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**INTERIM GUIDANCE ON ADMINISTRATIVE
RECORD FOR THE SELECTION OF CERCLA
RESPONSE ACTIONS**

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REPORT**

INTERIM GUIDANCE ON ADMINISTRATIVE RECORDS
FOR THE
SELECTION OF CERCLA RESPONSE ACTIONS

U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
Washington, D.C. 20460

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I. INTRODUCTION

A. Purpose and Scope of the Administrative Record

This guidance addresses the establishment of administrative records under §113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).^{*} Section 113(k)(1) of CERCLA requires the establishment of administrative records upon which the President shall base the selection of a response action (see Appendix A for the complete statutory language).

Chapter I of this guidance introduces the purpose and scope of the administrative record. Chapter II reviews procedures for compiling and maintaining the administrative record. Chapter III examines the various types of documents which should be included in the administrative record. Chapter IV discusses the involvement in establishing the record of parties outside the Agency. Finally, this guidance includes a glossary of frequently used terms and acronyms as well as several appendices.

Although written for use by the United States Environmental Protection Agency (EPA), this guidance can be adapted for use by State and Federal agencies required to establish administrative records for the selection of CERCLA response actions. This guidance is not intended as a treatise on general principles of administrative law with regard to administrative records. This guidance reflects, to the extent feasible, proposed revisions to the National Contingency Plan (NCP) published on December 21, 1988 (53 FR 51394) (see Appendices L and M). The Agency may refine or change this memorandum when it promulgates the regulations in final form.

The administrative record established under §113(k) of CERCLA serves two primary purposes. First, the basis for the response selection is set forth in the record and under §113(j), judicial review of any issue concerning the adequacy of a response selection is limited to the record. Second, §113(k) requires that the administrative record act as a vehicle for public participation in the selection of the response action. This guidance document discusses procedures developed to ensure that the Agency's administrative records meet these twin purposes.

The basis of the Agency's selection of a response action must be documented in the administrative record. The record should include the documents considered or relied on by the Agency in making the response action decision for the site. For

^{*}References made to CERCLA throughout this memorandum should be interpreted as meaning "CERCLA, as amended by SARA."

purposes of this guidance, documents considered by the Agency are documents that were relied upon or comments which the Agency solicited or received from interested parties and the public. The following principles should be applied in establishing administrative records:

- o The record should be compiled as documents relating to the selection of the response action are generated or received by the Agency;
- o The record should include documents that form the basis for the Agency's decision, whether or not they support the Agency's response selection; and
- o The record should be a contemporaneous explanation of the basis for the selection of a response action.

The effort to establish adequate administrative records encompasses a vast array of people including: Administrative Record Coordinators, Remedial Project Managers (RPMs), On-Scene Coordinators (OSCs), enforcement staff, records management staff, Regional Counsel, Community Relations Coordinators (CRCs), other Federal agencies, States, CERCLA contractors, and the public. The roles and responsibilities of these people and their interaction forms an integral part of this guidance.

B. Judicial Review

Section 113(j)(1) of CERCLA provides that judicial review of any issues concerning the adequacy of any response action shall be limited to the administrative record.

Judicial review on the basis of an administrative record can provide numerous benefits. Under §113(j) of CERCLA and general principles of administrative law, the trial court reviewing the Agency's selection of response action is limited to the facts as set out in the administrative record. As a result, arguments that potentially responsible parties (PRPs) or citizens raise for the first time in court concerning the selection of a response action should not be considered.

Record review saves time by limiting the scope of trials, thereby saving the Agency's resources for cleanup rather than litigation. Courts will not allow a party challenging an Agency decision to use discovery, hearings, or additional fact finding to look beyond the Agency's administrative record, except in very limited circumstances. In particular, courts generally will not permit persons challenging the Agency's response decision to depose Agency decision-makers, staff, or contractors concerning the selection of the response action.

Furthermore, the administrative record may be cited long after officials responsible for the response decisions have moved

into different positions or have left the Agency. Judicial review limited to the record will save the Agency the time involved in locating former employees who may not remember the facts and circumstances underlying decisions made at a much earlier time. 227

Moreover, in ruling on challenges to the response action decision, the court will apply the highly deferential "arbitrary and capricious" standard of review set forth in §113(j)(2) of CERCLA. Under that standard, a court does not substitute its judgment for that of the Agency, but only overturns the response selection decision if it can be shown "on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law."

However, the extent to which the Agency attains the benefits of judicial review limited to the record depends on the quality and completeness of each record. If the record is incomplete or fails to provide an adequate explanation of the basis for the Agency's response action selection, the court may remand the case to the Agency for reconsideration of its decision. Proper and thorough compilation of the record will help avoid these results.

C. Public Participation

Section 113(k)(2) of CERCLA requires that the public have the opportunity to participate in the development of the administrative record for response selection. Section 117 of CERCLA also includes provisions for public participation in the remedial action selection process. Both sections reflect a statutory emphasis on public participation in the development of the record and the response selection. Participation by interested persons will ensure that the Agency has considered the concerns of the public, including PRPs, in selecting a response action. In addition, for purposes of administrative and judicial review, the record will contain documents that reflect the views of the public, including PRPs, concerning the selection of a response action.

Without an opportunity for involvement of interested parties in the development of the administrative record, persons challenging a response action may argue that judicial review should not be limited to the record. The Agency must, therefore, make the information considered or relied on in selecting a response action available to the public, provide an appropriate opportunity for public comment on this information, place comments and information received from the public in the record, and reflect in the record the Agency's consideration of this information.

II. PROCEDURES FOR ESTABLISHING THE ADMINISTRATIVE RECORD

A. Administrative Record Coordinator

Each Region should designate a person to be the Administrative Record Coordinator. As delegated, the Record Coordinator generally has the duty of ensuring the adequate compilation and maintenance of the administrative record files. The Record Coordinator will not be responsible for deciding which documents are included in a record file. Those decisions should be made jointly by the OSC or RPM and the ORC. The Record Coordinator's duties ordinarily include:

- o Developing procedures for the creation of record files;
- o Ensuring notification of the availability of the record files for public inspection;
- o Ensuring availability of the record at the location at or near the site;
- o Coordinating efforts to obtain the necessary documents;
- o Updating the record files and indices on a regular basis (e.g., quarterly);
- o Compiling information in a central Regional location;
- o Indexing the record files;
- o Ensuring availability of the record file for copying;
- o Ensuring availability of validated sampling data, possibly at a location other than that of the record files;
- o Coordinating with ORC on questions of relevance and confidentiality of documents submitted for inclusion in the record files;
- o Maintaining the confidential portion of the record files, if necessary;
- o Maintaining the Regional compendium of guidance documents and technical references;
- o Coordinating with States and Federal agencies on record files compiled by them; and
- o Notifying appropriate personnel of the timing for review of State and Federal record files.

Appendix D contains a model position description for an Administrative Record Coordinator.

The Record Coordinator must work closely with RPMs, OSCs, enforcement staff, records management staff, Regional counsel, community relations staff, and the Department of Justice (DOJ) (for cases in litigation). 227

In the event that procedures associated with the compilation and maintenance of the record are drawn into question in litigation, the Record Coordinator may be called upon to prepare an affidavit or testify about those procedures. Therefore, the Record Coordinator should be familiar with the procedures associated with the record, and be qualified to fulfill the responsibilities outlined above.

B. Multiple Response Actions

Cleanups conducted under CERCLA are often broken up into distinct decision points within a total site response action. For remedial actions, these separate decision points are called "operable units." The response may be an action that fully addresses an operable unit, an "interim action," or a removal action taken before, during or after remedial actions.

In general, a separate administrative record forms the basis for each of these distinct actions. Every Record of Decision (ROD) or Action Memorandum must be supported by an administrative record. Information relevant to more than one response decision, such as a site inspection report or a preliminary assessment report may be placed in the record file for an initial response action and incorporated by reference in the indexes of subsequent record files for that site.

C. Compilation

The administrative record file should be compiled contemporaneously with the generation or receipt of pertinent information regarding a response selection. All documents for which there is no question as to the relevance and non-privileged nature of the information should be placed in the record file, entered into the index, and made available to the public as soon as possible after generation or receipt of the documents. For example, the remedial investigation/feasibility study (RI/FS) workplan, summaries of quality assured data, the RI/FS released for public comment, the proposed plan, and any public comments received on the RI/FS and proposed plan should be placed in the record file as soon as they are generated or received.

When there are questions as to whether particular documents should be included in the record file, such documents can be segregated and reviewed at regular intervals (e.g., every 3-4 months). For example, draft documents or documents subject to claims of privilege may be set aside for review by ORC and appropriate staff. At critical times, such as prior to the

public comment period, the issues regarding these documents should be completely resolved and the documents included in the record file if appropriate.

The record file may be updated while it is available for public inspection. The additional documents should be placed in the record file and entered in the index. It is not necessary to hold a public comment period for each update. Any updates to the record file should be made to all copies of the record file to maintain consistency.

All documentation of the selection of the response action should be in the record file when a decision document (i.e., ROD or Action memorandum) is signed. Documents relevant to the response selection but generated or received after the decision document is signed should be placed in a post-document decision file and may be added to the administrative record file in certain circumstances (see section III.N.).

D. Index

Each administrative record file must be indexed. The index plays a key role in enabling both agency staff and members of the public to help locate and retrieve documents included in the record file. In addition, the index can be used for public information purposes, identifying documents located elsewhere, e.g., included in the compendium of guidance documents (see Appendix E). The index also provides a concise overview of the history of the response action at the site.

The index also provides the Agency with a degree of control over documents located at or near the site. The creation of an index will prevent persons from altering the record simply by physically adding or removing documents from the file.

The index should include the following information for each document:

- o Document Number
- o Document Title - one or two line identification. Identify the actual document, not a transmittal memo or other less relevant document. Include sufficient information so the document cannot be confused with another (e.g., the title "report" may be insufficient).
- o Author - Name and affiliation
- o Recipient - Name and affiliation
- o Document Date - date the document was finalized (or made available if never finalized), not the transmittal date or the receipt date.

o Document Location

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The index can be organized either by subject or in chronological order. Appendix C contains a model index organized by subject. Computer databases have been helpful in generating and updating the index.

The index should be updated when the record file is updated. Such updates should coincide with the periodic updating of the record file and review of material for which there questions about relevance or privilege (see section II.C.). The index should be considered a "draft" index until the decision document is signed, at which time the index for the record file should be up-to-date.

E. Location

E.1. General

Section 113(k)(1) of CERCLA requires that the administrative record be available to the public "at or near the facility at issue." Duplicates of the record file may be kept at any other location.

A copy of the record file should be available for public inspection at the central Regional location. This copy of the record file should be maintained in a docket room and available for public inspection at reasonable times (e.g., 9-4, Monday-Friday). A copy of these files, with some exceptions described below, must be located at or near the site, as required by statute. In the case of an emergency removal, however, the record file need be available for public inspection only at the central location (see section II.F.3.).

The record file located at or near the site should be placed in one of the information repositories which may already exist for community relations purposes. These are typically located in a library, town hall, or other publicly accessible place. If there is no existing information repository, or if the repository does not have sufficient space for the record file, any other publicly accessible place may be chosen to house the record file. The Community Relations Coordinator (CRC) should be consulted on the location of the information repository and record file.

The record file should be transmitted to the local repository in coordination with the CRC. The CRC should make the initial contact to establish the local repository and request housing for the record file. The Record Coordinator should make arrangements for delivering the record file to the local repository.

The record file should include an introductory cover letter addressed to the librarian or repository manager (see Appendix F). In addition, a transmittal acknowledgement form should be included to ensure receipt of the record file (see Appendix G). Finally, an administrative record fact sheet should accompany the record to answer questions from the public (see Appendix H). Updates to the record file should be handled in a similar fashion (see section II.C.).

If feasible, a master copy of the record file should be kept at the Regional office or the central office of the lead agency. The master copy of the record file should not be accessible to the public in order to preserve the integrity of the record file. The master copy of the record file may be maintained in microform to conserve storage space (see section II.J.). If not feasible, the Region will need to establish an effective security system for the record file.

E.2. Special Documents

Certain documents which are included in the record file do not have to be maintained at or near the site or, in some cases, at the central Regional location, because of the nature of the documents and the burden associated with maintaining such documents in multiple locations. Such documents must, however, be incorporated in the record file by reference (i.e., in the index but not physically in the record file), and the index must indicate where the documents are publicly accessible.

Validated Sampling Data

Validated sampling data does not have to be located in the central Regional location or at or near the site. The sampling data may be left in its original storage location (e.g., Environmental Services Division (ESD) or contract laboratory). Data summary sheets, however, must be located in the file. The index must list the data summary sheets, reference the underlying validated sampling data, and indicate where that underlying data can be found.

Chain of Custody Forms

Chain of custody forms do not have to be located in the central Regional location or at or near the site. As with validated sampling data, chain of custody forms may be left in the original storage location. The index must reference the chain of custody forms and indicate their location.

Privileged Documents

When a privileged document is included in the record, it should be kept in a confidential portion of the record file. The confidential file should be kept in a locked cabinet at the

central Regional location. It should not be located at or near ²²⁷ the site. The index should identify the title and location of the privileged document, and describe the basis for the asserted privilege. A short (non-privileged) description of the information in the privileged document should be inserted in the portion of the record file available to the public and included in the index. See also section III.H.

Guidance and Policy Documents

Guidance and policy documents may be kept in a compendium located in the Regional office to eliminate the need for reproducing copies of the same frequently used documents for each site record file. The documents included in such a compendium need not be physically included in the record file. The index must indicate which documents in the record file are located in the guidance compendium and specify the location of the guidance compendium. The index should reference the specific documents in the guidance compendium which were considered or relied on for the particular response action. See also section III.I. and Appendix E.

Technical Literature

Publicly available technical literature not generated for the site at issue (e.g., an engineering textbook), does not have to be located in the central Regional location or at or near the site. The document must be clearly referenced in the index. However, technical literature not publicly available must be physically included in the record file at the central location and at or near the site. See also section III.J.

F. Public Availability

F.1. General

Section 113(k) of CERCLA specifies that the administrative record "shall be available to the public." In satisfying this provision, the Agency must comply with all relevant public participation procedures outlined in §§113(k) and 117 of CERCLA; the proposed NCP (see Appendices L and M) contains additional guidance with respect to public availability (see also "Community Relations in Superfund: A Handbook," October 1988 - OSWER Directive No. 9230.0-3A; "Community Relations During Enforcement Activities," November 3, 1988 - OSWER Directive No. 9836.0-1A).

The availability of the record will vary depending upon the nature of the response action. Different procedures are outlined below for remedial and removal response actions.

In all cases, the Agency should publish a notice of availability of the record file when the record file is first made available for public inspection in the vicinity of the site

at issue. The notice should explain the purpose of the record file, its location and availability, and how the public may participate in its development. 227

The notice should be published in a major local newspaper of general circulation and distributed to persons on the community relations mailing list. This notice should also be sent to all known PRPs if they are not already included on the community relations mailing list. Publication of the notice should be coordinated with the Community Relations staff. A copy of the notice of availability should be included in the record file. Appendix I contains a model notice of availability.

Such a notice may be combined with other notices for the same site, such as a notice of availability of the community relations information repository, if they occur at the same time. Where desired, additional notice can be made in the Federal Register. In addition to the required newspaper notice, the public can be informed of the availability of the record file through existing Agency mechanisms, e.g., general and special notice letters, §104(e) information requests, and the community relations mailing list.

2. Remedial Actions

The administrative record file for a remedial action must be available for public inspection when the remedial investigation begins. For example, when the remedial investigation/feasibility study (RI/FS) work plan is approved, the Agency must place documents relevant to the selection of the remedy generated up to that point in the record file. Documents generally available at that time include the preliminary assessment (PA), the site investigation (SI), the RI workplan, inspection reports, sampling data, and the Community Relations Plan (CRP). The Agency must continue to add documents to the record file periodically after they are generated or received during the RI/FS process.

The record file must be publicly available both at a central Regional location and at or near the site at issue (see section II.E.). As mentioned above, a notice of the availability of the record file should be published in a major local newspaper when the record file is first made available for public inspection. In addition, the notice of availability should be sent to persons on the community relations mailing list.

With the completion of the RI/FS, the lead agency should undertake the following public participation procedures:

- o Prepare a Proposed Plan which briefly analyzes the remedial alternatives studied in the RI/FS and proposes a preferred remedial action alternative;

- o Make the RI/FS report and Proposed Plan available at a **227** central Regional location and at or near the site;
- o Publish in a newspaper a notice of availability and brief analysis of the RI/FS report and Proposed Plan;
- o Provide a formal comment period of not less than 30 calendar days for submission of comments on the Proposed Plan; [Note: the current NCP requires a public comment period of not less than 21 days. The Agency has proposed in the revised NCP a public comment period of not less than 30 days.]
- o Provide the opportunity for public meeting(s) in the affected area during the public comment period regarding the RI/FS and Proposed Plan;
- o Keep a transcript of the public meeting(s) on the RI/FS and Proposed Plan held during the comment period and make such transcript available to the public by including a copy in the record file;
- o Prepare a discussion (to accompany or be part of the decision document) of any significant changes to the Proposed Plan which occurred after the Proposed Plan was made available for public comment which are reflected in the ROD;
- o Prepare a response to each of the significant comments submitted during the public comment period to accompany the ROD (see section III.D.); and
- o Publish in a newspaper a notice of the availability of the ROD and make the ROD available to the public before commencement of any remedial action as required under §117(b) of CERCLA.

The Agency may hold additional public comment periods after signing the ROD. Comments received after signing the ROD should be placed in a post-decision document file and may be added to the record file in certain situations (see section III.N.).

F.3. Removal Actions

Section 113(k)(2)(A) of CERCLA requires that the Agency establish procedures for the appropriate participation of interested persons in the development of the administrative record for the selection of a removal action. "Appropriate" participation depends on the nature of the removal, as outlined below.

Non-Time-Critical Removal Actions

A non-time-critical removal action is a removal action for which, based on the site evaluation, the Agency determines that a planning period of at least six months exists before on-site removal activities must be initiated.

The administrative record file for a non-time-critical removal action must be made available for public inspection when the engineering evaluation/cost analysis (EE/CA) is made available for public comment. The record file must be available both at a central Regional location and at or near the site at issue (see section II.E.). A notice of the availability of the record file must be published in a major local newspaper and a copy of the notice included in the record file.

A public comment period on the EE/CA of not less than ~~30~~ days must be held so that interested persons may submit comments on the response selection for inclusion in the record file. A notice of the public comment period may be combined with the notice of availability of the record file if they occur at the same time. The Agency must respond to all significant comments received during the public comment period and place the comments and the responses to them in the record file (see section III.D.).

Comments generated or received after the decision document is signed related to selection of the removal action should be kept in a post-decision document file. They may be added to the record file in certain situations (see section III.N.).

Time-critical Removal Actions

A time-critical removal action is a removal action for which, based on the site evaluation, the Agency determines that a period of less than six months exists before on-site removal activities must be initiated. This category includes emergency removal actions which are described in greater detail below.

The administrative record file for these actions must be available for public inspection no later than 60 days after the initiation of on-site removal activity. If feasible, the record file should be made available earlier. The record file must be available both at a central Regional location and at or near the site at issue.

If, however, on-site cleanup activity is initiated within hours of the verification of a release or threat of a release and on-site cleanup activities cease within 30 days (emergency actions), the record file may be made available only at a central Regional location and need not be made available at or near the site.

For all time-critical removals, a notice of the availability of the record file must be published in a major local newspaper and a copy of the notice included in the record file.

A public comment period of not less than 30 days should be held in appropriate situations. In general, a public comment period will be considered appropriate if cleanup activity has not been completed at the time the record file is made available to the public and if public comments might have an impact on future action at the site. If a public comment period is considered appropriate, it should begin at the time the record file is made available for public inspection. The notice for the public comment period may be combined with the notice of availability of the record file if they occur at the same time. The Agency must respond to all significant comments received during the public comment period and place the comments and the responses to them in the record file (see section III.D.).

Whether or not the Agency holds a public comment period, comments received by the Agency related to the selection of the removal action must be placed in the record file. For information, including comments, generated or received after the decision document is signed - see section III.N.

G. Maintaining the Record

Document room procedures should be established to ensure orderly public access to the record files. In establishing public access procedures, the security and integrity of the record files must be maintained at all times.

The Agency prefers that each Regional Office have a reading area where visitors are able to review the record files. The record file must be available during reasonable hours (e.g., 9-4, Monday-Friday). The public reading area should include, wherever feasible:

- o Administrative record files
- o Guidance Compendium (see section III.I.)
- o Access to a copier
- o Sign-in book

Controlled access to the files is accomplished by use of a visitor sign-in book. Sign-in books help minimize instances in which documents are lost or damaged. It also provides documentation of the Agency's efforts to provide public access to the record files. Pertinent information recorded in the book should include:

- o Date of visit

- o Name
- o Affiliation
- o Address
- o Phone number
- o Site documents viewed
- o Cost of copied materials (if applicable)

Since documents in the record file should be complete, properly organized and legible, the integrity of the record file must be maintained. If possible, storage and reading areas should be supervised to maintain proper security. Documents should not leave the document room or be left unattended. To the extent feasible, the Record Coordinator should check the order of the documents after being viewed by the public to be certain all documents have been returned intact. The documents in the record file should be kept secure, either in a locked room or in locked cabinets.

The record file located at or near the site should be handled with similar care. If possible, the record file should be treated as a non-circulating reference; it should not leave the local repository except under supervision. The phone number of a record file contact should be provided to record file users and to the manager of the local repository so that problems can be identified and cured. Such information can be included in an informational fact sheet accompanying the record file (see Appendix H). In addition, the Record Coordinator should plan reviews of the local record files on a systematic basis.

Where the site is a fund-lead or PRP-lead, EPA should retain a master copy of the record file at a central Regional location. Where a State is the lead agency at a site, EPA should assure that the State maintains a master copy of the record file. The record files are permanent records that must be retained.

As to the local repository, the statute and proposed regulations are silent concerning the duration of public availability of the record file. The Agency's primary concern is public participation in selection of the response action. Following initiation of the response action, public interest in background information other than the Record of Decision, RI/FS or administrative record file may wane. In any event, the statutory provisions for judicial review and deadlines for filing cost recovery actions provide useful references for keeping the record file publicly available. See §§113(g) and (h) of CERCLA.

Where there is cost recovery litigation or such litigation is possible, the record file should be available at least until the completion of pending litigation concerning the site.

The record file continues to serve as a historical record of the response selection, even after the statute of limitations for cost recovery action has passed. Where there is considerable public interest, the local repository may wish to keep the record file available for public viewing.

H. Confidential File

In certain situations, documents in the record file may be subject to an applicable privilege (see section III.G.). Whenever feasible, information relevant to the response selection which is contained in a privileged document should be extracted in a releasable manner and included in the publicly accessible portion of the record file. The privileged document should be included in a confidential portion of the record file.

The Administrative Record Coordinator should maintain a confidential portion of the record file for such privileged documents. These documents should be listed in the index to the entire record file and identified as "privileged." The index should identify the title and location of the privileged document, and describe the basis for the asserted privilege. A short (non-privileged) description of the document and its privileged nature should, where possible, be placed in the files available to the public.

The confidential portion of the record file should be stored in locked files at a central Regional location and should not be located at or near the site. The confidential portion of the record file should be separate from the publicly available record file to protect against inadvertent disclosure. Each privileged document should be stamped "confidential" at the bottom of each page of the document. Where the material is not a written document (such as a computer disk or cassette tape) the jacket should be stamped "confidential." A complete list of all materials contained in the confidential portion of the record file should be maintained by the Record Coordinator. The coordinator should also maintain a log which will include the time, date, document name, and identity of persons checking out and returning materials to the confidential file.

A routine access list should be prepared for each record file or, in the future, as soon as a new record file is established. This routine access list must be approved by the Waste Management Division Director or the Environmental Services Division Director, and ORC. Once approval is given, persons on the list will be able to access the confidential files through the Record Coordinator. No one should have access to the

confidential files without the approval of the persons listed above.

This policy and procedure for privileged materials does not supersede any policy and procedures established by the Agency under the Freedom of Information Act (FOIA), 5 U.S.C., §552, and Agency regulations implementing FOIA at 40 C.F.R. Part 2. If the requester is in close proximity to the record file, the Agency may respond to FOIA requests for the administrative record by telling a requester the location and availability of the record file. Decisions regarding disclosures of materials under FOIA should be coordinated among the various agency officials with access to such materials.

I. Copying

Section 117(d) of CERCLA requires that each document developed, received, published, or made available to the public under §117 be made available for public inspection and copying at or near the site. Under §113(k)(2)(B) of CERCLA, these documents must also be included in the administrative record. Under these provisions of CERCLA, the lead agency must ensure that documents in the record files are available for copying but does not bear responsibility for copying the documents themselves. Therefore, it is preferable that the record file should be located in a facility which contains a copying machine (e.g., a public library).

Alternatively, the Agency may arrange for copying on behalf of a requester. The Agency may ask that requesters arrange for copying by contractors or commercial copy centers who then bill the requester directly.

The Agency should follow the FOIA regulations at 40 C.F.R. Part 2 in determining the appropriate charge for copying. Generally, copying fees should be waived for other Federal Agencies, EPA contractors or grantees, and members of Congress. The Agency should charge \$.20 a page for paper copies as provided in 40 C.F.R. Part 2. Reproduction of photographs, microfilms or magnetic tapes, and computer printouts should be charged at the actual direct cost to the Agency.

J. Micrographics

The administrative record file may be maintained in microform such as microfilm or microfiche. Use of micrographics can significantly reduce the space required to store administrative record files. In addition, micrographics can simplify the tasks of reproducing copies of the record and transmission of the record files to the local repositories. Any use of micrographics should be conducted in an orderly manner consistent with records management procedures. If using micrographics to maintain the record files, readers will need to

be available at the Regional office and with the record file located "at or near the site" to ensure public access to the record files.

Microform copies of original documents are admissible in court if created in an organized fashion. The Business Records as Evidence Act (28 U.S.C. §1732) specifies that copies of records, which are made "in the regular course of business" and copied by any process which accurately reproduces the original, are "as admissible in evidence as the original itself." See also Federal Rules of Evidence 1003. Thus, if the lead agency can demonstrate that CERCLA records and microform copies of those records are produced in the regular course of business, they would be admissible in court.

The Office of Information Resources Management (OIRM) has granted approval for the use of micrographics in establishing administrative records (see Appendix J). Any use of micrographics must still comply with the remaining provisions of Chapter 6 of the EPA Records Management Manual (7/13/84).

K. Certification

The Agency must certify the completeness of the administrative record when the record is filed in court. Appendix K contains a model court certification.

Such certification should be signed by the Regional Administrator's designee after consultation with ORC and DOJ. Any certification of the record should be made by program staff and not legal staff.

Although not required, the Region may choose to have the Administrative Record Coordinator certify that the record was compiled and maintained in accordance with applicable Agency regulations and guidance. Such certification would attest that the record was compiled in accordance with current Agency procedures and would not address the completeness of the record file.

III. CONTENTS OF THE ADMINISTRATIVE RECORD

A. Remedial Actions

The administrative record for selection of a remedial action should consist of:

- o documents which the Agency considered or relied on to select the remedial action; and
- o documents which demonstrate the public's opportunity to participate in and comment on the selection of the remedial action.

As stated earlier, the administrative record file for the selection of a remedial action must be made available for public inspection at the commencement of the remedial investigation phase. For example, when the RI/FS work plan is approved, the Agency must place documents on selection of remedy generated up to that point in the record file. Documents should continue to be added to the record file until a decision document is signed. Documents containing new information relevant to the response selection but generated or received after the decision document is signed should be kept in a post-decision document file and may be added to the record file in certain situations (see section III.N.).

Typically, but not in all cases, the record for a remedial response action will consist of the following types of documents. The list below is neither a statement of requirements for each record nor is it exclusive. The record file should include any other documents not listed below which meet the general criteria described in the first paragraph of this section.

Factual Information/Data

- o Preliminary Assessment (PA) report
- o Site Investigation (SI) report
- o Approved Remedial Investigation/Feasibility Study (RI/FS) workplan
- o Amendments to final workplan
- o Sampling and Analysis Plan (SAP): consisting of a quality assurance project plan (QAPP) and a field sampling plan (FSP)
- o Sampling data: validated data during the RI/FS, or any data collected for previous actions such as RCRA or removal actions which are considered or relied on in selecting the

remedial action. Unvalidated data should be included only if relied on by the Agency in the absence of validated data.

- o Chain of custody forms
- o Inspection reports
- o Fact sheet or summary information regarding remedial action alternatives generated when special notice letters are issued to PRPs at an early stage of the RI/FS (see "Interim Guidance on Notice Letters, Negotiations, and Information Exchange," October 19, 1987 - OSWER Directive No. 9834.1)
- o Data summary sheets
- o Technical studies performed for the site (e.g., a ground water study)
- o Endangerment assessment/risk assessment and underlying documentation (see section III.C.)
- o RI/FS (as available for public comment and as final, if different)
- o Data submitted by the public, including PRPs

Policy and Guidance

- o Memoranda on site-specific or issue-specific policy decisions. Examples include memoranda on off-site disposal availability, special coordination needs (e.g., dioxin), and applicable, or relevant and appropriate requirements (ARARs) (to the extent not in the RI/FS), cost effectiveness, and utilization of permanent solutions and alternative treatment technologies.
- o Guidance documents (see section III.I.)
- o Technical literature (see section III.J)

Public Participation

- o Community Relations Plan
- o Proposed Plan
- o Public notices: any public notices concerning response action selection such as notices of availability of information, notices of meetings, and notices of opportunities to comment
- o Documentation of public meetings: information generated or received during meetings with the public (including PRPs)

and memoranda or notes summarizing significant information submitted during such meetings 227

- o Public comments: complete text of all written comments submitted (see also section III.D.)
- o Transcripts of public meetings: includes especially meetings held during the public comment period on RI/FS, Proposed Plan, and any waiver of ARARs under §121(d)(4) of CERCLA
- o Responses to significant comments: responses to significant comments received from the public concerning the selection of a remedial action
- o Responses to State and other Federal agency comments

Enforcement Documents (included if the document contains information relevant to the response selection or public participation in the response selection and does not pertain exclusively to liability)

- o Administrative orders
- o Consent decrees
- o Affidavits containing relevant factual information not contained elsewhere in the record
- o Notice letters to PRPs
- o Responses to Notice letters
- o §104(e) information request letters and subpoenas
- o Responses to §104(e) information request letters and subpoenas

Other Information

- o Index (see section II.D.)
- o Documentation of State involvement: documentation of the request and response on ARARs, §121(f)(1)(G) notices and responses, a statement of the State's position on the Proposed Plan (concurrence, nonconcurrence, or no comment at the time of publication), opportunity to concur in the selected remedy and be a party to a settlement (see section IV.A.)
- o health assessments, health studies, and public health advisories issued by the Agency for Toxic Substances and Disease Registry (ATSDR) (see section IV.C.)

- o Natural Resource Trustee findings of fact and final reports and natural resource damage assessments (see section IV.D.)

Decision Documents

- o Record of Decision (ROD): final remedial action decision document (including responsiveness summary)
- o Explanations of significant differences (under §117(c)) and underlying information
- o Amended ROD and underlying information

The administrative record should both track the history of the site and be understandable to the reader. Appendix B provides a model file structure for organizing the record. Appendix C contains a model index.

B. Removal Actions

The administrative record for selection of a removal action should consist of:

- o documents which the Agency considered or relied on to select the removal action; and
- o documents which demonstrate the public's opportunity to participate in and comment on the selection of the removal action, when appropriate.

For a time-critical removal action, the record file should be available for public inspection (as early as possible) and must be available no later than 60 days after initiation of on-site removal activity. Documents prepared prior to the final decision document must be placed in the record file and made available to the public.

For a non-time-critical removal action, the record file must be made available for public inspection when the EE/CA is available for public inspection. Documents should continue to be added to the record file from the time the EE/CA is available until a decision document (i.e. Action memorandum) is signed.

For all removal actions, documents containing new information generated after the selection of a response action, other than comments made during the public comment period and responses to those comments, should be kept in a post-decision document file and may be added to the record file in certain situations (see section III.N.).

Typically, but not in all cases, the record for a removal response action will consist of the following types of documents.

The list below is neither a statement of requirements for each record nor is it exclusive. The record file should include any other documents not listed below which meet the general criteria described in the first paragraph of this section.

Factual Information/Data

- o Preliminary Assessment (PA) report
- o Site evaluation (SI) report
- o EE/CA (for a non-time-critical removal action)
- o Sampling plan
- o Sampling data: validated data obtained in support of the removal action, or any data collected for previous actions such as RCRA or other response actions which are considered or relied on in selecting the removal action. Unvalidated data should be included only if relied on by the Agency in the absence of validated data.
- o Chain of custody forms
- o Inspection reports
- o Technical studies performed for the site (e.g., a ground water study)
- o Endangerment assessment/risk assessment and underlying documentation
- o Data submitted by the public, including PRPs

Policy and Guidance

- o Memoranda on site-specific or issue-specific policy decisions. Examples include memoranda on off-site disposal availability, compliance with other environmental statutes, special coordination needs, e.g., dioxin.
- o Guidance documents (see section III.I.)
- o Technical literature (see section III.J.)

Public Participation

- o Community Relations Plan
- o Public notices: any public notices concerning response action selection such as notices of availability of information, notices of meetings, and notices of opportunities to comment

- o Documentation of public meetings: information generated or submitted during meetings with the public (including PRPs) and memoranda or notes summarizing significant information submitted during such meetings
- o Public comments: complete text of all written comments submitted (see also section III.D.)
- o Responses to significant comments: responses to significant comments received from the public concerning the selection of a removal action
- o Responses to State and other Federal agency comments

Enforcement Documents (included if the document contains information relevant to the response selection or public participation in the response selection and does not pertain exclusively to liability)

- o Administrative orders
- o Consent decrees
- o Affidavits containing relevant factual information not contained elsewhere in the record
- o Notice Letters to PRPs
- o Responses to Notice Letters
- o §104(e) information request letters and subpoenas
- o Responses to §104(e) information request letters and subpoenas

Other Information

- o Index (see section III.D.)
- o Documentation of State involvement (see section IV.A.)
- o ATSDR health assessments, health studies, and public health advisories (see section IV.C.)
- o Natural Resource Trustee findings of fact and final reports and natural resource damage assessments (see section IV.D.)

Decision Documents

- o EE/CA Approval Memorandum
- o Action Memorandum

o Amended Action Memorandum → *what is this?*

The administrative record should both track the history of the site and be understandable to the reader. Appendix B provides a model file structure for organizing the record. Appendix C contains a model index.

C. Imminent and Substantial Endangerment

Under §106 of CERCLA, the Agency may find the existence of an imminent and substantial endangerment to the public health or welfare of the environment because of an actual or threatened release of a hazardous substance.

The determination of the existence of an imminent and substantial endangerment is an important component of the selection of the response action. Therefore, all documents considered or relied on in making that determination, including any endangerment assessment and its underlying documentation, must be included in the administrative record file. If the determination that there is an imminent and substantial endangerment is properly documented in the record file, judicial review of that determination in an action under §106 of CERCLA will also be limited to the administrative record.

D. Public Comments

In general, the administrative record should document any opportunity for public involvement in the selection of a response action. All documents related to the opportunity (e.g., notices and fact sheets), and relevant written comments received from the public should be included in the record file to establish a complete record for purposes of judicial review.

The record file should contain information brought to the Agency's attention by the public. Reports, data and other information generated by outside parties and submitted to the Agency should be included in the record file. Public requests for information (e.g., Freedom of Information Act (FOIA) requests for copies of reports), need not be included in the record file.

The Agency should request that substantive oral comments (either in person or over the phone) be put in writing by the commenter for inclusion in the record file. The commenter should be advised that the obligation to reduce the comment to writing rests with the commenter.

The Agency may respond to comments received prior to a public comment period in various ways, depending on the nature and relevance of a particular comment. The Agency's consideration of such a comment may be in the form of a written response, or reflected by documented actions taken after

receiving the comment, or even by changes in subsequent versions of documents. If the Agency prepares a written response to a comment, the response should be included in the record file.

The Agency may notify commenters that comments submitted prior to a formal public comment period must be resubmitted or specifically identified during the public comment period in order to receive formal response by the Agency. Alternatively, the Agency may notify a commenter that the Agency will respond to the comment in a responsiveness summary prepared at a later date. The Agency, however, has no duty to respond to any comments received before the formal public comment period, or to respond to comments during the public comment period until the close of the public comment period. The Agency may, in its discretion, respond in writing to comments submitted outside of a formal public comment period.

Comments received during the formal public comment period must be addressed in the responsiveness summary (included with the ROD in remedial response actions). The responses may be combined by subject or other category in the record file. Comments should be included in the record file in their original form wherever feasible.

Comments which are received after the formal comment period closes and before the decision document is signed should be included in the record file but labeled "late comment." Such comments should be handled as post-decision information (see section III.N.).

Comments received after the decision document is signed should be placed in a post-decision document file. They may be added to the record file in limited circumstances (see section III.N.).

E. Enforcement Actions

The same procedures should be used for establishing an administrative record whether or not a response action is selected in the context of an enforcement action. The following additional information, however, may assist the establishment of administrative records for selection of CERCLA response actions where there is enforcement activity.

E.1. Negotiation Documents

During negotiations with the Agency, a potentially responsible party (PRP) may produce documents and claim that they constitute confidential business information (CBI) or offers of settlement subject to Rule 408 of the Federal Rules of Evidence.

Generally, those documents are not part of the administrative record for response selection unless they are

submitted by PRPs for consideration in selecting a response action and are considered or relied on in selecting the response action. A privileged document which was considered or relied on in selecting the response action should be placed in the confidential portion of the record file. Such a document should be summarized and the summary included in the publicly accessible portion of the record file (see section II.H.). If the information cannot be summarized in a disclosable manner, the information should be placed in the confidential portion of the record file only and listed in the index to the file.

E.2. PRP-lead RI/FS

Where a PRP is conducting the RI/FS, the PRP must submit all technical information on selection of the remedial action generated during the RI/FS to the Agency. Technical information includes sampling data, workplans, reports, and memoranda. The Agency, and not the PRP, will establish the administrative record (see "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies," May 16, 1988 - OSWER Directive No. 9835.1a).

PRPs may be delegated responsibility for some record file maintenance activities, such as housing the files at or near the site. PRPs cannot, however, be responsible for decisions on what documents comprise the record, because of, among other things, the potential for a conflict of interest.

E.3. Administrative Orders and Consent Decrees

Final administrative orders and consent decrees issued prior to selection of the response action (e.g. ordering a PRP to conduct the RI/FS), should be included in the administrative record file. Administrative orders or consent decrees issued after the signing of the ROD or the action memorandum should not be included in the record file, unless the consent decree or administrative order meets the criteria for the inclusion of post-decision documents in the record file (see section III.N.). In such cases, the documents may be added to the record file in accordance with procedures for post-decision documents. Drafts of administrative orders and consent decrees should not be included in the record file.

Note that administrative orders must also be supported by an administrative record. These administrative records are not the same as administrative records for the selection of a response action as described in this guidance. Some of the documents, however, which form the basis for a response decision may also form the basis for an order or decree. For example, some of the same documents which were considered or relied on to make the response decision embodied in a ROD will likely form the basis of a de minimis settlement embodied in a consent order. In such a case, the record file which forms the basis for the consent order

can reference the documents contained in the record file for the response decision.

F. Excluded Documents

Certain documents should not be included in the administrative record because they are irrelevant to the selection of the response action. Documents should be excluded from the administrative record if the Agency did not consider or rely on them in selecting the response action.

Material beyond the scope of the record should be kept in separate files maintained at the Regional office. These files need not be made publicly available, although many of the documents in the files may be available to the public if requested under FOIA.

Examples of documents that are irrelevant to the decision on selecting a response action may include Hazard Ranking System (HRS) scoring packages, contractor work assignments, cost documentation (as opposed to cost effectiveness information), and National List (NPL) deletion information. If, however, these documents contain information that is considered or relied on in the response action selection and that is not contained elsewhere in the record file, then the documents should be included in the record file.

Information regarding PRP liability is generally not included in the record file for selection of the response action except to the extent such information (typically substance specific) is considered or relied on in selecting the response action. Documents relating to PRP liability, however, should be compiled and maintained in the Regional office so that they are available at the time of notice to PRPs or referral of any litigation.

G. Draft Documents and Internal Memoranda

In general, only final documents should be included in the administrative record file. The record file should not include preliminary documents such as drafts and internal memoranda. Such documents are excluded from the record file because drafts and internal memoranda are often revised or superseded by subsequent drafts and memoranda prior to the selection of the response action. The preliminary documents are, therefore, not in fact considered or relied on in making the response action decision.

Drafts (or portions of them) and internal memoranda should be included, however, in two instances. First, if a draft document or internal memorandum is the basis for a decision (e.g., the draft contains factual information not included in a final document, a final document does not exist, or did not exist

when the decision was made), the Agency should place the draft document or internal memorandum in the record file.

Second, if a draft document or internal memorandum is circulated to an outside party who then submits comments which the decisionmaker considers or relies on when making a response action decision, relevant portions of the draft document or the memorandum and the comments on that document should be included in the record file.

Examples of internal memoranda and staff notes which should not be included in the record file are documents that express tentative opinions or recommendations of staff to other staff or management, or internal documents that evaluate alternative viewpoints.

Drafts and internal memoranda may also be subject to claims of privilege (see section III.H.).

H. Privileged Documents

Some documents in the administrative record file may be protected from public disclosure on the basis of an applicable privilege. Any documents which are considered or relied on in a response action selection, but withheld from the public portion of the record file based on privilege, must be placed in a confidential portion of the record file (see section II.H.).

If a document is excluded from the public portion of the record file based on privilege, the relevant information should, if feasible, be extracted and included in the public record file. This can often be accomplished by deleting or redacting the privileged information from the document.

The privileges discussed below may be asserted by the Agency with respect to documents that are considered or relied on in the selection of a response action. The head of the office responsible for developing the document in question should assert the privilege. In all cases, the official asserting a privilege should consult with ORC.

Public disclosure of a privileged document may result in waiver of the privilege, although the nature and extent of the waiver will depend on the privilege asserted and the circumstances of the disclosure. In light of the potential for waiver, it is important that Agency personnel not release potentially privileged documents to the public without consulting with ORC.

Deliberative Process

The deliberative process privilege applies to pre-decisional, deliberative communications that express opinions,

advice, and recommendations of staff to other staff or management. The privilege functions to encourage the honest and free expression of opinion, suggestions and ideas among those formulating policy for government agencies (see "Guidance for Assertion of Deliberative Process Privilege," 10/3/84).

In general, if a document contains factual information forming the basis for the selection of the response action, it should be included in the record file.

Use of the deliberative process privilege should be balanced with the statutory mandate of including the public in the response action selection process. The privilege should be asserted if disclosure of the document will have an inhibiting effect on frank and open discussion among government staff and decisionmakers. Documents should not be withheld solely because they would reveal flaws in the case or information embarrassing to the government. Specific procedures exist for assertion of the deliberative process privilege, which include consulting with ORC.

Confidential Business Information (CBI)

The Agency must withhold from the public record trade secrets and commercial and financial information that is subject to protection under 40 C.F.R. Part 2. However, §104(e)(7) of CERCLA greatly restricts the assertions of confidentiality claims by PRPs at CERCLA sites. The Agency should attempt to avoid using CBI in making response action decisions and can do so in most cases by using other information instead. Where the Agency must use CBI in making its decision, 40 C.F.R. Part 2 and §104(e)(7) of CERCLA will apply and such information should be placed in the confidential portion of the administrative record file.

Attorney Work Product

This exclusion applies to documents prepared in anticipation of possible litigation. The work product privilege covers all documents prepared by an attorney or under an attorney's supervision, including reports prepared by a consultant or program employee. Litigation need not have commenced but it must be reasonably contemplated. These documents generally relate to enforcement or defensibility of a decision and are not considered or relied on in selecting a response action. These documents should not, therefore, be in the administrative record file.

Attorney-Client Communication

The attorney-client privilege applies to confidential communications made in connection with securing or rendering legal advice. The privilege is limited to communications where there was an intention to keep the information confidential.

Personal Privacy

This exemption covers information about individuals in personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The records must pertain to an individual, and not a business, to be excluded from the public portion of the administrative record file under this exemption. Often, information subject to the protection under the personal privacy privilege can be redacted from the document and the redacted version can be placed in the public portion of the record file.

State Secrets

An agency is authorized to exclude from public scrutiny information which, if released, would harm national security or interfere with the government's ability to conduct foreign relations. This privilege could be particularly important where the PRP is a Federal agency or a contractor for a Federal agency. In the case of a Federal facility cleanup, an Inter-Agency Agreement should spell out procedures for asserting this privilege.

Confidential Informant

Statements obtained from witnesses who have been granted confidentiality may be privileged.

Information Exempted by Other Statutes

Information specifically exempted from disclosure by a Federal statute need not be part of the public record. The statute in question must leave no discretion as to the requirement that matters be withheld from the public or it must establish particular criteria for withholding or refer to particular types of matters to be withheld.

I. Guidance Documents

Guidance documents, or portions of guidance documents, that are considered or relied on in selecting a response action should be included in the administrative record file for that response action. Any guidance documents generated for the site for which the record file is being compiled should be physically included in the record file. Certain guidance documents, however, do not have to be kept in the record file. Guidance documents not generated for the particular site for which the record is being compiled may be kept in a compendium of guidance documents maintained at a central Regional location.

Each EPA Regional office should maintain a compendium of guidance documents which are frequently used in selecting

response actions. As with an administrative record file, the compendium of guidance documents must be available to the public, but only at the central Regional location. The Administrative Record Coordinator should maintain and update the compendium of guidance documents. If a guidance document maintained in the compendium is considered or relied on when making a response action decision, the index to the record file must list the document and indicate its location and availability. See also Appendix E.

If a guidance document is listed in a bibliography to a document included in the record file (e.g., listed in the bibliography to the RI/FS), it need not be listed again in the index to the record file. In this case, however, the index must state that documents listed as bibliographic sources might not be listed separately in the index.

If a guidance document which is not included in the guidance compendium is considered or relied on in selecting the response action, the document should be physically included in the record file.

J. Technical Literature

Technical literature generated for the site at issue should be physically included in the administrative record file for that site, whether or not it is publicly available.

Similarly, technical literature not specifically generated for the site at issue which is not publicly available should also be included in the site-specific record file. Such documents include technical journals and unpublished documents that are not available through the Library of Congress or not circulated to technical libraries.

Publicly available technical literature not generated for the site at issue, however, need not be located at or near the site or at a central Regional location if the documents are referenced in the index to the record file. These documents do not have to be physically included in the record file because they are already available to public. Copying such documents creates a significant burden to the Agency and copyright laws may pose additional barriers to such copying. Examples of publicly available technical literature include engineering manuals, ground-water monitoring or hydrogeology textbooks, ATSDR toxicological profiles, and articles from technical journals.

Computer models and technical databases need not be physically included in the record file but should be referenced in the index to the record file. Printouts or other documents produced from the models and databases should be physically included in the record file if such documents contain information

which was considered or relied on in selecting the response action.

K. Legal Sources

Copies of statutes and regulations cited in documents included in the administrative record need not be included in the record file if they are readily available to the public. For example, the NCP and other regulations are easily accessible since they are published in the Federal Register and the Code of Federal Regulations.

Copies of the actual standards (statutes or regulations) comprising Federal and State ARARs should be physically included in the record file if they are not easily accessible. Also, other Federal and State criteria, advisories, and guidance documents pertinent to the site (i.e., what the Agency refers to as "TBCs," or standards "to be considered"), may not be easily accessible. If such documents are cited in an RI/FS, appendix to the RI/FS, EE/CA, or ROD, those advisories which are not readily available should be included in the record file.

L. NPL Rulemaking Docket Information

Generally, information included in the National Priorities List (NPL) rulemaking docket, such as the Hazard Ranking System (HRS) scoring package and comments received on the listing, need not be included in the administrative record for selection of a response action. The NPL docket contains information relevant to the decision to list a site, which may be irrelevant to the decision on response action selection.

Documents in the NPL docket which contain sampling data or other factual information which was considered or relied on in selecting a response action should be included in the record file if the information is not available already in the record file. Such information may include early sampling data taken by parties other than the Agency or its contractors (e.g., a State).

M. RCRA Documents

If an action is taken under CERCLA at a site with a history of Resource Conservation and Recovery Act (RCRA) activity, much of the information relating to those RCRA activities may be considered or relied on in making the CERCLA response action selection. Any relevant RCRA information, particularly information on waste management and RCRA corrective action at the site, should be included in the administrative record file (e.g., RCRA permit applications, inspection reports, RCRA Facility Assessment (RFA), RCRA Facility Investigation (RFI), Corrective Measures Studies (CMS), or responses to RCRA information requests).

Not all pre-existing RCRA information will be considered or relied on in selecting a CERCLA response action, but information on types of wastes, quantity of wastes, and observations of potential threats gathered during RCRA investigations should be included if not contained elsewhere in the record file.

N. Post-Decision Information

In general, documents generated or received by the Agency after signing the response action decision document (e.g., ROD or Action Memorandum), should not be added to the administrative record file. Since the administrative record contains the information which forms the basis for the response selection, documents generated or received after selecting the response action are not relevant to that response decision and should not be included in the record file. In limited situations, however, the Agency must include in the record file documents generated or received after the decision document is signed.

In all cases, documents generated or received after signing the decision document should be kept in a post-decision document file. This file is not part of the administrative record file and should be maintained at a central Regional location. Documents kept in the post-decision document file may be added to the record file in the situations described below:

- o Where a decision document does not address or reserves a significant aspect of a response action decision to be made at a later date. For example, a decision document that does not resolve the type of treatment technology. In such cases, the Agency should continue to add documents to the record file which form the basis for the unaddressed portion of the decision.
- o Where there is a significant change in the selected response action. Changes that result in a significant difference to a basic feature of the selected remedial action (e.g., timing, ARARs), with respect to scope, performance, or cost may be addressed in an explanation of significant differences. Under §117(c) of CERCLA,

"(a)fter adoption of a final remedial action plan - (1) if any remedial action is taken, (2) if any enforcement action under section 106 is taken, or (3) if any settlement or consent decree under section 106 or section 122 is entered into, and if such action, settlement, or decree differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differences and the reasons such changes were made."

The record file should include the explanation of significant differences, underlying documentation for the response action changes, any significant comments from the public, and Agency responses to any significant comments. A formal public comment period is not required on an explanation of significant differences.

- o Some changes will be so significant that they fundamentally alter the very nature or basis of the overall response action. Such changes will require an amended decision document. The Region will decide whether a change to a response action is considered a significant or a fundamental change for purposes of addressing the change (the "Guidance on Preparing Superfund Decision Documents: The Proposed Plan and Record of Decision," OSWER Directive No. 9355.3-02) is expected to address this.

When the decision document is amended, the amended decision document, the underlying documentation, any significant comments from the public, and Agency responses to any significant comments, should be included in the record file. ROD amendments will require a formal public comment period.

- o Where comments containing significant information are generated or received after the close of the public comment period. The Agency must consider comments submitted after the public comment period only to the extent that the comments contain significant information not contained elsewhere in the record file which could not have been submitted during the public comment period and which substantially support the need to consider significantly altering the response action. Documents meeting this test should be included in the record file, along with the Agency's responses to the significant comments, whether or not such information results in a change to the selected decision. In this case, the comments, the underlying documentation, and Agency responses to such comments, should be included in the record file.
- o Post-decision information may also be added to the record file if the Agency holds public comment periods after the selection of the response action. The Agency may hold additional public comment periods or extend the time for submission of public comment on any issue concerning response selection. Such comment should be limited to the issues for which the Agency requested additional comment. All significant comments submitted during such comment periods, along with any public notices of the comment period, transcripts of public meetings, and Agency responses to the comments, should be placed in the record file.

IV. INVOLVEMENT OF OTHER PARTIES

A. States

A.1. State Involvement on Federal-Lead Sites

The administrative record for a Federal-lead site must reflect the opportunity for involvement in the selection of the response action afforded the particular State. The record for a remedial action should include documents that reflect at least the following State participation or the opportunity for State participation:

- o Letter to State requesting identification of ARARs and the final response from State identifying ARARs (and certification from the State);
- o Opportunity to comment or comments on a proposed finding or decision to select a remedial action not attaining a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation (as mandated by §121(d)(4) of CERCLA);
- o Opportunity to comment or comments on the final draft RI/FS, the Proposed Plan and EPA responses to the comments;
- o Significant post-decision State comments and EPA responses to the comments (place in the post-decision document file for possible inclusion in the record file - see section III.N.).

The administrative record for a removal action should reflect any State participation, especially any State comments and EPA responses to the comments.

The record file should only include final State comments. Any preliminary deliberations between the State and EPA relevant to the response selection need not be part of the record file if superseded by documentation of the State's final position.

The governing body of an Indian tribe should be afforded the same treatment as a State in accordance with §126 of CERCLA.

A.2. Federal Involvement in State-Lead Sites

Where a State has been officially designated the lead agency for a CERCLA site, the State must compile the administrative record for that site in accordance with §113(k) of CERCLA. Since EPA has ultimate responsibility for both the selection of a response action (EPA signs the ROD) and the record on which that response action is based, EPA must participate in compiling and maintaining the record. In such cases, EPA must assure that the

record file forms a complete basis for the selection of the response action. 227

The State as lead agency must maintain the record file at a State office (e.g., the State's central environmental agency office) and at or near the site. At a minimum, the State as lead agency also must transmit a copy of the index, RI/FS workplan, the RI/FS released for public comment, the Proposed Plan, and any public comments received on the RI/FS and the Proposed Plan to the appropriate EPA Regional office. These documents should be transmitted to the Agency as they are generated or received. Transmittal of the index will not suffice. In addition, other documents may be requested by EPA on a case-by-case basis.

The Superfund Memorandum of Agreement (SMOA), or Cooperative Agreement (CA), must address the administrative record requirements. The following language should be included in the SMOA or CA where the State has been officially designated the lead agency for a CERCLA site:

"The State must compile and maintain the administrative record upon which the selection of the [remedial, removal] action is based. The compilation and maintenance of the record must be, to the extent feasible, in accordance with EPA guidance on the administrative record. The administrative record must be located at the State [environmental agency] office, and at or near the site. In addition, the State must submit copies of the index, the RI/FS workplan, the RI/FS released for public comment, the Proposed Plan, and any public comments received on the RI/FS and Proposed Plan to the EPA Regional office, as they are added to the administrative record file. In addition, other documents may be requested by EPA on a case-by-case basis. The State shall comply with §113 of CERCLA and any applicable regulations. EPA may require the retention of other documents for cost recovery purposes."

The record file compiled by the State should reflect EPA's participation, comments, concurrence, and disagreements at the same stages as are required for State involvement in a Federal-lead site. The State must place in the record file any documents submitted by EPA for inclusion in the record file.

B. Federal Facilities

Federal agencies have the responsibility, pursuant to Executive Order 12580, to establish the administrative record for Federal facilities under their jurisdiction, custody, or control where using CERCLA authority for a response action. The record file for a Federal facility must include all documents considered or relied on in selecting a response action, including documents

submitted by EPA on the selection of the response action. The Federal agency must comply with all NCP (see Appendix M) and CERCLA requirements in compiling and maintaining the record, including the minimum public participation requirements in §§113 and 117 of CERCLA.

The Federal agency must maintain the record file at or near the site and ensure easy public access to the record file. If, for example, a site is a Department of Defense facility, the record file should be housed in a location which does not require military clearance for access. The Federal agency should keep a complete copy of the record file at a location within the Federal agency office comparable to an EPA Regional office.

At NPL sites and any other site where EPA is involved in selecting a response action at a Federal facility, EPA must participate in compiling and maintaining the record. In such cases, EPA must assure that the record file forms a complete basis for the selection of the response action. At a minimum, the Federal agency must transmit a copy of the index, the RI/FS workplan, the RI/FS released for public comment, the Proposed Plan, and any public comments received on the RI/FS and Proposed Plan to the appropriate EPA Regional office. These documents should be transmitted to the Agency as they are generated. Transmittal of the index will not suffice. In addition, other documents may be requested by EPA on a case-by-case basis. Inter-Agency Agreements (IAGs) should spell out procedures for compiling and maintaining the record.

C. ATSDR

Participation in the selection of a response action by the Agency for Toxic Substance and Disease Registry (ATSDR) should be reflected in the administrative record. The record file must include the initial and subsequent health assessments and any other information EPA solicits and obtains from ATSDR which EPA considers or relies on in its selection of a response action.

Draft versions of the health assessment and other draft documents upon which ATSDR comments should not be included in the record file. If, however, EPA solicits comments from ATSDR on a draft document such as a draft work plan or RI report, and receives formal comments from ATSDR which EPA considers or relies on in selecting a response action, then the document and comments should be included in the record file.

In the event that the ATSDR health assessment and EPA's risk assessment appear inconsistent, a document explaining the difference should be generated and placed in the record file.

D. Natural Resources Trustees

Section 122(j)(1) of CERCLA requires that the Agency give notice to the Natural Resources Trustee of a release or threatened release of any hazardous substance which may have resulted in damages to natural resources. The administrative record file must include the Agency's notice to the Natural Resources Trustee, and any subsequent final communications (e.g., a release or final report). In addition, any factual information provided by the Natural Resources Trustee which the Agency considers or relies on in selecting a response action should be included in the record file.

In the event that the Natural Resources Trustee's damage assessment and EPA's risk assessment appear inconsistent, a document explaining the difference should be generated and placed in the record file.

V. DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of employees of the U.S. Environmental Protection Agency. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. EPA reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

VI. FURTHER INFORMATION

For further information concerning this memorandum, please contact Sven-Erik Kaiser in the Office of Waste Programs Enforcement at FTS (202) 475-9806.

GLOSSARY

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Administrative Record: as used in this guidance, the completed compilation of documents the Agency considered or relied on in selecting a response action.

Administrative Record File: as used in this guidance, the ongoing collection of documents the Agency anticipates will constitute the administrative record when the selection of response action is made.

ARAR: applicable or relevant and appropriate requirements (see §121(d) of CERCLA).

ATSDR: Agency for Toxic Substance and Disease Registry.

CA: cooperative agreement (entered into with a State or local government to transfer funds to conduct response activities).

CBI: confidential business information.

CERCLA: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 (also known as Superfund).

C.F.R.: Code of Federal Regulations.

CMS: corrective measure study (RCRA corrective action document, equivalent to an FS).

CRC: Community Relations Coordinator.

CRP: community relations plan.

Document: as used in this guidance, includes writings, drawings, graphs, charts, photographs, and data compilation from which information can be obtained. It does not, however, include physical samples.

DOJ: Department of Justice.

EE/CA: engineering evaluation/cost analysis (removal document).

EPA: United States Environmental Protection Agency.

ESD: Environmental Services Division.

Explanation of Significant Differences: post-ROD document described in §117(c) of CERCLA.

FOIA: Freedom of Information Act.

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FSP: field sampling plan.

HRS: Hazard Ranking System.

IAG: inter-agency agreement (made with a Federal agency).

Lead Agency: the agency that provides the OSC or RPM to plan and implement a response action under the NCP.

NCP: National Oil and Hazardous Substances Contingency Plan, proposed revisions published on December 21, 1988 (53 FR 51394).

NPL: National Priorities List.

OECD: EPA Office of Enforcement and Compliance Monitoring.

OERR: EPA Office of Emergency and Remedial Response.

OIRM: EPA Office of Information Resources Management.

Operable Unit: a discrete action that comprises an incremental step toward comprehensively addressing site problems (see section 300.5 of the proposed NCP).

ORC: EPA Office of Regional Counsel.

OSC: On-Scene Coordinator (project manager for a removal action)

OSWER: EPA Office of Solid Waste and Emergency Response.

OWPE: EPA Office of Waste Programs Enforcement.

PA: preliminary assessment.

PRP: potentially responsible party.

QAPP: quality assurance project plan.

RA: remedial action.

RCRA: the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act.

RD: remedial design.

RI/FS: remedial investigation/feasibility study.

RFA: RCRA facility assessment (RCRA document, equivalent to a PA/SI).

RFI: RCRA facility investigation (RCRA corrective action document, equivalent to an RI).

ROD: Record of Decision (documents the selection of a remedial action).

RPM: remedial project manager (project manager for a remedial action).

SAP: sampling and analysis plan.

SARA: Superfund Amendments and Reauthorization Act of 1986 (see CERCLA above).

Site File: the file containing all site documentation.

SI: site investigation.

SMOA: Superfund memorandum of agreement (made with a State).

Support Agency: the agency that provides the support agency coordinator to furnish necessary data to the lead agency, review response data and documents, and provide other assistance as requested by the lead agency. The support agency may also concur on decision documents.

APPENDIX A

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SECTION 113 (J) OF CERCLA

(j) JUDICIAL REVIEW.—

(1) LIMITATION.—In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) STANDARD.—In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) REMEDY.—If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) PROCEDURAL ERRORS.—In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

SECTION 113 (K) OF CERCLA

(k) ADMINISTRATIVE RECORD AND PARTICIPATION PROCEDURES.—

(1) ADMINISTRATIVE RECORD.—The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) PARTICIPATION PROCEDURES.—

(A) REMOVAL ACTION.—The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) REMEDIAL ACTION.—The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 117(a)(2) (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 117(d). The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code to carry out the requirements of this subparagraph.

(C) INTERIM RECORD.—Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

(D) POTENTIALLY RESPONSIBLE PARTIES.—The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

APPENDIX B

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MODEL FILE STRUCTURE

This model file structure may be used to compile an administrative record file for a remedial action, a removal action, or a combination of both remedial and removal actions. If the record documents a remedial action decision, section 2 of the file will contain only those removal action documents which (a) predate the remedial record of decision and (b) are relevant to the selection of the remedial action. If the record documents a removal action decision, sections 3, 4, and 5 of the file will contain only those remedial action documents which (a) predate the removal action memorandum and (b) are relevant to the selection of the removal action.

Justification is unnecessary for file categories without any documents. Those categories should be left out of the index.

A document should be filed in only one category, even if it falls into more than one category. It may be referenced in another category. If necessary, additional subcategories may be developed to accommodate documents not falling in any of the defined subcategories. Avoid adding categories of miscellaneous documents.

The correspondence subcategory can include comments and responses specific to the category. If the comments and responses are general in nature or address more than one category, they may be included in the public participation category.

INDEX (FIRST DOCUMENT)**1.0 SITE IDENTIFICATION**

- 1.1 Background - RCRA and other information
- 1.2 Notification/Site Inspection Reports
- 1.3 Preliminary Assessment (PA) Report
- 1.4 Site Investigation (SI) Report
- 1.5 Previous Operable Unit Information

2.0 REMOVAL RESPONSE

- 2.1 Sampling and Analysis Plans
- 2.2 Sampling and Analysis Data/Chain of Custody Forms
- 2.3 EE/CA Approval Memorandum (for non-time-critical removals)
- 2.4 EE/CA
- 2.5 Action Memorandum
- 2.6 Amendments to Action Memorandum

3.0 REMEDIAL INVESTIGATION (RI)

- 3.1 Sampling and Analysis Plan (SAP)
- 3.2 Sampling and Analysis Data/Chain of Custody Forms
- 3.3 Work Plan
- 3.4 RI Reports

4.0 FEASIBILITY STUDY (FS)

- 4.1 ARAR Determinations
- 4.2 FS Reports
- 4.3 Proposed Plan
- 4.4 Supplements and Revisions to the Proposed Plan

5.0 RECORD OF DECISION (ROD)

- 5.1 ROD
- 5.2 Amendments to ROD
- 5.3 Explanations of Significant Differences

6.0 STATE COORDINATION

- 6.1 Cooperative Agreements/SMOAs
- 6.2 State Certification of ARARs

7.0 ENFORCEMENT

- 7.1 Enforcement History
- 7.2 Endangerment Assessments
- 7.3 Administrative Orders
- 7.4 Consent Decrees
- 7.5 Affidavits
- 7.6 Documentation of Technical Discussions with PRPs on Response Actions
- 7.7 Notice Letters and Responses

8.0 HEALTH ASSESSMENTS

- 8.1 ATSDR Health Assessments
- 8.2 Toxicological Profiles

9.0 NATURAL RESOURCE TRUSTEES

- 9.1 Notices Issued
- 9.2 Findings of Fact
- 9.3 Reports

10.0 PUBLIC PARTICIPATION

- 10.1 Comments and Responses
- 10.2 Community Relations Plan
- 10.3 Public Notice(s) (Availability of the Administrative Record File, Availability the Proposed Plan, Public Meetings)
- 10.4 Public Meeting Transcripts
- 10.5 Documentation of Other Public Meetings
- 10.6 Fact Sheets and Press Releases
- 10.7 Responsiveness Summary
- 10.8 Late Comments

11.0 TECHNICAL SOURCES AND GUIDANCE DOCUMENTS

11.1 EPA Headquarters Guidance

11.2 EPA Regional Guidance

11.3 State Guidance

11.4 Technical Sources

APPENDIX C

MODEL INDEX

Attached is an excerpt of the Index of documents included in the Administrative Record for the Love Canal site. The Index lists the documents according to the EPA file structure (category number). The Index includes the following information fields:

- DOCUMENT NUMBER.... indicates the first and last page numbers of the document. Both page numbers will be the same for one-page documents. In this particular index, the document number consists of a three letter site code followed by microfilm reel and frame numbers.
- TITLE..... indicates the title or an enhanced description of the document in parentheses.
- AUTHOR..... indicates the author or primary originator and the author's corporate affiliation.
- RECIPIENT..... indicates the addressee or primary recipient and the addressee's corporate affiliation.
- DATE..... indicates document date by month/day/year. / / means no date was available.
- TYPE..... indicates the document type.
- CATEGORY..... indicates the EPA file structure number.

09/09/87

Administrative Record - Category Number Order
LOVE CANAL

227 Page: 125

Document Number: LOV-001-1079 To 1089

Date: 02/07/86

Title: Additional Sampling of the Black, Bergholtz & Cayuga Creeks and Extended Sewer Inspection
Project - Summary

Type: PLAN
Category: 11.4.0 Public Meeting Transcripts
Author: none: NY Dept of Environmental Conservation
Recipient: Garbarini, Douglas: US EPA

Document Number: LOV-001-1069 To 1078

Date: 11/13/86

Title: (Status report of Love Canal Remedial Programs for public meeting held on 11/13/86)

Type: GRAPHIC
Category: 11.4.0 Public Meeting Transcripts
Author: Bobersky, Guy T: NY Dept of Environmental Conservation
Recipient: none: none

Document Number: LOV-009-0013 To 0018

Date: 08/12/87

Title: (Love Canal Feasibility Study Workshop, schedule of days events and attendance sheets)

Type: CORRESPONDENCE
Category: 11.4.0 Public Meeting Transcripts
Condition: INCOMPLETE
Author: none: none
 none: none

Document Number: LOV-009-0019 To 0024

Date: 08/25/87

Title: (Presentation of Proposed Plan for Love Canal)

Type: GRAPHIC
Category: 11.4.0 Public Meeting Transcripts
Condition: INCOMPLETE
Author: none: none
Recipient: none: none

APPENDIX D

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MODEL POSITION DESCRIPTION FOR ADMINISTRATIVE RECORD COORDINATOR

INTRODUCTION

The incumbent serves as an Administrative Record Coordinator in one of the Regional offices of the Environmental Protection Agency (EPA). [Each Region may want to add an introduction to Superfund and the Regional office here.] The incumbent is responsible for compiling and maintaining administrative record files for CERCLA (Superfund) response action decisions.

Section 113(k) of CERCLA requires the establishment of an administrative record upon which the selection of a response action is based. Such a record is a compilation of all documents which the Agency considered or relied on in making its response action decision. Judicial review of any issues concerning the adequacy of any response action decision is limited to the administrative record. Public participation in the development of the record is required by law.

Establishment of thorough and complete administrative records is essential to EPA's Superfund program. Administrative records which include public participation and withstand judicial scrutiny allow EPA to meet its goals and objectives.

The incumbent will be responsible for compiling and maintaining administrative records for large numbers of Superfund sites. Each record requires coordination with many people including: Federal staff, State and local officials, private contractors, the general public and potentially responsible parties. Further responsibilities include deliberations over which materials to include in each record and requirements for dealing with privileged materials.

MAJOR DUTIES AND RESPONSIBILITIES

1. The incumbent is responsible for compiling and maintaining all of the administrative records for selection of CERCLA response actions for a Regional office of the EPA. The incumbent must have complete knowledge of all rules and procedures governing development of the administrative record files.
2. Receives and reviews all documents submitted by the Remedial Project Manager (RPM), On-Scene Coordinator (OSC), Office of Regional Counsel (ORC) and other appropriate staff for inclusion in the administrative record files. The incumbent will coordinate with staff responsible for deciding what

documents are included in the record and will arrange for adding documents to the record file.

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3. Compiles the administrative record file for each CERCLA response action. This includes logging the receipt of each document, maintaining a central master file of documents, redacting information from privileged documents as directed by ORC, maintaining any privileged portions of each record using Agency security measures, arranging for copying of documents in each record and transmitting the documents to appropriate repositories.
4. Coordinates the compilation of the administrative record files with State and Federal agencies. This includes receiving records maintained by State and Federal agencies and notifying appropriate personnel of these records for their review.
5. Maintains and updates (monthly) an index of each administrative record file in conformance with Agency guidelines.
6. Ensures public access to administrative record files. This includes notifying the public of the availability of the record, making the record available for public inspection, coordinating with personnel at the facility where the record is located, maintaining an adequate copying facility and maintaining a log of persons reviewing documents. The incumbent will have to respond to phone calls and visitors wanting information on and from the record. These functions will be coordinated with the Office of Public Affairs and Superfund Community Relations Coordinators.
7. Maintains the Regional Superfund Central Library of guidance documents and technical references.

CONTROLS OVER WORK

The incumbent works under the general supervision of the [Hazardous Waste Branch Chief]. An administrative record is reviewed and certified for litigation by a person designated by the Regional Administrator.

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COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

The "Compendium of CERCLA Response Selection Guidance Documents" is a collection of guidance documents which are frequently used in the selection of a CERCLA response action.

The following documents are the core guidance documents used in the CERCLA response selection process and are included in the Compendium. The Agency is preparing a more comprehensive list of frequently used guidance documents. This particular list and file structure was adapted from "Selected Technical Guidance for Superfund Projects," September 1988 - OSWER Directive No. 9200.7-01.

SITE ASSESSMENT

Data Quality Objectives for Remedial Response Activities:
Development Process [EPA 540/G87-003]

Data Quality Objectives for Remedial Response Activities:
Example Scenario [EPA 540/G87-004]

Design and Development of Hazardous Waste Reactivity Testing
Protocol [NTIS PB-84-158-807]

Guidance for Conducting Remedial Investigations and Feasibility
Studies Under CERCLA (Interim Final) [OSWER Directive 9335.3-01]

Handbook for Evaluating Remedial Action Technology Plans (Final
Report, Oct. 81-Jun. 82) [NTIS PB-84-118-249]

Handbook, Remedial Action at Waste Disposal Sites, Revised [EPA
625/6-85-006]

Modeling Remedial Actions at Uncontrolled Hazardous Waste Sites
[OSWER Directive 9355.0-08]

Test Methods for Evaluation of Solid Waste: Physical/Chemical
Methods, 3rd Edition [GPO 955-001-00000-1]

MONITORING AND SAMPLING

Geophysical Methods for Locating Abandoned Wells [NTIS PB-84-212-
711]

Geophysical Techniques for Sensing Buried Wastes and Migration
[NTIS PB-84-198-449]

Practical Guide for Ground-water Sampling [NTIS PB-86-137-304]

RCRA Ground-water Monitoring Technical Enforcement Guidance Document [NTIS PB-87-107-751] 227

Sediment Sampling Quality Assurance User's Guide [NTIS PB-85-233-542]

Soil Sampling Quality Assurance User's Guide [NTIS PB-84-198-621]

SOURCE CONTROL: ALTERNATIVE TREATMENT TECHNOLOGIES

Directory of Commercial Hazardous Waste Treatment and Recycling Facilities [NTIS PB-86-178-431]

Guidance Document for Cleanup of Surface Tank and Drum Sites [NTIS PB-87-110-672]

Guidance Manual for Research, Development, and Demonstration Permits Under 40 CFR, Section 270.65 [NTIS PB-86229-192]

Handbook for Stabilization/Solidification of Hazardous Waste [EPA 540/2-86/001]

Management of Hazardous Waste Leachate [NTIS PB-81-189-359]

Mobile Treatment Technologies for Superfund Waste [EPA 540/2-86-003F]

Practical Guide - Trial Burns for Hazardous Waste Incinerators: Project Summary [NTIS PB-86-190-246/AS]

Prohibition on the Placement of Bulk Liquid Hazardous Waste in Landfills - Statutory Interpretive Guidance [NTIS PB-86-212-271]

Review of In-Place Treatment Techniques for Contaminated Surface Soils, Volume 1 Technical Evaluation [NTIS PB 85-124-881]

Review of In-Place Treatment Techniques for Contaminated Surface Soils, Volume 2 Background Information for In-Situ Treatment [NTIS PB-85-124-889]

Systems to Accelerate in Situ Stabilization Waste Deposits [EPA 540/2-86-002]

Technology Screening Guide for Treatment of CERCLA Soils and Sludges [EPA 540/2-88/004]

Treatment Technology Briefs: Alternatives to Hazardous Waste Landfills [EPA 600/8-86-017]

SOURCE CONTROL - STORAGE/LAND DISPOSAL

Systems to Accelerate in Situ Stabilization of Waste Deposits [EPA 540/2-86-002]

GROUND-WATER REMEDIATION

Guidance on Remedial Actions for Contaminated Ground Water at Superfund Sites (Interim Final) [OSWER Directive 9283.1-2]

Leachate Plume Management [NTIS PB-86-122-330]

RISK/ENDANGERMENT ASSESSMENT

Superfund Exposure Assessment Manual (Draft) [EPA 540/1-88/100]

Superfund Public Health Evaluation Manual [EPA 540/1-86/060]

CONSTRUCTION TECHNIQUES AND PROCEDURES

Emergency Response Procedures for Control of Hazardous Substance Release [NTIS PB-84-128-719]

Guidance Manual for Minimizing Pollution From Waste Disposal Sites [NTIS PB-286-905]

Guide for Decontaminating Buildings, Structures, and Equipment at Superfund Sites [NTIS PB-85-201-234/AS]

Slurry Trench Construction for Pollution Migration Control [NTIS PB-84-177-831]

Superfund Remedial Design and Remedial Action Guidance [NTIS PB-88-107529]

Superfund Removal Procedure Revision #3 [OSWER Directive 9360-0.03B]

PROGRAM GUIDANCE

CERCLA Compliance With Other Environmental Statutes [OSWER Directive 9234.0-02]

Guidance Document for Cleanup of Surface Impoundment Sites [NTIS PB-87-110-664]

Handbook, Remedial Action at Waste Disposal Sites, Revised [EPA 625/6-85-006]

Superfund Federal-Lead Remedial Project Management Handbook [EPA 540/G-87/001]

Superfund State-Lead Remedial Project Management Handbook [EPA 540/G-87/002]

CASE STUDIES

Case Studies 1-23: Remedial Responses at Hazardous Waste Sites
[NTIS PB-86-121-721]

Summary Report: Remedial Response at Hazardous Waste Sites [NTIS
PB-86-121-721]

COSTS

Costs of Remedial Response Actions at Uncontrolled Hazardous
Waste Sites [NTIS PB-83-164-830]

Remedial Action Costing Procedures Manual [NTIS PB-88-113-691]

Removal Cost Management Manual [OSWER Directive 9360.0-02B]

APPENDIX F

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MODEL TRANSMITTAL COVER LETTER

[Name of Contact]
[Address]

Dear [Name of Contact]:

The U.S. Environmental Protection Agency is required by law to establish administrative records "at or near a facility at issue." This administrative record consists of information upon which the Agency bases its selection of response action for a particular Superfund site.

By providing the public with greater access to these records, it is our hope that they will be better equipped to comment constructively on site activities and to understand the issues relating to the selection of the response action at the site.

We appreciate having the [Name of local repository] as the designated administrative record facility for the [Name of site] Superfund site. The enclosed record files, along with any future documents relating to technical activities at the site should be placed in the [Name of local repository] and be available for public review. The record files should be treated as a non-circulating reference - it should not be removed from your facility.

Also enclosed is a fact sheet to assist you and your staff in answering questions posed by the public concerning administrative records for selection of response actions at Superfund sites. Please feel free to distribute this guide to the public.

To ensure the receipt of the administrative record file, I would appreciate your completion of the attached Document Transmittal Acknowledgment form. Please return this form in the enclosed self-addressed, stamped envelope.

Again, I would like to thank you for your cooperation with the U.S. EPA in serving as a Field Repository. If you have any questions or comments, please contact [Name of EPA contact] at [Phone No.].

Sincerely,

[Name]
Administrative Record Coordinator

APPENDIX G

MODEL DOCUMENT TRANSMITTAL ACKNOWLEDGMENT

From: [Regional Office Address]

To: [Field Repository Address]

I acknowledge that I have received the following documents from the U.S. EPA Region ____ Office, pertaining to [Site Name] Superfund site.

Administrative Record Name - _____ [Site Name]

Administrative Record Document Numbers - _____

Signed _____

Date _____

Please return this form to: [Regional Office Address]

APPENDIX H

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FACT SHEET

Administrative Records in Local Repositories

The "administrative record" is the collection of documents which form the basis for the selection of a response action at a Superfund site. Under section 113(k) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act (CERCLA), EPA is required to establish an administrative record for every Superfund response action and to make a copy of the administrative record available at or near the site.

The administrative record file must be reasonably available for public review during normal business hours. The record file should be treated as a non-circulating reference document. This will allow the public greater access to the volumes and also minimize the risk of loss or damage. Individuals may photocopy any documents contained in the record file, according to the photocopying procedures at the local repository.

The documents in the administrative record file may become damaged or lost during use. If this occurs, the local repository manager should contact the EPA Regional Office for replacements. Documents may be added to the record file as the site work progresses. Periodically, EPA may send supplemental volumes and indexes directly to the local repository. These supplements should be placed with the initial record file.

The administrative record file will be maintained at the local repository until further notice. Questions regarding the maintenance of the record file should be directed to the EPA Regional Office.

The Agency welcomes comments at any time on documents contained in the administrative record file. Please send any such comments to [name and address]. The Agency may hold formal public comment periods at certain stages of response process. The public is urged to use these formal review periods to submit their comments.

For further information on the administrative record file, contact [name and phone no. of Administrative Record Coordinator].

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APPENDIX I

MODEL NOTICE OF PUBLIC AVAILABILITY

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THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ANNOUNCES THE AVAILABILITY OF THE
ADMINISTRATIVE RECORD
XYZ SITE, [Locality, State]

The U.S. Environmental Protection Agency (EPA) announces the availability for public review of files comprising the administrative record for the selection of the [remedial, removal] action at the XYZ site, [Locality, State]. EPA seeks to inform the public of the availability of the record file at this repository and to encourage the public to comment on documents as they are placed in the record file.

The administrative record file includes documents which form the basis for the selection of a [remedial, removal] action at this site. Documents now in the record files include [preliminary assessment and site investigation reports, validated sampling data, RI/FS workplan, and the community relations plan]. Other documents will be added to the record files as site work progresses. These additional documents may include, but are not limited to, the RI/FS report, other technical reports, additional validated sampling data, comments and new data submitted by interested persons, and EPA responses to significant comments.

The administrative record file is available for review during normal business hours at:

[Repository Name] and U.S.EPA - Region Z
[Address and Phone #] [Address and Phone #]

Additional information is available at the following locations:

Verified sampling data - Contract laboratory,
and documentation [Address and Phone #]

Guidance documents and - EPA-Region Z
technical literature [Address and Phone #]

Written comments on the administrative record should be sent to:

[Name], Office of Public Affairs
U.S. EPA - Region Z
[Address and Phone #]

APPENDIX J

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MICROFORM APPROVAL MEMORANDUM



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

OCT 21 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Microfilming the Administrative Record

FROM: Edward J. Hanley, Director *E. Hanley*
Office of Information Resources Management

TO: Asa R. Frost, Jr., Director
OSWER Information Management Staff

In accordance with EPA Records Management Manual, Chapter 6, dated 7/13/84, I approve OSWER's request for an administrative record micrographic system for regional hazardous waste management programs.

The feasibility study prepared for OWPE, entitled "Assessment of the Suitability and Costs of Alternatives for the Administrative Record" (June 30, 1988), satisfactorily documents and justifies the need for converting the administrative record to microform. In particular, the requirement under SARA to make the administrative record publicly available at or near each hazardous waste site makes microform a cost-effective storage medium.

Please inform each regional hazardous waste program of my approval of OSWER's request and of the need to comply with the remaining provisions of Chapter 6 of the EPA Records Manual should the region proceed with implementing an administrative record micrographic system.

cc: SIRMOS, Region 1 - X

APPENDIX K

MODEL CERTIFICATION

IN THE [NAME OF COURT]

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
[NAMES OF DEFENDANTS]	:	
	:	
Defendants,	:	CIVIL ACTION
NO. [number]	:	
	:	
v.	:	
	:	
[NAMES OF THIRD PARTY	:	
DEFENDANTS]	:	
	:	
Third Party Defendants	:	

CERTIFICATION OF DOCUMENTS
COMPRISING THE ADMINISTRATIVE RECORD

The United States Environmental Protection Agency (EPA) hereby certifies that the attached documents constitute the administrative record for selection of response actions under the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, for the [name of site] site in [City or County], [State].

By the United States Environmental Protection Agency:

In witness whereof I have
subscribed my name this ____ day of
____, 19__ in ____ [city]__.

[signature]

[typed name]

act in their capacity as a unit of government, they may receive funds from the Fund for section 104 response action as authorized by section 111(a)(1) of CERCLA. A political subdivision of a State is treated as a State for the purpose of section 107.

3. *Grants for technical assistance.* Current NCP § 300.25(d) refers to cooperative agreements and contracts. Amendments to CERCLA section 111 authorize technical assistance grants pursuant to section 117(e). Cooperative agreements and grants, when taken together, are generally referred to as "assistance agreements." EPA is proposing to revise § 300.25(d) to refer to "procurement contracts or assistance agreements."

Subpart I—Administrative Record for Selection of Response Action

Proposed Subpart I of the NCP is entirely new. It implements CERCLA requirements concerning the establishment of an administrative record. Section 113(k)(1) of CERCLA requires the establishment of an administrative record that contains the documents that form the basis for the selection of a CERCLA response action. In addition, section 113(k)(2) requires the promulgation of regulations establishing procedures for the participation of interested persons in the development of the administrative record.

EPA is proposing regulations regarding the administrative record that include procedures for public participation. This will ensure the development of a complete and accurate record by all parties responsible for compiling records, because procedures for establishing and maintaining the record are closely related to the procedures governing public participation.

Because this subpart is entirely new, the following discussion is not divided into major revisions, other revisions, and points of clarification. Instead, it explains the purpose of the administrative record and then generally provides a paragraph by paragraph explanation of the proposed regulations.

A. Background and Purpose

Under CERCLA, the administrative record established under section 113(k) serves two primary purposes. First, under section 113(j), judicial review of any issue concerning the adequacy of a response action is limited to the administrative record. Second, section 113(k) requires that the administrative record be used as a vehicle for public participation in the selection of the response action, ensuring that EPA has

considered all relevant factors in selecting the response and that interested parties have been given adequate notice and an opportunity to participate in that selection.

1. *Judicial review.* Section 113(j)(1) of CERCLA provides that judicial review of any issues concerning the adequacy of any response action shall be limited to the administrative record. Section 113(j)(2) provides that the court shall uphold the selection of a response action unless the objecting party can demonstrate, based on the administrative record, that the decision was arbitrary and capricious, or otherwise not in accordance with law. These statutory provisions codify well-established principles of administrative law concerning the applicable standard and scope of review for informal agency actions. The legislative history of section 113 demonstrates that it is intended to clarify and confirm the applicability of these administrative law principles to CERCLA response selection. (See S. Rep. 99-11, 99th Cong., 1st Sess. 57 (1985); H.R. Rep. 99-253, 99th Cong., 1st Sess. 82 (1985); Cong. Rec. H 11084 (daily ed. Dec. 5, 1985)).

Limiting judicial review of the selection of a response action to the administrative record ensures that litigation on the selection of the response action focuses on the selection in light of the information available to the decisionmaker at the time the response was selected. Judicial review limited to the administrative record contributes to the overwhelming public interest in effecting the expeditious cleanup of potentially health- and environment-threatening hazardous waste sites and ensures that all interested persons may participate equally in the administrative decisionmaking process. The principal effect of limiting judicial review to the administrative record is that courts will not engage in de novo fact-finding during their review of a challenge to the decision to select a certain response. Thus, record review of response selection decisions would mean that persons challenging the response decision could not depose, examine or cross-examine on-scene coordinators (OSCs), remedial project managers (RPMs), government consultants, or decisionmakers with respect to the response decision or engage in any other discovery activities. Also, the imposition of long and costly trial-type procedures in section 108 actions would greatly delay response.

2. *Public participation.* Sections 113(k)(2)(A) and (B) of CERCLA require the promulgation of regulations establishing procedures for the

participation of interested persons in the development of the administrative record. Participation by interested persons, where appropriate, will ensure that EPA has considered the concerns of the public, including potentially responsible parties (PRPs), in selecting the response action. In addition, for purposes of administrative and judicial review, the administrative record can contain documents that reflect the views of the public, including PRPs and those not party to any judicial proceeding, concerning the selection of a response action.

For remedial actions, section 113(k)(2)(B) of CERCLA establishes the following minimum procedures for public participation:

- i. Notice to potentially affected persons and the public, accompanied by a brief analysis of the plan and alternative plans that were considered;
- ii. A reasonable opportunity to comment and provide information regarding the plan;
- iii. An opportunity for a public meeting in the affected area, in accordance with section 117(a)(2) of CERCLA;
- iv. A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations; and
- v. A statement of the basis and purpose of the selected action.

These requirements are virtually the same as those required by section 117 of CERCLA concerning public participation for remedial actions. These public participation requirements are proposed for codification today in § 300.430 of Subpart E of the NCP. Subpart I expands on the public participation requirements of Subpart E.

Because the nature of removal actions often involves the need for prompt action, the procedures proposed today for public participation in removal actions are quite different from those for remedial actions. Removal authority allows the lead agency to move quickly in situations where prompt lead agency action is warranted. Section 113(k)(2)(A) of CERCLA requires that there be "appropriate" participation of interested persons in the development of the administrative record supporting removal actions. The legislative history of this section states that these public participation requirements "are not intended to hamper emergency removal actions. Nonetheless, the Administrator is directed to develop appropriate participation procedures for removal actions and should follow these requirements to the maximum extent practicable." (H.R. Rep. 99-253, 99th

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Cong. 1st Sess. 1983, at 82). Public participation requirements for removal actions are addressed in § 300.415(a) of today's proposed regulations. Additional public participation procedures in the development of an administrative record for a removal action are addressed in § 300.620. The public participation procedures are designed to ensure an appropriate level of public involvement for removal actions without causing unnecessary delay. In general, where there is time to solicit public comment before the selection of a removal action, the lead agency will do so. Public participation procedures for removal actions are described in greater detail below.

B. Current Record Requirements

Section 113(k)(2)(C) of CERCLA states that until regulations on the participation of interested persons in the development of the administrative record are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. Current procedures on public participation in the selection of response actions include an extensive community relations program through which interested persons have notice of information through notices in local newspapers, community relations mailings, public meetings, and letters, including notice letters to potentially responsible parties. An adequate record should be compiled and maintained through use of current procedures for sites where the remedial investigation or removal action has already begun prior to promulgation of these regulations. These proposed administrative record requirements build upon and formalize existing procedures for the exchange of information on the selection of a response action.

The cutoff date for the applicability of these regulations is based on when the administrative record file must first be made available under these regulations. The lead agency may not be able to fully comply with regulations concerning compilation of the record which are promulgated after a record has already been compiled and made available at or near a site. Thus, at such sites, the lead agency will comply with these regulations to the extent practicable.

C. Summary of New Subpart I

1. *Establishment of an administrative record (§ 300.800)*. As explained earlier, section 113(k) requires the establishment of an administrative record consisting of the documents that form the basis for

the selection of a response action. An administrative record is the compilation of documents considered or relied on by the agency in making a decision; in this case, the selection of the response action for the site. Proposed § 300.800(a) codifies this statutory provision and provides that such establishment is the responsibility of the lead agency. The regulation also uses the term "administrative record file" to refer to documents which the lead agency anticipates will be included in the administrative record when the decision on response action selection is made. The administrative record file contains a body of documents which increases as documents are added and does not necessarily constitute the final administrative record.

The term "documents," also used in the preamble and proposed regulations, is intended to be very broad. It includes writings, drawings, graphs, charts, photographs, and data compilations from which information can be obtained. It does not include physical samples.

Section 300.800(b) addresses administrative records for Federal facilities. Executive Order 12580 authorizes Federal agencies to establish the administrative record for selection of response actions for Federal facilities under their jurisdiction, custody, or control. EPA, however, is required to promulgate regulations establishing procedures for the participation of interested parties in the development of the record. Federal agencies must compile and maintain records as required by this subpart, as finally promulgated. Section 300.800(b) also clarifies that although the Federal agency is responsible for compiling and maintaining the administrative record, EPA may furnish documents which the Federal agency is to place 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.

Section 300.800(b)(2) provides that when EPA (or the United States Coast Guard (USCG)) is the lead agency at a Federal facility, EPA (or USCG) shall compile and maintain the record. Executive Order 12580 delineates cases in which EPA (or USCG) is the lead agency. EPA is the lead agency, for example, at Federal facilities conducting on-site emergency removal actions (other than at DOD or DOE facilities). The USCG can be the lead agency at Federal facilities with on-site emergency removal actions in the coastal zone.

Section 300.800(b)(3) requires that when EPA is involved in the selection of a response action at a Federal facility on

the NPL, the Federal 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 requested by EPA on a case-by-case basis. EPA is involved in the selection of a response action when it is jointly selecting the response action with the Federal agency, as delineated in Executive Order 12580. Such joint selection occurs, for example, for all remedial actions at Federal facilities on the NPL. In such cases, EPA must be sufficiently familiar with the contents of the administrative record to be able to select jointly the response action.

EPA considered other options for involvement in the development of the administrative record for Federal facilities, such as periodic visits to the Federal facility to review the administrative record file as it is compiled, receipt of the entire contents of the record file for all NPL sites, and receipt of the entire contents of the record file for all response actions at all Federal facilities. EPA has tentatively rejected these options as being overly burdensome. EPA believes that the preferred option allows enough flexibility for EPA to ensure that the response action selected by the Federal agency adequately accounts for the concerns of the public, is consistent with response action selection at non-Federal facilities, and allows EPA to be sufficiently involved in the decision when it is jointly selecting the response action. EPA solicits comments on alternative procedures for EPA's involvement in the development of the administrative record for Federal facilities.

Section 300.800(c) specifies that it is the responsibility of the State to compile and maintain administrative records at a State-lead site. Section 300.800(c) applies only if EPA and the State formally designate the State as the lead agency for a site as specified in Subpart A under the definition of lead agency. The requirements for State-lead sites are similar to those for Federal agencies compiling administrative records for Federal facilities at which EPA is involved in the selection of the response action. EPA is proposing that the State provide EPA, commencing at the time the administrative record file is first made available to the public, with the index of documents included in the administrative record file. The issues relating to this requirement are similar to those outlined above for Federal

facilities. Additionally, EPA may require that States place additional documents in the record file to ensure that the administrative record includes all documents which form the basis for the selection of the response action.

Section 300.800(d) provides that Subpart I applies to all response actions taken under section 104 of CERCLA or sought, secured, or ordered administratively or judicially under section 106 of CERCLA. The statutory language of section 113(j)(1) states that in any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. It has been argued that section 113(j)(1) of CERCLA does not apply to injunctive actions taken under section 106, and that the literal meaning of the phrase "taken or ordered by the President" does not include section 106 actions for injunctive relief unless an administrative order is issued.

The statutory language of sections 113(j) (1) and (2), when read together, indicates that this narrow interpretation of section 113(j) is incorrect. Together, sections 113(j) (1) and (2) provide that judicial review of any response action is limited to the administrative record. In addition, section 121 of CERCLA expressly provides that the President shall select all remedial actions to be carried out by EPA under section 104 of CERCLA or secured under section 106. No exception for section 106 injunctive actions was made.

Accordingly, consistent with the statutory language and congressional intent, EPA is clarifying that limiting judicial review of response action selection to the administrative record applies to all actions taken under section 104 of CERCLA, or sought, secured, or ordered administratively or judicially under section 106 of CERCLA.

Section 300.800(d) further provides that Subpart I only applies to those sites at which the remedial investigation commences or the action memorandum is signed after the promulgation of these regulations. For those sites grandfathered by paragraph (d), paragraph (e) provides that the lead agency shall comply with these regulations to the extent practicable on a case-by-case basis. This does not mean that administrative records are not required for these sites or that judicial review of the selection of a response action at these sites will not be limited to the administrative record. Rather, as explained earlier, this provision simply recognizes that there will be ongoing actions at which the final regulations cannot be complied

with in full. The public participation procedures for remedial actions outlined in section 113(k)(2)(B) and 117 of the statute and discussed earlier in this preamble, however, are applicable to any Record of Decision (ROD) signed after October 17, 1986, the date that, in general, the amendments to CERCLA took effect.

Subpart I does not apply to third party cleanups, i.e., those not undertaken pursuant to sections 104, 106, or 111 of CERCLA. Under this proposal, such cleanups need not comply with these administrative record requirements. Section 300.800(d) does not require that State actions for cost recovery under section 107 of CERCLA, where the State used only its own authorities to conduct a response action, comply with this subpart. If a State is seeking to recover costs from responsible parties under section 107 of CERCLA, EPA may wish to require that States comply with this subpart to expedite judicial proceedings in such circumstances. EPA solicits comments on whether these regulations should apply to those situations.

2. Location of the administrative record (§ 300.805). Section 113(k)(1) of CERCLA requires that "the administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location." EPA proposes to require that the administrative record file generally be located in two places. First, as provided by the statute, the record file shall be located at or near the facility at issue. (To conform to the terminology of the rest of the NCP, the term "site" will be used in this subpart as a substitute for the term "facility" used in the statute.)

In addition, EPA proposes that the administrative record file be located at an office of the lead agency or other central location. Examples of central locations include an EPA Regional Office, an EPA field office, a Federal agency equivalent to an EPA Regional office, or, for State lead sites, a State environmental agency office. EPA considered making the central location requirement optional, but concluded that the lead agency has more control over the maintenance of the necessary documents at the central location than at or near the site. As described below, the file at or near the site should contain a copy of most of the documents included in the administrative record file at the central location.

Under § 300.805, the file at the central location must contain all documents which are part of the administrative record except certain verified sampling data, quality control and quality

assurance documents, chain of custody forms, and publicly available technical literature. These documents, which are part of the record, may be located elsewhere, as provided in § 300.805 (a) and (c), and explained further below.

The administrative record file at or near the site at issue should be located at one of the information repositories which may already exist for community relations purposes. The information repository, maintained by the community relations coordinator, may contain additional information which is of interest to the public, but which does not form a basis for the response action decision. Examples of such information include newspaper articles, press releases, and information concerning the NPL listing. If there is no existing community relations information repository, or the information repository is inadequate for maintaining the administrative record file, the file may be located in some other publicly accessible place. EPA is considering and seeks comments on limiting the information which must be available at or near the site in situations where the record is too voluminous for the publicly accessible location. Typically, local libraries, town halls, or public schools are used as publicly accessible locations.

EPA may make the administrative record file available to the public in microform. EPA may microform-copy documents that form the basis for the selection of a CERCLA response action in the regular course of business. The microform copying will be done in accordance with technical regulations concerning micrographics of Federal Government records and EPA records management procedures.

EPA proposes that some information need not be physically located at or near the site because of the substantial administrative burden this would pose. The information not available at or near the site would, however, always be available to the public at another location. For example, § 300.805(a) provides that certain types of technical information may be located in the central location or elsewhere, such as a contract laboratory or field office. The index to the administrative record file, which will be included in the administrative record file both at or near the site and at the central location, must indicate where the information is located and how it can be obtained for inspection. Thus, such information continues to be easily accessible to interested persons. Examples of such information include validated sampling data, which are normally summarized in

data summary sheets and are quite voluminous. Documentation of quality assurance and quality control which is normally summarized in the remedial investigation/feasibility study (RI/FS), and chain of custody forms. These types of documents may be stored in the EPA Regional office, contract laboratory office that conducted the testing, State environmental agency office, or elsewhere, as appropriate.

Section 300.805(b) provides that guidance documents not generated for the particular site for which an administrative record is being compiled may be maintained in a library at the central location. The guidance documents need not be in each site-specific administrative record file at the central location or at or near the site at issue. EPA anticipates that each EPA Regional office will maintain a central library of guidance documents which are frequently cited as a basis for selecting a response action. This approach eliminates the need for reproducing copies of the same document for each site record. The term guidance document includes issue-specific policy memoranda as well as formal guidance documents. Examples of such guidance documents and issue-specific memoranda include the RI/FS guidance document, guidance on risk/exposure assessments, guidance on applicable or relevant and appropriate requirements, memoranda on maximum contaminant levels, and guidance on testing for specific contaminants.

Guidance documents and memoranda which are generated for a particular site must be placed in the site-specific administrative record file. (For example a document on dioxin contamination at XYZ site must be placed in the XYZ site-specific administrative record file. If it is also used as a guidance document on the cleanup of dioxin at other sites, it may be located only in the central library rather than physically in the administrative record file at those other sites.) The central library of guidance documents will be available to the public.

EPA proposes in § 300.805(c) that publicly available technical literature not generated for a site at issue need not be located at or near the site at issue, in the central library of guidance documents or in the site-specific administrative record file, provided that it is listed in the index to the administrative record. Copyright laws may bar the copying of these materials without specific approvals. EPA believes that expending Superfund resources on obtaining copies of publicly available technical literature is

not appropriate. Examples of publicly available technical literature include widely used engineering handbooks on ground-water monitoring, and articles from technical journals, which are readily available in technical libraries. The index must list these documents separately and indicate information on their availability, or, the literature may already be cited in a document included in the record.

Technical literature, however, which is not generally available should be included in the site-specific administrative record file. Because these documents are by definition not easily obtainable, they should not simply be indexed. They generally will not be used for many sites; therefore, it is also not appropriate to include them in the central library of guidance documents. The library should be reserved for documents which are frequently used to select response actions. Examples of technical literature not generally available include articles from technical journals or unpublished documents not available through the Library of Congress or not circulated to technical libraries.

Section 300.805(d) provides that documents included in the confidential portion of the administrative record file shall be located only in the central location. Since the public cannot review the confidential and privileged information, there is no reason to require that such information be maintained at or near the site.

EPA is proposing in § 300.805(b)(5) that, for reasons of administrative feasibility, an administrative record file for emergency removal actions where on-site activities cease within 30 days of initiation need only be available for public inspection at the central location. Emergencies are those actions with little or no lead time and generally of very short duration—for example, a highway spill. The benefits of placing the record file at or near the site are outweighed by the administrative burden on the response to such emergencies. Where feasible, a notice may be placed at the site explaining that the administrative record file will be available for public inspection at the EPA Regional office (or other central location).

3. *Contents of the administrative record (§ 300.810).* The administrative record under section 113(k) consists of documents which form the basis for the selection of a response action at a particular site. In determining which documents form the basis for the response action, i.e., what constitutes a complete record, the lead agency shall include all documents considered by the

decisionmaker, including those relied upon by the decisionmaker in selecting the response action.

It should be noted that documents constituting the administrative record for selection of a response action are only a subset of documents that the lead agency may have compiled with respect to a particular site. The lead agency will also have general files consisting of documents relevant to other aspects of a site.

Section 300.810 discusses generally what should be contained in the administrative record file for response selection and what should be excluded. Section 300.810(a) states that it should contain factual information: data; analysis of the factual information and data; guidance documents; technical literature; site-specific policy memoranda; documents received, published, or made available to the public under §§ 300.815 and 300.820 of this subpart; decision documents; and enforcement orders. In addition, an index listing the documents contained in the administrative record file should be included at the beginning of the record file.

The following is a list of documents which typically, but not in all cases, should be part of the administrative record for selection of a remedial or removal action. (For purposes of this subpart, an RI/FS should be included as a component of a remedial action record.) Only documents within each category which form a basis for selecting the response action will be part of the record (i.e., although correspondence is listed under public participation, correspondence on liability issues is not part of the record). This list is intended to be illustrative, but not necessarily required at each site or complete.

i. *Contents of Remedial Action Administrative Record.*

- (a) *Factual Information/Data.*
- Sampling plan.
 - Validated sampling and analysis data.
 - Chain of custody forms.
 - Project plan or program plan (QAPP).
 - Preliminary assessment report.
 - Site investigation report.
 - Inspection reports.
 - RI/FS final workplan.
 - Amendments to final RI/FS workplan.
 - Summary of remedial action alternatives (used in conjunction with early special notice letters).
 - Data summary sheets.
 - RI/FS.
 - Technical studies.
 - Factual information submitted by the public, including PRPs.

Documents supporting the lead agency's determination of imminent and substantial endangerment.

(b) *Policy and Guidance.*
Memoranda on policy decisions (site-specific and issue-specific).
Guidance documents.
Technical literature.

(c) *Public Participation.*
Correspondence.
Public notices.
Public comments.
Community relations plan.
Notice letters to PRPs.
Proposed plan.

Transcript of meeting on RI/FS and proposed plan, and waivers under section 121(d) of CERCLA.

Documentation of other public meetings.

Response to significant comments.

(d) *Other Party Information.*

ATSDR health assessment.

Natural Resource Trustees finding of fact and final reports.

Documentation of State involvement.

(e) *Decision Documents.*

Record of Decision, including responsiveness summary.

(f) *Enforcement Documents.*

Administrative orders.

Consent decrees.

Affidavits.

Response to notice letters containing relevant factual information.

(g) *Index.*

ii. *Contents of Removal Action*

Administrative Record.

(a) *Factual Information/Data.*

Sampling plan.

Validated sampling and analysis data.

Chain of custody forms.

Preliminary assessment report.

Site investigation report.

Inspection reports.

Engineering evaluation/Cost analysis report (EE/CA).

Technical studies performed for the site.

Factual information submitted by the public, including PRPs.

Documents supporting the lead agency's determination of imminent and substantial endangerment.

(b) *Policy and Guidance.*

Memoranda on policy decisions (site-specific and issue-specific).

Guidance documents.

Technical literature.

(c) *Public Participation.*

Correspondence.

Public notices.

Public comments.

Community relations plan.

Notice letters to PRPs.

Documentation of other meetings.

Response to significant comments.

(d) *Other Party Information.*

ATSDR health assessment.

Natural Resource Trustees finding of fact and final reports.

Documentation of State involvement.

(e) *Decision Documents.*

EE/CA approval memorandum.

Action memorandum.

(f) *Enforcement Documents.*

Administrative orders.

Consent decrees.

Affidavits.

Response to notice letters containing relevant factual information.

(g) *Index.*

Several documents in the list above require further explanation. First, verified sampling data are included on the list above. Data which have undergone quality assurance/quality control and are relied on must be included in the record. Data which have been rejected as inaccurate, or will otherwise not be considered or relied upon, need not be included in the record.

Second, EPA is proposing in § 300.810(a)(1) that documents supporting the determination of an imminent and substantial endangerment be part of the administrative record. EPA and other Federal agencies have the discretion to conduct assessments to determine the extent of an imminent and substantial endangerment to the public health or welfare or the environment due to an actual or threatened release of a hazardous substance. If EPA chooses to exercise its discretion to conduct such an assessment, the assessment shall be included in the record. A determination of an imminent and substantial endangerment is based on factual information which forms a basis for the selection of the response action. As such, when a determination of an imminent and substantial endangerment is made, it is part of the record of the selection of a response action. EPA believes that judicial review of the determination that there is an imminent and substantial endangerment in actions under section 106 to enforce an order or for injunctive relief, therefore, is limited to the administrative record.

Third, for a remedial action record, the list includes a summary of remedial action alternatives. This summary will only be generated in conjunction with special notice letters EPA may issue to PRPs pursuant to section 122(e) of CERCLA if the notice letter is issued prior to the availability of an RI/FS report and it appears necessary to inform interested persons of the lead agency's direction on remedial alternatives. In this context, a summary of remedial action alternatives would be generated if necessary to enable PRPs to make an informed good faith offer to undertake the remedial design or

remedial action. The summary of remedial action alternatives should be included in the administrative record file so that the public and not just the PRPs have the information.

Finally, EPA is proposing that notice letters to PRPs be included in the administrative record. EPA has recently issued guidance on the notice letters issued under section 122(e) of CERCLA, 53 FR 5296 (February 23, 1988). PRPs that receive notice letters are expected to become familiar with CERCLA, if they have not already done so. In light of notice letters and general principles of administrative law, PRPs are on notice that an administrative record file will be, or is, available for public inspection.

Section 300.810(b) addresses documents which generally will not be included in the administrative record. The type of documents referenced in § 300.810(b) are those which by definition are not appropriate for inclusion in the administrative record because they do not form a basis for the selection of the response action. These documents are specified in the regulation for purposes of clarity.

Draft documents, internal memoranda, and day-to-day notes of staff generally will not be included in the administrative record. Examples of draft documents that will be included in the administrative record are those that were considered or relied on in response action selection and never superseded by a final document, and those that contain material facts which do not appear in any other document included in the administrative record file. The general rule, however, is that only final documents will be included in the administrative record.

Examples of internal memoranda and day-to-day notes of staff which are not appropriate for inclusion in the administrative record are documents that express opinions or recommendations of staff to other staff or management, or internal pre-decisional documents that evaluate alternative viewpoints.

Section 300.810(c) addresses privileged documents. Examples of privileged documents include, but are not limited to: documents subject to attorney-client privilege and attorney work product exclusion, documents subject to deliberative process privilege, and enforcement sensitive information. Common law and other privileges may be asserted.

An assertion of confidentiality of information does not necessarily eliminate the need to make such information part of the administrative record, if confidential information which

forms a basis for the selection of a response action is not included in any other document in the administrative record, that information must be part of the administrative record. Section 300.810(d) requires that the information, to the extent feasible, must be summarized in such a manner as to make it disclosable to the public and placed in the administrative record file. If it is not feasible to summarize the information in a releasable manner, e.g., when the privilege applies directly to the information which forms a basis for the selection of the response action, such as confidential business information, the documents must be maintained by the lead agency in a confidential portion of the administrative record file. (These documents may be reviewed in camera in any subsequent judicial proceeding.) The index to the administrative record must list the confidential or privileged document even though the document will not be available for public inspection. Whether or not the information can be summarized in a releasable manner, the actual document containing confidential or privileged material must be included in the confidential portion of the administrative record file. In light of the nature of the information in the RI/FS and underlying documents and the fact that contamination levels are generally not privileged, this is not expected to occur frequently.

It should be noted that section 104(e)(7) of CERCLA governs the extent to which information may be claimed confidential by persons required to provide information under that section. Where confidential business information is claimed, EPA will proceed according to regulations set forth in 40 CFR Part 2.

4. *Administrative record for a remedial action (§ 300.815).* Section 300.815(a) provides that the documents included in the administrative record file for a remedial action shall be available for public inspection at the commencement of the remedial investigation phase. Generally, the commencement of the remedial investigation phase occurs when the final RI/FS work plan is available. The regulations do not specify when the remedial investigation phase commences because this may be a site-specific determination. EPA solicits comments on whether the regulation should specify in greater detail when the lead agency must make the administrative record file for a remedial action available for public inspection. The file at that time should contain the documents which will form a basis for

the selection of the response action generated or received through the date when the administrative record file is first made available. Documents generally available when the RI/FS work plan is approved include a preliminary assessment report, site inspection report, the RI/FS work plan, underlying inspection reports, and the community relations plan. From that time until the ROD is signed (except as provided in § 300.825, described below) documents which form the basis for the selection of the remedial action, shall be added as generated or received to the administrative record file.

The lead agency may establish a system allowing for periodic review of documents where there are questions as to whether the documents must be included in the administrative record file. Quarterly or monthly updates of the administrative record file may be appropriate in given situations and allows the lead agency to analyze data and organize it in a manner that will be meaningful to the public. In addition, it may save the lead agency the time involved in making daily or weekly determinations on whether questionable documents should be added to the administrative record file. If there is no question that a document belongs in the administrative record file, e.g., the RI/FS report, the document should be placed in the record file as soon as practicable after its generation or receipt.

EPA proposes in § 300.815(a) that the lead agency publish a notice of availability of the administrative record file. The notice must be published in a major local newspaper of general circulation, as is required for the notice of availability of the proposed plan. (See § 300.430 of today's proposed rule.) EPA considered proposing that a notice be published in the Federal Register for wider circulation, but rejected such a requirement as unnecessary. EPA solicits comments on whether a notice of availability of the record or of commencement of the public comment period should be published in the Federal Register. EPA also considered proposing that a separate notification of known potentially responsible parties be made. Section 113(k)(2)(D) of CERCLA provides that the President shall make reasonable efforts to identify and notify PRPs as early as possible before selection of a response action. EPA will be issuing notice letters to PRPs under section 122(e) of CERCLA early in the process in many situations. Given these early efforts, as well as the notice in a local newspaper, EPA chose not to propose a separate notification of PRPs here.

Section 300.815(b) clarifies that interested persons may submit comments for inclusion in the administrative record file during the public comment period on the RI/FS and proposed plan described in § 300.430(f) of Subpart E. The lead agency need not, however, respond to comments that were submitted prior to the public comment period on the proposed plan, although in many instances, the lead agency will either make appropriate modifications to the response action or respond in writing to those early comments.

A written response to significant comments will be included in the administrative record file. The lead agency need not respond to any comments received during the public comment period until the close of the public comment period. Generally, responses will be included in the responsiveness summary, which is part of the ROD. In responding to significant comments, the lead agency need not respond separately to each comment but may combine comments by subject or other category in the response.

The public participation procedures for a remedial action are set forth in § 300.430. Section 300.815(c) of Subpart I requires that compliance with the requirements of § 300.430(f) be documented for inclusion in the administrative record file. The requirements of § 300.430(f) include preparation of a proposed plan; publication of a notice of availability and brief analysis of the proposed plan; placing a copy of the proposed plan in the information repository; providing an opportunity for the submission of written or oral comments on the proposed plan, RI/FS, and any waivers to cleanup standards under section 121(d)(4) of CERCLA; providing an opportunity for a public meeting on the RI/FS, proposed plan, and waivers to cleanup standards; preparing a transcript of public meetings held during the public comment period; making the transcript available to the public; discussing significant changes to the proposed plan; responding to significant comments; and soliciting additional public comment and providing for other public participation procedures at the lead agency's discretion prior to the adoption of the decision where new and substantial issues have been raised. It will generally be the practice of the lead agency that, whenever possible, documents upon which the selection decision is based will be included in the administrative record file as soon as possible after they are generated or received, and no later than when the

decision document is signed. This is intended to encourage maximum public participation in the development of the record.

Documents generated or received after the selection is made do not provide a basis for the decision and thus generally are not part of the administrative record, except as provided in § 300.825, discussed below.

5. *Administrative record for a removal action* (§ 300.820). Section 300.820 proposes requirements for administrative records for removal actions. It is divided into two parts. Paragraph (a) addresses "non-time-critical" removal actions, i.e., those for which, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of at least six months before on-site cleanup activities must be initiated. Paragraph (b) addresses all other removal actions.

Explanations of regulatory requirements and related issues which are the same as those for remedial actions will not be repeated here. Only requirements and issues specific to removal actions will be addressed.

Section 300.820(a)(1) provides that the administrative record file for a non-time-critical removal action shall be available for public inspection when the engineering evaluation/cost analysis (EE/CA) report is made available for public comment. At that time, an administrative record file shall be established and made available to the public and shall contain all documents relevant to selection of the removal action generated up through that date. Documents generally available at that time include sampling data, a preliminary assessment report, a site inspection report, the EE/CA approval memorandum, and the EE/CA. After the EE/CA report is available and until the Action Memorandum is signed (except as provided in § 300.825, discussed below), documents relevant to the selection of the removal action shall be added to the administrative record file as discussed in the remedial action section of today's preamble.

The public participation procedures for non-time-critical removal actions are set forth in § 300.415(n)(3) of Subpart E of today's proposed regulations. Section 300.820(a)(3) requires that compliance with § 300.415(n)(3) (i) through (iii) be documented for inclusion in the administrative record. The requirements of § 300.415(n)(3) (i) through (iii) include publication of a notice of availability and brief description of the EE/CA; making the EE/CA available to the public; providing a reasonable opportunity, not less than 30 days, for

submission of comments after the completion of the EE/CA; and responding to significant comments.

Section 300.820(b) provides different procedures for time-critical, including emergency, removal actions. As explained earlier, section 113(k)(2)(A) of CERCLA requires procedures for the "appropriate" participation of interested persons in the development of the administrative record for removal actions. Appropriate participation is significantly different in situations where an action must be taken on short notice. Where the exigencies of the situation demand that cleanup be initiated and often completed within short timeframes, public comment periods may delay expeditious response to the emergency. In view of Congressional intent that public participation requirements not hamper or delay emergency removal actions, EPA has considered many options for the appropriate level of public participation. EPA must balance the benefits of public involvement in advance of the selection of a removal action against the need to proceed quickly in emergency situations. EPA believes that the requirements proposed today strike the correct balance.

EPA has had to consider two questions in determining the level of participation for time-critical removals. First, at what point should the administrative record file be made available to the public, and second, should there be a formal public comment period on the record? EPA is proposing in § 300.820(b)(1) that for all time-critical removals (including emergencies), the record file should be made available to the public no later than 60 days after initiation of on-site removal activity. EPA is choosing to make the record available at this time recognizing that there will be many situations where immediate action must be undertaken to remove threats to human health and the environment before the administrative record file can be assembled and placed in a public docket for inspection. In reviewing typical removal actions, EPA found that generally containment or stabilization (i.e., those activities taken to retard, reduce, or prevent the spread of a release or threat of release and eliminate any immediate threat) at removal sites often are completed within 60 days. Clearly, where circumstances warrant, EPA should focus on addressing the threat at a site, and attend to administrative procedures later. The proposal meets both EPA's charge to protect human health and the environment and the requirement to provide for appropriate public

participation by requiring that the administrative record file be made available to the public no later than 60 days after initiation of removal activities. Making the record available involves: assembling the administrative record file, identifying a publicly accessible location for the record file at or near the site, finding an acceptable newspaper and placing an advertisement in it to notify the public, and preparing for receipt and evaluation of comments. The proposed requirement that the file be available "no later than" 60 days does not preclude making the record file available at an earlier time, if circumstances allow.

EPA is also proposing in § 300.820(b)(2) that the lead agency shall, as appropriate, provide a 30-day public comment period to begin at the time the administrative record is made available to the public. Generally, when the removal action has not been completed, a public comment period will be considered appropriate at the time the administrative record file is made available to the public. EPA requests comment on whether public comment should be solicited on activities that have already been completed at the time the record is made available.

EPA has also considered other public participation procedures for time-critical removals. They include:

i. Requiring that the record file be made available immediately upon issuing the Action Memorandum, and delaying the initiation of cleanup until after public comment is solicited and responded to. This would allow maximum public participation in selection of the removal, but it is not consistent with the need to provide prompt response for protection of human health and the environment at the site. Such an approach would also be inconsistent with the legislative history which states that administrative procedures established under section 113 should not hamper emergency removal actions.

ii. Requiring that the record be made available "promptly" after issuing the Action Memorandum, and then soliciting public comment "as time allows." EPA considered this as a way of addressing the individual nature of removals, the different timeframes that may be involved, and the need to provide meaningful opportunities for public comment in cases where time allows. As discussed earlier, EPA believes resources should first be directed toward mitigating threats at a time-critical removal site and that 60 days of on-site work will allow this. However, EPA is concerned that a

standard of "prompt" availability is too vague and would be a source of controversy at each site. Thus, EPA believes an objective standard is preferable. Similarly, while providing for public comment "as time allows" permits flexibility in the requirements, such a rule would require the exercise of judgment and would allow disputes over compliance with this requirement in individual cases. In addition, as discussed above, it is rare that there is sufficient time before beginning a time-critical action to solicit, consider and respond to comments.

iii. Delaying the availability of the record until 120 days after beginning cleanup and then soliciting public comment. This approach parallels the community relations requirements (within 120 days of cleanup for ongoing responses). A Community Relations Plan must be prepared and an information repository must be made available: see § 300.415(n)). This would increase the number of sites at which cleanup has been completed before the public is notified. EPA believes that the increased cleanup time provided under this option generally does not justify the delay in public involvement concerning response selection.

iv. Requiring that the record file be made available after performing containment or stabilization at a site where disposal is needed (over 25 percent of removals do not require disposal) and delaying disposal until public comment could be solicited, evaluated and responded to. This approach attempts to balance the need for public comment with the urgency of the response, limiting the response selection undertaken without benefit of public input to those aspects of removals which must be conducted swiftly in order to protect public health and the environment.

There are two major difficulties with this approach. The first concerns precisely defining "containment" and "stabilization" in this context and providing indicators to mark their completion. While it is possible, based on experience, to say that the containment or stabilization phase of a removal action is generally completed within 60 days of initiating work, it is much more difficult to determine such completion on a site-specific basis.

The second difficulty with such a rule is that it fails to take into account several important factors which may make such an approach infeasible in many cases. Specifically, delay of disposal activities may: (a) Create additional unnecessary risks to human health and the environment, and (b) result in needless expenditures of time

and money. Site conditions, weather conditions, location, public accessibility, availability of approved disposal facilities, availability of treatment facilities and the effect of the delay on the statutory time and money limitations on removals are only some of the factors to be considered before a site-by-site determination could be made as to whether or not it was practicable to solicit public comment.

v. Making the record publicly available as in the proposal (i.e., no later than 60 days after initiation of cleanup), but not formally soliciting any public comment. Given the need for quick action on time-critical removals, that they are generally limited in scope, and few cleanup options are feasible, this may be an appropriate approach. This approach, however, would not provide the public with an opportunity for meaningful participation where it might be appropriate in specific removal situations.

EPA solicits comments on the proposed and other considered approaches to public participation on removal actions.

6. *Adding documents after selection of response action (§ 300.825).* New documents may be added to the record file after the decision document is signed only as provided in § 300.825. Documents generated or received after the decision document (e.g., Action Memorandum or ROD) is signed generally will be kept in a post-decision document file unless and until a determination is made that the document(s) should be placed in the administrative record file, pursuant to § 300.825.

Section 300.825(a) provides that the lead agency may add post-decision documents to the administrative record file in two situations. The first situation occurs when the decision document does not address or reserves a portion of the response action decision. In such cases, the lead agency will continue to add to the administrative record file documents which form the basis for that portion of the decision not addressed or reserved by the decision document. Where appropriate, the lead agency shall provide public notice that the administrative record file for this portion of the decision continues to be available for public inspection and comment. It should be noted that this exception applies to RODs that address an operable unit but leave a portion of the decision on that operable unit open.

The second situation arises when an explanation of significant differences provided for in § 300.435(c) or an amended decision document is required. An explanation of significant differences

is issued when, after adoption of a final remedial action plan, the remedial action or enforcement action taken, or the settlement or consent decree entered into, significantly differs in scope, performance or cost from the final plan. The record shall include an explanation of significant differences and all documents that form the basis for the decision to modify the response selection decision. The lead agency shall publish a notice of availability of these documents, as required by section 117 of CERCLA and as proposed in § 300.435(c). If, in addition, an amended decision document is required, the record shall include the amended document and all documents that form the basis for the amended decision. The public participation procedures outlined in Subpart E on explanations of significant differences and amendments to decision documents shall apply.

Section 300.825(b) provides that the lead agency may, in its discretion, hold additional public comment periods or extend the time for submission of public comment after the decision document is signed, and may limit such comment to issues for which the lead agency has requested additional comment. This is intended to allow the lead agency to solicit additional comment on the response action whenever it determines that new information or other circumstances warrant additional input.

Section 300.825(c) governs public comments received after the close of the comment period. Under this section, the lead agency will need to consider such comments only if they could not have been submitted during the comment period and provide critical, new information relevant to the response selection which substantially supports the need to significantly alter the response action. EPA is proposing the standard set out in § 300.825(c) as providing the best balance between EPA's desire to remain open to critical, new information on the effectiveness of a selected response and the need to make final decisions in order to allow expeditious implementation of the response action. EPA solicits comment on this approach.

D. Compliance With This Subpart

As provided in section 113(j)(4) of CERCLA, in reviewing alleged procedural errors related to the administrative record, a court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(C) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action), (e) (on permit requirements), and (g) (on identification of ARARs);

(D) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);

(E) Section 300.410 (on removal site evaluation) except paragraphs (e)(5) and (6) and the reference to listing releases in CERCLIS in (h);

(F) Section 300.415 (on removal actions) except paragraphs (a)(2), (b)(2)(vii), (b)(4), and (g);

(G) Section 300.420 (on remedial site evaluation);

(H) Section 300.430 (on RI/FS and selection of remedy) except paragraph (f)(3)(iv)(F); and

(I) Section 300.435 (on RD/RA and operation and maintenance).

(ii) In addition, other persons undertaking response actions shall provide an opportunity for public comment concerning the selection of the response action. A response action shall not be considered consistent with the NCP unless:

(A) The person taking the response action complies with the following NCP provisions regarding public participation, with the exception of administrative record and information repository requirements stated therein:

(1) Section 300.155 (on public information and community relations);

(2) Section 300.415(n) (on community relations during removal actions);

(3) Section 300.430(c) (on community relations during RI/FS) except paragraph (5);

(4) Section 300.430(f)(1), (2), and (5) (on community relations during selection of remedy); and

(5) Section 300.435(c) (on community relations during RD/RA and operation and maintenance); or

(B) The person taking the response action complies with State or local requirements which provide a substantially equivalent opportunity for public involvement in the choice of remedy.

(iii) When selecting the appropriate remedial action, any other person shall, as appropriate, consider the methods of remedying releases listed in Appendix D of this Part.

(iv) Except for actions taken pursuant to CERCLA sections 104 or 106 or response actions for which reimbursement from the Fund will be sought, any action to be taken by the lead agency in §§ 300.415, 300.430, and 300.435 may be taken by the person carrying out the response action.

(d) Section 111(a)(2) Claims. (1) Persons, other than those listed in paragraphs (d)(1)(i) through (iii) of this

section, may be able to receive reimbursement of response costs by means of a claim against the Fund. The categories of persons excluded from pursuing this claims authority are:

(i) Federal government;

(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;

(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)(2) (i), (ii), and (iii) 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 10, 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 or 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

§ 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 at 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 at 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.

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:

(a) 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.

(b) 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.

(c) 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.

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

(e) 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.

§ 300.810 Contents of the administrative record.

(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 the 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 assessment, 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 work plans, 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 new 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.

(b) *Documents not included in the administrative record.* 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 placed in the publicly available portion of the administrative record file. The

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confidential or privileged document shall be placed in the confidential portion of the administrative record file. If information, such as confidential 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 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 files containing the administrative record.

(b) The lead agency shall provide a public comment period as specified in § 300.430(f) 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 not required to respond to 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) 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 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 file containing the administrative record.

(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 not required to respond to 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(n) and shall document compliance with § 300.415(a)(3) (i) through (iii) in the administrative record file.

(4) Documents generated or received after the action memorandum 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 file containing the administrative record.

(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 is made available to the public. The lead agency is not required to respond to 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 action memorandum is signed shall be added to the administrative record file only as provided in § 300.825.

§ 300.825 Record requirements after 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, 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 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

§ 300.800 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.

(b) This subpart applies to the navigable waters of the United States and adjoining shorelines, the waters of the contiguous zone, and the high seas beyond the contiguous zone in connection with activities under the Outer Continental Shelf Lands Act, activities under the Deepwater Port Act of 1974, or activities that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States, including resources under the Magnuson Fishery Conservation and Management Act of 1976.

(c) This subpart applies to the use of any chemical agents or other additives as defined in Subpart A of this Part that may be used to remove or control oil discharges.

§ 300.805 NCP Product Schedule.

(a) *Oil Discharges.* (1) EPA shall maintain a schedule of dispersants and other chemical or biological products that may be authorized for use on oil discharges in accordance with the procedures set forth in § 300.910. This schedule, called the NCP Product Schedule, may be obtained from the Emergency Response Division (OS-210), U.S. Environmental Protection Agency.