the sediments as soon as possible. All types of removal actions have specific requirements for community relations activities and for the Administrative Record. The Administrative Record is a compilation of documents that form the basis for the selection of a response action. It may include the following types of information: verified sampling and testing data, quality assurance and quality control documentation, site evaluation reports, health assessments, documents supporting the lead agency's determination of imminent and substantial endangerment, public health evaluations, and technical and engineering evaluations. Guidance documents and site-specific policy memorandums may also be included. There are specific provisions for disclosure of privileged and confidential information. Draft documents, internal memoranda, and day-to-day notes of staff are not included in the Administrative Record unless such documents contain information that forms the basis for selecting the response action and the information is not included elsewhere in the file.

Table 3-1 summarizes these requirements for each type of removal described in the NCP Sect. 300.415. A figure displaying removal action critical paths is presented in Appendix B. The information contained therein corresponds directly to the requirements presented in Table 3-1. Additional requirements concerning the Administrative Record for response actions in general are included in the NCP Subpart I, Sects. 300.800-810. Section 300.820 specifically addresses removal actions. These requirements are also summarized in Table 3-1, and the full text is included in Appendix B.

3.2.2.8 Designation of an On-Scene Coordinator

Although there does not appear to be a statutory requirement for DOE to designate an OSC per se, several of the regulators involved have expressed a desire to have someone on-site at all times during construction to document the activity in some detail. Energy Systems has designated a person to be on site at all times during construction activities.

3.2.2.9 Submission of an OSC Report After Completion of the Removal

NCP Sect. 300.165, OSC Reports, specifies that "an OSC report is due within 1 year after completion of removal activities for a major discharge of oil, a major release of a hazardous substance. . . ." The remainder of these sections is written specifically for "major" oil and hazardous substance releases and does not appear to be applicable to this proposed action. To meet the substantive requirements of this section, it is appropriate to prepare a report following completion of construction. The report should summarize the site history and background information and the daily activities during construction, including monitoring results. This report should be circulated to the regulatory agencies cooperating in this effort (TVA, TDEC, COE, and EPA) and should also be made available to the public within 1 year of completion of construction.

3.2.2.10 Post-Construction Activities/Non-NCP Requirements

Following completion of construction, DOE will need to conduct periodic stability monitoring and other routine maintenance activities as will be described in an operation and maintenance manual. Long-term water quality monitoring associated with construction and/or discharge will not be required or conducted separate from other ongoing on-site and off-site facility investigations.

3.2.2.11 Non-Time-Critical Removals

As shown in Table 3-1, the major difference between emergency removals, time-critical removals, and non-time-critical removals is the length of the planning period before initiation of on-site activities. Additional requirements for non-time-critical removals include conducting an engineering evaluation/cost analysis (EE/CA), publishing a notice of availability and description of the EE/CA in a major local newspaper, and providing a public review and comment period of at least 30 days on the analysis. A written responsiveness summary addressing significant comments must also be prepared. Another requirement is that if environmental samples are to be collected, the lead agency must prepare sampling and analysis plans that will be reviewed and approved by EPA. The sampling and analysis plans include a field sampling plan and a quality assurance project plan.

This scenario introduces the requirement for an approval memorandum for the EE/CA [Sect. 300.415 (m)(4)(i)] that is not referenced elsewhere in the NCP or in other guidance documents reviewed. Presumably, this approval memorandum constitutes final selection of the engineering alternative by the lead agency. Additional requirements include preparing a community relations plan and conducting interviews in the affected community. These final two requirements are also applicable to time-critical removals where on-site activity lasts more than 120 days, as shown in Table 3-1. These activities will be completed as part of ongoing

TABLE 3-1
PROPOSED COMMUNITY RELATIONS AND
ADMINISTRATIVE RECORD REQUIREMENTS FOR REMOVALS

ACTIVITY	EMERGENCY[1] Where on-site activity lasts less than 30 days	TIME-CRITICAL[2] Where on-site activity lasts less than 120 days	TIME-CRITICAL[2] Where on-site activity lasts more than 120 days	NON-TIME CRITICAL[3]
Designate Spokesperson	X	X	X	X
Notify Affected Citizens	X	X	X	X
Establish Administrative Record (AR) File	X	X	X	X
Make AR Available When EE/CA Approval Memorandum is Signed				X
Make AR Available Within 60 Days of Initiation of Site Activity	X	X	X	
Place AR in Central Location	X	X	X	X
Place AR at or Near Facility		X	X	X
Notify Public of AR	X	X	X	X
Provide a 30 Day Comment Period From Date AR is Available		X	X	X
Prepare Responsiveness Summary		X	X	X
Conduct Community Interviews			X	X
Prepare Community Relations Plan			X	X

[1] Emergencies generally refer to those actions where the release requires that on-site activities be initiated within hours of the lead agency's determination that a removal action is appropriate.

[2] Removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a period of less than six months available before on-site activities must be initiated.

[3] Removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of more than six months available before on-site activities must begin.

Source: OSWER Directive 9360.0-03B, February 1988

community relations activities in accordance with the *Community Relations Plan for the Environmental Restoration Program at Oak Ridge Reservation, Oak Ridge, Tennessee* (DOE/ORO 928).

3.2.3 Analysis of Applicable or Relevant and Appropriate Requirements

NCP Sect. 300.415(i) addresses attaining applicable or relevant and appropriate requirements (ARARs) during removal actions. It specifically addresses only fund-financed removal actions in terms of "to the extent practicable." NCP Sect. 300.430(f)(1)(ii)(C) describes waivers from ARARs that may be used for removal actions. This section specifically addresses the remedial investigation/feasibility study process and selection of a remedy. Waivers include the following:

- interim measures that will become part of total remediation that will attain ARARs;
- compliance with a requirement that will increase risk;
- compliance with a requirement that is technically impracticable;
- attaining an equivalent standard of performance through another method or approach;
- state standards or criteria that have not been consistently applied; and
- for fund-financed responses only, alternatives that attain ARARs but that are not balanced with regard to cost and protectiveness.

The approach for this proposed removal action has been to identify and address all regulatory requirements that would be applicable if permits for construction were required. The following provides the framework for and discussion of this issue.

The Oak Ridge Reservation, which is owned by DOE and managed by Energy Systems, includes the submerged land in WOL, WOC, and WOCE; surface waters are considered waters of the state. The regulatory agency consensus is that the proposed action in WOCE is an "onsite" response action. According to provisions described in CERCLA Sect. 121(e)(1), and NCP Sect. 300.400(e), federal, state, and local permits are not required for on-site response actions conducted under CERCLA Sect. 104 and others.

The key issue for applicability of the permit exemption is the fact that the response action will be conducted "onsite," as has been previously substantiated. Although permits will not be required for this action, all applicable regulatory requirements were reviewed and are summarized below.

3.2.3.1 Clean Water Act, Sect. 404, Permits for Dredged or Fill Material

Under Sect. 404, a dredge-and-fill permit from the COE would normally be required for construction of a structure as proposed herein. The normal permitting process includes provisions for public notice of the intent to issue a permit and response to comments. For each permit issued, the COE must also determine whether issuance of the permit constitutes a major federal action under the NEPA regulations and, if so, an environmental assessment (EA) or an environmental impact statement (EIS) must be prepared before issuance of the

permit. Because the COE has agreed that a permit is not required in this case, these provisions will not be applied.

Specific issues and concerns identified by the Nashville COE Permitting Division that are relevant to this project include the following:

- Construction should be accomplished during winter pool drawdown, if possible.
- For a coffer-cell type construction, riprap stone should be considered for the outer surface on the downstream side of the retention structure to provide habitat for stream flora and fauna.
- Coffer cell (sheet pile) construction is considered a clean method of construction that causes minimal sediment disturbance.
- The cells should not be intentionally filled with material from the river/embayment (the intention is to solidify contaminated materials that are incidentally collected in the cells during dam construction).
- Any material or water removed from the cells during construction should be properly disposed of or contained in an upland location and not allowed to re-enter the surface water.
- COE does not usually require or specify any particular type of monitoring during construction using sheet pile cells because it is considered a clean method.

With regard to constructing the structure during winter pool drawdown, initially the project schedule was specifically focused on this time frame. However, after review of the site-specific geotechnical data, it was determined that the soft sediment characteristics were not favorable for construction during this period. To minimize the head difference across the structure, the construction was initiated during summer pool conditions and is being stabilized to allow completion during winter pool conditions.

The applicable state regulatory permit authority concerning this project is related to the COE 404 dredge-and-fill permit, that is, the state water quality certification requirement [Clean Water Act, Section 401(a)(1)]. A COE 404 permit cannot be issued until the state 401 certification has been obtained. The state 401 certification primarily addresses water-quality-related effluent limitations and monitoring requirements.

3.2.3.2 Clean Water Act, Sect. 401, State Certification

TDEC has specifically agreed to waive the state 401 water quality certification requirement for this project. However, TDEC has identified three specific plans that DOE should prepare to ensure the success of the project and help minimize and assess the potential impacts.

- Contract documents for construction of the sediment retention structure should include a best management plan (BMP) for control of sediments disturbed during construction. This BMP should be consistent, to the extent practicable, with the approach in the overall ORNL National Pollutant Discharge Elimination System BMP. This BMP does not need

to be submitted to or approved by TDEC. The BMP was prepared and included in the contract documents.

- DOE/Energy Systems should document their intentions regarding water quality monitoring during construction in a monitoring plan. The water quality monitoring plan was prepared, submitted to TDEC for review, and approved.

- DOE/Energy Systems should prepare and provide TDEC with a copy of the operation and maintenance manual for the sediment retention structure and specify post-construction monitoring activities.

3.2.3.3 Other Applicable State Regulatory Authorities

Because surface waters in WOC are waters of the state, they are subject to the Tennessee Water Quality Control Act of 1977 as amended (TCA Sect. 69-3-105) and Rules of TDEC Chap. 1200-4-3, General Water Quality Criteria. These surface waters have been classified under Chap. 1200-4-4 for propagation of fish and aquatic life and for livestock watering and wildlife. Relevant water quality criteria for stream use classifications are found in Chap. 1200-4-3.03(3) for fish and aquatic life, and Chap. 1200-4-3.03(6) for livestock watering and wildlife. These water quality criteria are applicable and should be considered in developing the construction monitoring plan. All actions conducted in waters of the state should also consider Chap. 1200-4-3.06, Tennessee Antidegradation Statement.

3.2.3.4 The State of Tennessee Safe Dams Act of 1973, as amended (TCA, Sect. 69-12-102 et seq.), and TDEC Rules and Regulations Applied to the Safe Dams Act of 1973 (Chap. 1200-5-7)

Language in Chap. 1200-5-7-.02(32) specifically excludes the United States government and agencies owned by the government from compliance with the safe dam regulations. However, in the past, through a cooperative effort with TDEC, DOE has complied with applicable safe dam program requirements. The only safe dam regulatory requirement identified as applicable to this project is the provision for post-construction stability monitoring. This monitoring should be addressed in the operation and maintenance manual for maintenance of the structure as described previously.

3.2.3.5 Tennessee Valley Authority (TVA) Act 48 Statutes 58, as Amended

Section 26A of the TVA Handbook describes permitting and approval authority of TVA for dam construction or for conduct of other activities that may impact TVA's development or regulation of the Tennessee River System. TVA has also agreed to waive permit requirements for the WOCE project; however, DOE will be subject to power loss and flood storage loss assessments under TVA land rights. TVA has retained certain flowage easement rights on DOE property in the WOC area. This easement gives TVA the right to flood and store water to a particular elevation within the easement. Because dam construction will impair TVA's easement rights, TVA is entitled to compensation for power loss and flood storage loss in the form of monetary assessments. The assessments are based on the replacement cost of power facilities, interest rates, and the spill frequency of Watts Bar Dam (personal communication with Ken Spencer, TVA).

In 1983 the board of directors of TVA passed a resolution to enforce the policy of charging assessments for power loss. In many cases where public entities were involved before 1983, the assessments were waived. Now, TVA uniformly enforces assessments for power loss and, to a lesser extent, flood storage loss.

3.2.3.6 The National Environmental Policy Act of 1969, as amended (PL-91-190), DOE Directive 5440.1D and 10 CFR Part 1021

NEPA establishes a national policy to ensure that environmental values and factors are considered in federal planning and decision making. DOE's policy is to comply fully with the letter and spirit of NEPA. To ensure that environmental factors are considered in the decision-making process and to promote environmentally responsible decisions, DOE incorporates NEPA requirements early in the planning process for proposed actions. DOE also coordinates its NEPA actions with the states that host DOE facilities.

DOE has considered the environmental and human health factors related to construction of the sediment retention structure at WOCE, while closely coordinating with EPA Region IV, TDEC, COE Nashville District, and TVA. All agencies have concurred that construction of the structure (coffer cell sheet-pile construction) will create minimal impacts and accomplish the more important goal of stabilizing migration of contaminated surface sediments in WOCE.

DOE has complied with the timely planning and NEPA review requirements described by 10 CFR Part 1021.100 through completion of a CX in November 1990. This action has included a full engineering alternatives analysis that has been periodically reviewed by all cooperating agencies, resulting in full concurrence with the scope of the proposed action.

The proposed action meets the criteria for eligibility for CXs (Part 1021.412) that require documentation, in particular, Part 1021.412 (a)(3): "An action may be categorically excluded if, although sensitive areas are present on a site (floodplain and wetlands), the action would not adversely affect those areas."

Under Sect. 1021.413 (f)—Categorical Exclusions Applicable to Environmental Restoration and Waste Management, (1) removal actions under CERCLA are excluded. Section 1021.413 (f)(1) also includes a list of 17 specific types of actions that are introduced by the phrase "include, but are not limited to, the following types of actions."

Several of the 17 actions listed may apply as follows:

(v) capping or other containment of contaminated soils or sludges where the capping or containment would not affect future groundwater remediation and where needed to reduce migration of substances identified within the definition of hazardous substances under Sect. 101(14) of CERCLA, or pollutants or contaminants as defined by Sect. 101(33) of CERCLA, into soil, groundwater, surface water, or air;

(viii) confinement or perimeter protection using dikes, trenches, ditches, or diversions, where needed to reduce the spread of, or direct contact with, the contamination;

(xv) installation of fences, warning signs, or other security or site control precautions, where humans or animals have access to the release.

The addition of categorical exclusion of certain removal actions under CERCLA and RCRA was published in the *Federal Register* (55 *FR* 37174) on September 7, 1990. According to a DOE memorandum (EH-25) dated September 20, 1990, addressing supplemental interim procedural guidance for implementing NEPA (streamlined EAs), "these procedures apply only to actions (1) listed as categorical exclusions in the proposed DOE NEPA regulations and (2) not already categorically excluded in the existing DOE NEPA guidelines" (52 *FR* 47662, December 15, 1987) as amended (54 *FR* 14274, March 27, 1989; and 55 *FR* 37174, September 7, 1990). The DOE Proposed Rules, NEPA Implementing Procedures (10 CFR Part 1021), were promulgated in the *Federal Register* on November 2, 1990. These proposed rules specifically address inclusion of categories of actions subject to CX from EA and EIS requirements.

Notwithstanding the applicability of the CX, DOE/Energy Systems prepared floodplain and wetlands assessments to provide further documentation of the lack of impact of the project.

Specific requirements and/or requests of state and federal regulatory agencies that have been identified and discussed in this section have been included in the proposed project schedule of required activities presented in Sect. 4.0.

4. OVERALL PROJECT SCHEDULE OF REQUIRED ACTIVITIES

Figure 4-1 presents an overall schedule for the project, including all required and suggested activities discussed in Sect. 3.

4.1 DESIGNATION OF RESPONSIBILITY

All of the activities identified in Sect. 3 and summarized in Fig. 4.1 must be performed by DOE or its designated representative as the lead agency. For activities on the schedule that have already been conducted, the following clarification is provided:

1. Site discovery, notification, and the removal site evaluation were conducted by Energy Systems as a duly authorized representative of DOE.

2. The EE/CAs were performed by the COE under an IAG with DOE.

3. Construction will be conducted via subcontracts through MK-Ferguson of Oak Ridge Company, the DOE Construction Management Prime Contractor.

In essence, all of the remaining activities will be the responsibility of DOE/Energy Systems or their duly designated representatives.

4.2 SCOPE OF ACTIONS

Many of the actions described in the schedule are self explanatory or have been discussed in detail in previous sections. Those activities that have not been completed and/or bear further explanation are described below.

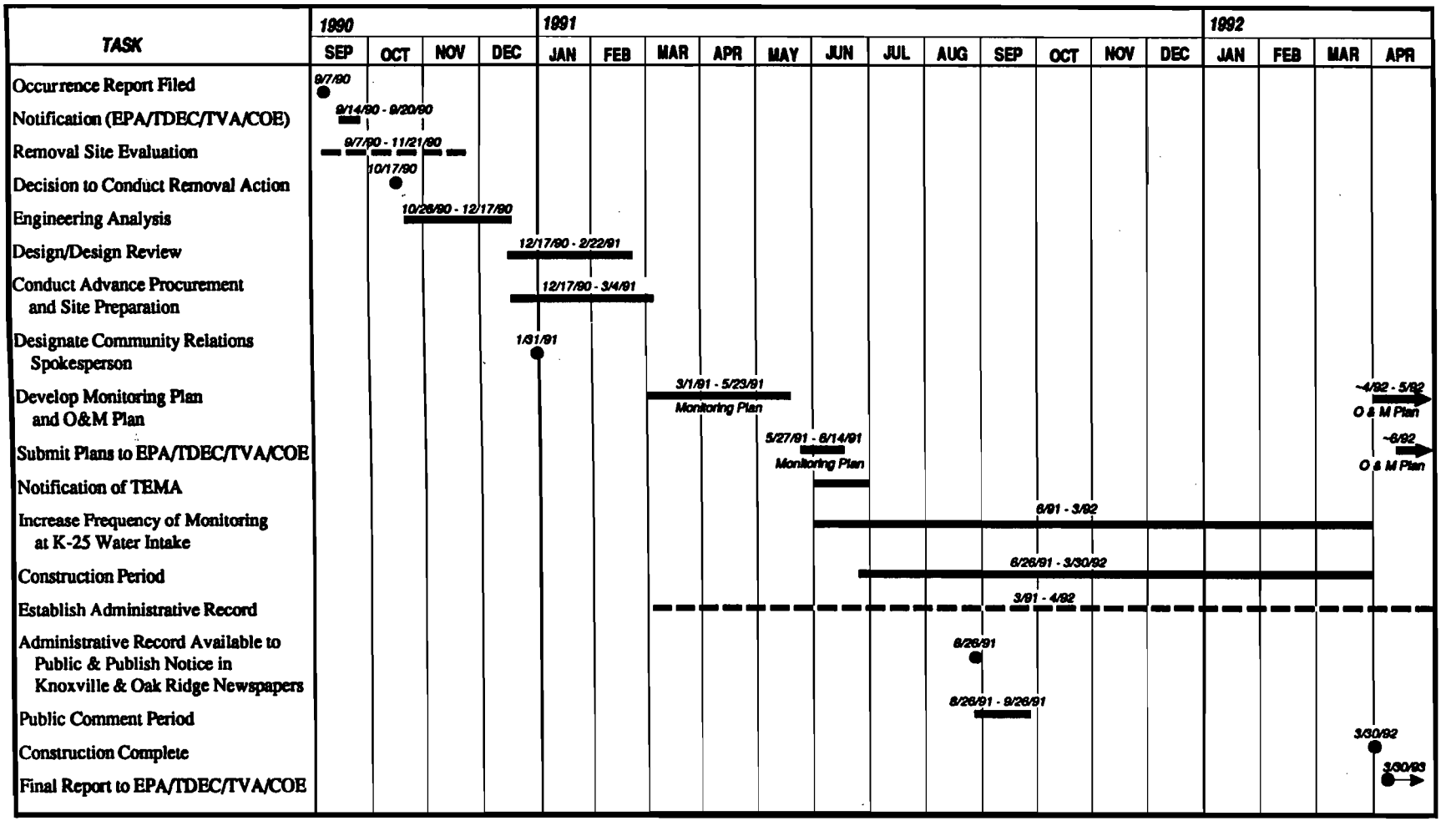
- Notification of TEMA should be in writing and should provide a brief description of the project, site background information, and information on the scope and schedule of the project. TEMA will in turn notify other local emergency management agencies and must be able to inform these agencies adequately in a timely manner, that is, before initiation of the removal.

- The Administrative Record should contain all documents that form the basis for selection of the removal action. Requirements are very specific for establishing the Administrative Record, its contents, and its availability. These requirements are included in Appendix C.

- TDEC has recommended that DOE/Energy Systems increase the frequency of monitoring for ^{137}Cs in the K-25 Site water intake (the first drinking water intake downstream of the site) during the construction period to ensure that Safe Drinking Water Act standards are not violated. This recommendation was incorporated into the Water Quality Monitoring Plan approved by TDEC.

Figure 4-1

SCHEDULE FOR THE WHITE OAK CREEK EMBAYMENT TIME-CRITICAL REMOVAL



- The community relations spokesperson designated by DOE/Energy Systems should be someone who is knowledgeable of the project and of general community relations activities and requirements, and someone who will be available to the public. This person should also be responsible for coordinating all required community relations activities and ensuring that administrative record requirements are met.

- The final report should include a description of all activities conducted from site discovery through completion of construction, including the results of construction monitoring. This report should be made available to all cooperating regulatory agencies (EPA, COE, TVA, and TDEC) for their records. The report will also serve as a completion report that can be used by EPA to complete documentation requirements for the removal action data bases.

Appendix A

STATE AND FEDERAL AGENCY CONTACTS

State and Federal Agency Contacts

1. Earl C. Leming
   Tennessee Department of Environment and Conservation
   2700 Middlebrook Pike
   Suite 220
   Knoxville, TN 37921
   (615) 594-6444

2. Robert J. Pryor
   Environmental Quality Staff
   Tennessee Valley Authority
   Summer Place Building
   Knoxville, TN 37902-1499
   (615) 632-6695

3. David Hopkins
   EPA Region IV
   Federal Facilities Coordinator for DOE
   345 Courtland Street, NE
   Atlanta, GA 30065
   (404) 347-3433

4. Beverly Spagg
   EPA Region IV
   Chief of Federal Facilities Remedial Section
   345 Courtland Street, NE
   Atlanta, GA 30365
   (404) 347-3016

5. Richard Campbell
   EPA Region IV
   Chief of DOE Remedial Unit
   345 Courtland Street, NE
   Atlanta, GA 30365
   (404) 347-3016

6. Jim Kapotic
   On-Scene Coordinator
   EPA Region IV
   Emergency Response Branch
   345 Courtland Street, NE
   Atlanta, GA 30365
   (404) 347-3931

7. Randy Castleman
   U.S. Army Corps of Engineers
   Permitting Division
   Nashville, TN 37202
   (615) 736-5181

8. Travis Claude
   U.S. Army Corps of Engineers
   Permitting Division
   Nashville, TN 37202
   (615) 736-5181

9. Ken Spencer
   Tennessee Valley Authority
   Norris Dam
   (615) 632-1503

10. Dan Fisher
    Tennessee Valley Authority
    P. O. Box 6000
    Morristown, TN 37815-6000
    (615) 587-5600

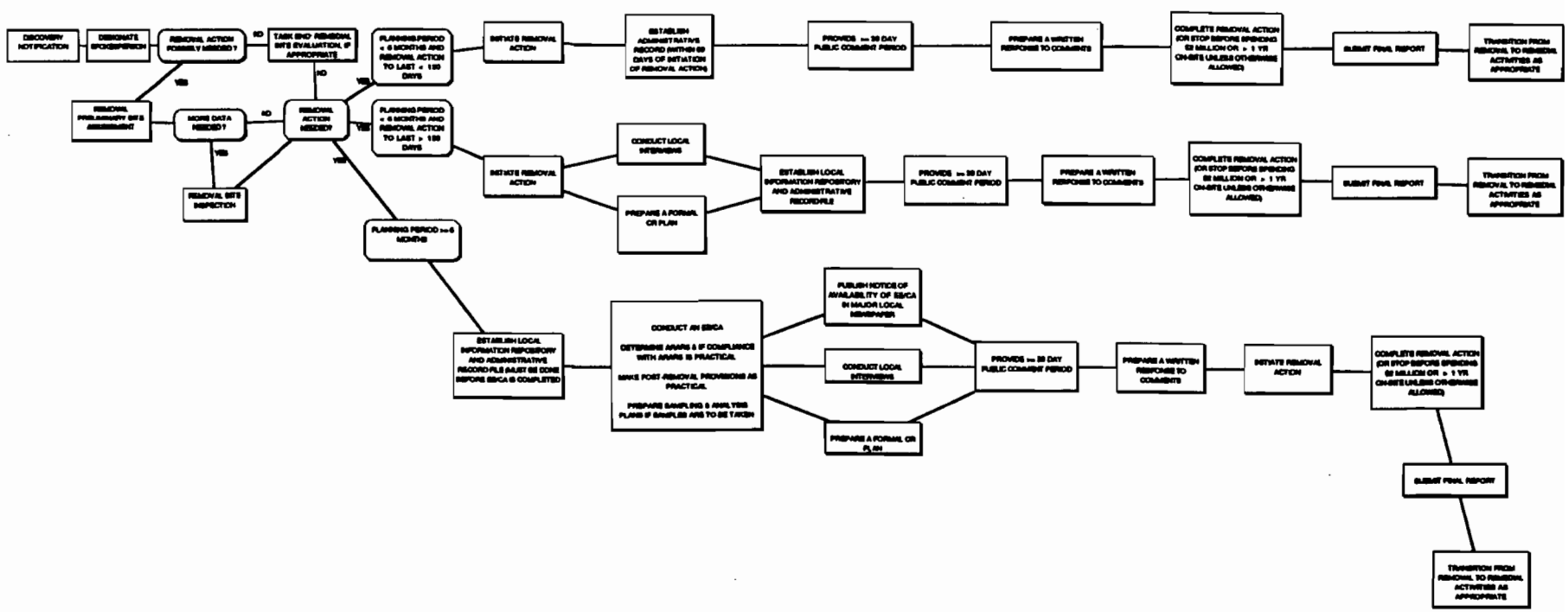
11. RCRA/Superfund Hotline
    (800) 424-9346

12. Federal Emergency Management Agency
    (202) 646-2854

13. National Response Center
    (800) 424-8802

Appendix B

REMOVAL ACTION CRITICAL PATH


DISCOVERY NOTIFICATION
DESIGNATE SPOKESPERSON
REMOVAL ACTION POSSIBLY NEEDED?
NO
TASK END REMEDIAL SITE EVALUATION, IF APPROPRIATE
YES
REMOVAL PRELIMINARY SITE ASSESSMENT
MORE DATA NEEDED?
NO
REMOVAL ACTION NEEDED?
NO
YES
YES
REMOVAL SITE INSPECTION
YES
PLANNING PERIOD < 6 MONTHS AND REMOVAL ACTION TO LAST < 120 DAYS
PLANNING PERIOD < 6 MONTHS AND REMOVAL ACTION TO LAST > 120 DAYS
PLANNING PERIOD >= 6 MONTHS
INITIATE REMOVAL ACTION
ESTABLISH ADMINISTRATIVE RECORD (WITHIN 60 DAYS OF INITIATION OF REMOVAL ACTION)
PROVIDE >= 30 DAY PUBLIC COMMENT PERIOD
PREPARE A WRITTEN RESPONSE TO COMMENTS
COMPLETE REMOVAL ACTION (OR STOP BEFORE SPENDING $2 MILLION OR > 1 YR ON-SITE UNLESS OTHERWISE ALLOWED)
SUBMIT FINAL REPORT
TRANSITION FROM REMOVAL TO REMEDIAL ACTIVITIES AS APPROPRIATE
INITIATE REMOVAL ACTION
CONDUCT LOCAL INTERVIEWS
PREPARE A FORMAL CR PLAN
ESTABLISH LOCAL INFORMATION REPOSITORY AND ADMINISTRATIVE RECORD FILE
PROVIDE >= 30 DAY PUBLIC COMMENT PERIOD
PREPARE A WRITTEN RESPONSE TO COMMENTS
COMPLETE REMOVAL ACTION (OR STOP BEFORE SPENDING $2 MILLION OR > 1 YR ON-SITE UNLESS OTHERWISE ALLOWED)
SUBMIT FINAL REPORT
TRANSITION FROM REMOVAL TO REMEDIAL ACTIVITIES AS APPROPRIATE
ESTABLISH LOCAL INFORMATION REPOSITORY AND ADMINISTRATIVE RECORD FILE (MUST BE DONE BEFORE EE/CA IS COMPLETED)
CONDUCT AN EE/CA
DETERMINE ARARS & IF COMPLIANCE WITH ARARS IS PRACTICAL
MAKE POST REMOVAL PROVISIONS AS PRACTICAL
PREPARE SAMPLING & ANALYSIS PLANS IF SAMPLES ARE TO BE TAKEN
PUBLISH NOTICE OF AVAILABILITY OF EE/CA IN MAJOR LOCAL NEWSPAPER
CONDUCT LOCAL INTERVIEWS
PREPARE A FORMAL CR PLAN
PROVIDE >= 30 DAY PUBLIC COMMENT PERIOD
PREPARE A WRITTEN RESPONSE TO COMMENTS
INITIATE REMOVAL ACTION
COMPLETE REMOVAL ACTION (OR STOP BEFORE SPENDING $2 MILLION OR > 1 YR ON-SITE UNLESS OTHERWISE ALLOWED)
SUBMIT FINAL REPORT
TRANSITION FROM REMOVAL TO REMEDIAL ACTIVITIES AS APPROPRIATE

Appendix C

NATIONAL CONTINGENCY PLAN

SUBPART I—ADMINISTRATION

(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)(5) 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 106 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 106(b) petition.* Subject to conditions specified in CERCLA section 106(b), any person who has complied with an order issued after October 16, 1986 pursuant to section 106(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 122 of CERCLA or a federal court judgment.

Subpart I—Administrative Record for Selection of Response Action

[Subpart I added by 55 FR 8813, March 8, 1990]

§ 300.800 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.

§ 300.805 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.

(2) Guidance documents not generated specifically for the site at issue need not be located at or near the site at issue, provided that they are maintained at the central location and the index to the administrative record file indicates the location and availability of these guidance documents.

(3) Publicly available technical literature not generated for the site at issue, such as engineering textbooks, articles from technical journals, and toxicological profiles, need not be located at or near the site at issue or at the central location, provided that the literature is listed in the index to the administrative record file or the literature is cited in a document in the record.

(4) Documents included in the confidential portion of the administrative record file shall be located only in the central location.

(5) The administrative record for a removal action where the release or threat of release requires that on-site removal activities be initiated within hours of the lead agency's determination that a removal is appropriate and on-site removal activities cease within 30 days of initiation, need be available for public inspection only at the central location.

(b) Where documents are placed in the central location but not in the file located at or near the site, such documents shall be added to the file located at or near the site upon request, except for documents included in paragraph (a)(4) of this section.

(c) The lead agency may make the administrative record file available to the public in microform.

§ 300.810 Contents of the administrative record file.

(a) *Contents.* The administrative record file for selection of a response action typically, but not in all cases, will contain the following types of documents:

(1) Documents containing factual information, data and analysis of the factual information, and data that may form a basis for the selection of a response action. Such documents may include verified sampling data, quality control and quality assurance documentation, chain of custody forms, site inspection reports, preliminary assessment and site evaluation reports, ATSDR health assessments, documents supporting the lead agency's determination of imminent and substantial endangerment, public health evaluations, and technical and engineering evaluations. In addition, for remedial actions, such documents may include approved workplans for the remedial investigation/feasibility study, state documentation of applicable or relevant and appropriate requirements, and the RI/FS;

(2) Guidance documents, technical literature, and site-specific policy memoranda that may form a basis for the selection of the response action. Such documents may include guidance on conducting remedial investigations and feasibility studies, guidance on determining applicable or relevant and appropriate requirements, guidance on risk/exposure assessments, engineering handbooks, articles from technical journals, memoranda on the application of a specific regulation to a site, and memoranda on off-site disposal capacity;

(3) Documents received, published, or made available to the public under § 300.815 for remedial actions, or § 300.820 for removal actions. Such documents may include notice of availability of the administrative record file, community relations plan, proposed plan for remedial action, notices of public comment periods, public comments and information received by the lead agency, and responses to significant comments;

(4) Decision documents. Such documents may include action memoranda and records of decision;

(5) Enforcement orders. Such documents may include administrative orders and consent decrees; and

(6) An index of the documents included in the administrative record file. If documents are customarily grouped together, as with sampling data chain of custody documents, they may be listed as a group in the index to the administrative record file.

(b) *Documents not included in the administrative record file.* The lead agency is not required to include documents in the administrative record file which do not form a basis for the selection of the response action. Such documents include but are not limited to draft documents, internal memoranda, and day-to-day notes of staff unless such documents contain information that forms the basis of selection of the response action and the information is not included in any other document in the administrative record file.

(c) *Privileged documents.* Privileged documents shall not be included in the record file except as provided in paragraph (d) of this section or where such privilege is waived. Privileged documents include but are not limited to documents subject to the attorney-client, attorney work product, deliberative process, or other applicable privilege.

(d) *Confidential file.* If information which forms the basis for the selection of a response action is included only in a document containing confidential or privileged information and is not otherwise available to the public, the information, to the extent feasible, shall be summarized in such a way as to make it disclosable and the summary shall be placed in the publicly available portion of the administrative record file. The confidential or privileged document itself shall be placed in the confidential portion of the administrative record file. If information, such as confidential

[Sec. 300.810(d)]

business information, cannot be summarized in a disclosable manner, the information shall be placed only in the confidential portion of the administrative record file. All documents contained in the confidential portion of the administrative record file shall be listed in the index to the file.

§ 300.815 Administrative record file for a remedial action.

(a) The administrative record file for the selection of a remedial action shall be made available for public inspection at the commencement of the remedial investigation phase. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of the availability of the administrative record file.

(b) The lead agency shall provide a public comment period as specified in § 300.430(f)(3) so that interested persons may submit comments on the selection of the remedial action for inclusion in the administrative record file. The lead agency is encouraged to consider and respond as appropriate to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(c) The lead agency shall comply with the public participation procedures required in § 300.430(f)(3) and shall document such compliance in the administrative record.

(d) Documents generated or received after the record of decision is signed shall be added to the administrative record file only as provided in § 300.825.

§ 300.820 Administrative record file for a removal action.

(a) If, based on the site evaluation, the lead agency determines that a removal action is appropriate and that a planning period of at least six months exists before on-site removal activities must be initiated:

(1) The administrative record file shall be made available for public inspection when the engineering evaluation/cost analysis (EE/CA) is made available for public comment. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of the availability of the administrative record file.

(2) The lead agency shall provide a public comment period as specified in § 300.415 so that interested persons may submit comments on the selection of the removal action for inclusion in the administrative record file. The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(3) The lead agency shall comply with the public participation procedures of § 300.415(m) and shall document compliance with § 300.415(m)(3)(i) through (iii) in the administrative record file.

(4) Documents generated or received after the decision document is signed shall be added to the administrative record file only as provided in § 300.825.

(b) For all removal actions not included in paragraph (a) of this section:

(1) Documents included in the administrative record file shall be made available for public inspection no later than 60 days after initiation of on-site removal activity. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of availability of the administrative record file.

(2) The lead agency shall, as appropriate, provide a public comment period of not less than 30 days beginning at the time the administrative record file is made available to the public. The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(3) Documents generated or received after the decision document is signed shall be added to the administrative record file only as provided in § 300.825.

§ 300.825 Record requirements after the decision document is signed.

(a) The lead agency may add documents to the administrative record file after the decision document selecting the response action has been signed if:

(1) The documents concern a portion of a response action decision that the decision document does not address or reserves to be decided at a later date; or

(2) An explanation of significant differences required by § 300.435(c), or an amended decision document is issued, in which case, the explanation of significant differences or amended decision document and all documents that form the basis for the decision to modify the response action shall be added to the administrative record file.

(b) The lead agency may hold additional public comment periods or extend the time for the submission of public comment after a decision document has been signed on any issues concerning selection of the response action. Such comment shall be limited to the issues for which the lead agency has requested additional comment. All additional comments submitted during such comment periods that are responsive to the request, and any response to these comments, along with documents supporting the request and any final decision with respect to the issue, shall be placed in the administrative record file.

(c) The lead agency is required to consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action. All such comments and any responses thereto shall be placed in the administrative record file.

Subpart J—Use of Dispersants and Other Chemicals

[Subpart J revised by 55 FR 8813, March 8, 1990]

§ 300.900 General.

(a) Section 311(c)(2)(G) of the Clean Water Act requires that EPA prepare a schedule of dispersants and other chemicals, if any, that may be used in carrying out the NCP. This subpart makes provisions for such a schedule.

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