

MANAGEMENT MEMO

Management Memo #EO-94-004-MM

Title: Identification of the Administrative Record

Affected Programs: Site Mitigation, Office of Legal Counsel

BACKGROUND:

The purpose of this Management Memo is to establish the Department's procedures for identifying the administrative record for removal and remedial actions at Site Mitigation Program sites. This Management Memo amends Official Policy and Procedure #87-2, "Remedial Action Plan Development and Approval Process," dated October 5, 1987, and it amends Official Policy and Procedure #88-2, "Removal Action," dated December 5, 1988. This Management Memo applies prospectively to all response action selection decisions.

The administrative record consists of all those documents the Department relied on or considered when selecting a removal action and/or remedial action. The administrative record includes all documents the Department considered when making the decision, whether or not each document actually supports the response action selected.

The purpose of the administrative record is twofold:

- 1) Health and Safety Code section 25357.5 limits judicial review of any response action selected by the Department to the administrative record (the reviewing court can only consider documents that are part of the administrative record). Our decision can neither be upheld nor overturned on the basis of documents that the Department did not consider. Section 113(j)(1) of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides similarly for response actions selected by the President. CERCLA is silent as to review of state-selected remedies at non-NPL sites, but it is possible that the federal courts would, applying common law principles, also limit review to the administrative record; and
 - 2) The administrative record is used as a vehicle for participation by the public (which includes responsible parties) in the selection of the response action by providing access to the Department's decision-making process.
- In view of both purposes served by the administrative record it is important that it be neither under-inclusive nor over-inclusive. The administrative record must include all documents the Department relied on or considered, and only those documents.

- Each decision, for selection of removal and remedial actions for each operable unit, must have its own administrative record.

Administrative Record for National Priority List Sites:

Subpart I of the National Contingency Plan (NCP), "Administrative Record for Selection of Response Action" (40 C.F.R. § 300.800 et seq.), states that all response actions taken pursuant to CERCLA §104 or §106 must establish the administrative record in accordance with the NCP. The United States Environmental Protection Agency (U.S. EPA), Office of Solid Waste and Emergency Response (OSWER) issued final guidance on establishing administrative records for National Priority List (NPL) sites. (Refer to OSWER Directive No. 9833.3A-1.) When the Department has been designated the lead agency at an NPL site (and under the provisions of the Core Cooperative Agreement), the Department is required to compile and maintain administrative records in accordance with section 113(k) of the CERCLA, and section 300.800 of the NCP. For NPL sites at which the Department is the lead, Site Mitigation staff should work closely with their U.S. EPA counterparts to ensure that the administrative record is compiled in accordance with the OSWER directive.

Administrative Record for Non-NPL Sites:

State law requires the Department to be consistent with the NCP to the maximum extent possible (Health and Safety Code (HSC) section 25350), requires that Remedial Action Plans (RAPs) be based on and consistent with the NCP (HSC §25356.1), and limits judicial review concerning the adequacy of the response action taken or ordered by the Department to the administrative record (HSC §25357.5).

The procedure that the Department will follow for compiling the administrative record for non-NPL sites, while consistent with the NCP, reduces the redundancy and expense of the procedures described in OSWER Directive No. 9833.3A-1 for NPL sites.

For NPL sites OSWER Directive No. 9833.3A-1 requires, in addition to the site file, a separate file (the "Administrative Record") that includes copies of all of the documents (and only those documents) that comprise the administrative record. This file is designated the "Administrative Record File" prior to completion of the response action selection process.

For non-NPL sites, a separate "Administrative Record File" will not be created. For purposes of establishing the administrative record for response actions at non-NPL sites, all documents which were relied on or considered when selecting a removal or remedial action shall simply be placed in the site file and an

"Administrative Record List" enumerating the administrative record documents will be included in the decision document for each response action selected.

The Administrative Record List will be included in the RAP for those response actions that require a RAP. For those response actions for which a RAP is not required, the Administrative Record List will be included in the Removal Action Completion Form, or if a public comment period is being provided as part of the removal action selection process, in the Removal Action Workplan and/or Engineering Evaluation and Cost Analysis (EECA).

ACTION (for non-NPL Sites):

Project Managers will be responsible for ensuring that an Administrative Record List is included in the Executive Summary of the draft and final RAP. This Administrative Record List will identify all documents, e.g., reports, data, policy and guidance documents, statutes and regulations, correspondence, California Environmental Quality Act (CEQA) documents, technical journals, etc. that were relied on or considered when selecting the removal or remedial action alternative implemented by the RAP. This includes all documents that show that the public was notified of site activity and had an opportunity to participate in the response selection process. The Administrative Record List will be revised as necessary following the public comment period. Project Managers should start developing the Administrative Record List as early in the selection process as possible.

If the response action does not require a RAP, Project Managers will include the Administrative Record List in the Removal Action Completion form. If a public comment period is being provided as part of the removal action selection process, the Administrative Record List should be included in the Removal Action Workplan and/or Engineering Evaluation and Cost Analysis (EECA).

Sites at which more than one response action is taken will have separate Administrative Record Lists for each selection process, but only one site file. Documents that are considered and relied upon for more than one response action at a site will be included in the Administrative Record List for each corresponding response action but only one copy of each document will be included in the site file.

Documents that will be part of the administrative record should be placed in the site file and made available to the public as soon as they are generated or received by the Department to assure timely public access. As explained below, certain categories of documents need not be physically included in the

site file. When questions arise as to whether particular documents should be included in the Administrative Record List or placed in the site file, the Case Management Team should be consulted.

The Administrative Record List:

- Only final documents should be placed in the Administrative Record List, except when the preliminary drafts and/or memoranda were relied on or considered when making the response action decision.
- Any relevant Resource Conservation and Recovery Act (RCRA) or Hazardous Waste Control Act (HWCA) information which was relied upon should be included, e.g., RCRA permits, inspection reports, etc.;
- Documents that are generally irrelevant to the selection of the response action should nevertheless be included in the Administrative Record List, if they contain information that was relied on or considered that is not available elsewhere in the administrative record. This may include, for example, contractor work assignments, cost documentation or information about PRP liability.

The Site File:

- Documents that are readily available to the public do not have to be maintained in the site file. They may be referenced in the Administrative Record List, with the location where they may be viewed clearly indicated. Examples include technical treatises, journals and non site-specific guidance and policy documents. Statutes and regulations do not have to be maintained in the site file if they are readily available, e.g., the NCP.
- Computer databases do not have to be included in the site file, but should be referenced in the list; however, printouts from these databases should be included in the file if the Department relied on or considered them when selecting the removal/remedial action.

Confidential or Privileged Documents

- Confidential or privileged documents that were relied on or considered in selecting the response action should be filed in the confidential portion of the site file. The Administrative Record List should identify the title and location of the confidential document. To the extent feasible, a brief summary of any factual information not found elsewhere in the Administrative Record should be prepared and placed in the portion of the file open to the public.
- Project Managers should consult with the Office of Legal Counsel to determine whether documents are confidential or privileged. Possible privileges include the attorney client privilege, attorney work product, confidential business information, confidential informants, deliberative process (for drafts and internal memoranda that express opinions and recommendations of staff to other staff or management), and personal privacy.

For a detailed analysis of the administrative record and the issues discussed in this memo, refer to OSWER Directive No. 9833.3A-1. Attached to this memo is an excerpt from the OSWER Directive, pages 23 through 29, which provides further information on documents contained in the administrative record.

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June 17, 1994
Date

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Attachment

Below is a list of documents that are usually generated when a remedial response action is selected. These documents should be included in the administrative record file if they are generated and considered or relied on in selecting the remedial response action. Documents that demonstrate the public's opportunity to participate in and comment on selecting the remedial response action should also be included in the record file. Documents not listed below, but meeting the above criteria, should be included.

Factual Information/Data

- o Preliminary Assessment (PA) report;
- o Site Investigation (SI) report;
- o Remedial Investigation/Feasibility Study (RI/FS) work plan;
- o Amendments to the final work plan;
- o Sampling and Analysis Plan (SAP): consisting of a quality assurance project plan (QAPP) and a field sampling plan;
- o Sampling data: --verified 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 in the absence of validated data (see note 9 at page 10);
- o Chain of custody forms;
- o Inspection reports;
- o Data summary sheets;
- o Technical studies performed for the site (e.g., a groundwater study);
- o Risk evaluation/endorsement assessment and underlying documentation (see section III.C. at page 29);
- o Fact sheet or summary information regarding remedial action alternatives generated if 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 RI/FS (as available for public comment and as final, if different); and

- 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), 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. at page 37); and
- o Technical literature (see section III.J. at page 38).

Public Participation (Include the documents that show the public was notified of site activity and had an opportunity to participate in and comment on the selection of response action)

- o Community relations plan;
- o Newspaper articles showing general community awareness;
- o Proposed plan;
- o Documents sent to persons on the community relations mailing list and associated date when such document was sent;
- 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 The community relations mailing list (including all known PRPs);²⁴
- o Documentation of informal public meetings: information generated or received during meetings with the public and

²⁴ Individual names and addresses of members of the general public which are on the community relations mailing list should not be included in the public record file. Disclosure of such information may result in a Privacy Act violation (see also section III.H. at page 34) or inhibit the general public from requesting information about the site. The lead agency should then place individual names and addresses in the confidential portion of the record file.

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. at page 30);
- o Transcripts of formal public meetings: including meetings held during the public comment period on the RI/FS, proposed plan, and any waiver of ARARs under Section 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; and
- o Responses to comments from the state and other federal agencies.

Enforcement Documents (Include if the document contains information that was considered or relied on in selecting the response selection or shows that the public had an opportunity to participate in and comment on the selection of response action. Do not include enforcement documents solely pertaining to liability)

- o Administrative orders;
- o Consent decrees;
- o Affidavits containing relevant factual information not contained elsewhere in the record file;
- o Notice letters to PRPs;
- o Responses to notice letters;
- o Section 104(e) information request letters and Section 122(e) subpoenas; and
- o Responses to Section 104(e) information request letters and Section 122(e) subpoenas.

Other Information

- o Index (see section II.D. at page 7);
- o Documentation of state involvement: documentation of the request and response on ARARs, Section 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. at page 42):

- o health assessments, health studies, and public health advisories issued by the Agency for Toxic Substances and Disease Registry (ATSDR) (see section IV.C. at page 45); and
- o Natural Resource Trustee notices and responses, findings of fact, final reports and natural resource damage assessments (see section IV.D. at page 45)

Decision Documents

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

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

B. Removal Actions

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

- o documents which were 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.²⁹

Below is a list of documents that are usually generated when a removal response action is selected. These documents should be included in the administrative record file if they are generated and considered or relied on when selecting the removal action. Documents that demonstrate the public's opportunity to participate in and comment on the removal response action should also be included in the record file. Documents not listed below, but meeting the above criteria, should be included.

²⁹ See 40 C.F.R. §§300.810 and 300.820.

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: verified data obtained for 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 in the absence of validated data (see note 9 at page 10);
- o Chain of custody forms;
- o Inspection reports;
- o Technical studies performed for the site (e.g., a ground water study);
- o Risk evaluation/endorsement assessment and underlying documentation; and
- o Data submitted by the public, including FRPs.

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. at page 37); and
- o Technical literature (see section III.J. at page 38).

Public Participation (Include the documents that show the public was notified of site activity and had an opportunity to participate in the response selection.)

- o Community relations plan;
- o Newspaper articles showing general community awareness;
- o Documents sent to persons on the community relations mailing list and associated date when such documents was sent;

- 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 The community relations mailing list (including all known PRPs);³⁰
- 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 section III.D. at page 30);
- o Responses to significant comments: responses to significant comments received from the public concerning the selection of a removal action; and
- o Responses to comments from states and other federal agencies.

Enforcement Documents (Include if the document contains information that was considered or relied on in selecting the response selection or shows that the public had an opportunity to participate in and comment on the selection of response action. Do not include enforcement documents solely pertaining to liability)

- o Administrative orders;
- o Consent decrees;
- o Affidavits containing relevant factual information not contained elsewhere in the Record file;
- o Notice letters to PRPs;

³⁰ Individual names and addresses of members of the general public which are on the community relations mailing list should not be included in the public record file. Disclosure of such information may result in a Privacy Act violation (see also section III.H. at page 34) or inhibit the general public from requesting information about the site. The lead agency should then place individual names and addresses in the confidential portion of the record file.

- o Responses to notice letters;
- o Section 104(e) information request letters and Section 122(e) subpoenas; and
- o Responses to Section 104(e) information request letters and Section 122(e) subpoenas.

Other Information

- o Index (see section II.D. at page 7);
- o Documentation of state involvement (see section IV.A. at page 42);
- o ATSDR health assessments, health studies, and public health advisories (see section IV.C. at page 45); and
- o Natural Resource Trustee notices and responses, findings of fact, final reports and natural resource damage assessments (see IV.D. at page 45).

Decision Documents

- o EE/CA Approval Memorandum;
- o Action Memorandum;
- o Amended Action Memorandum; and
- o Other documents which embody the decision for selection of a removal action.

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

C. Imminent and Substantial Endangerment

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

Determining the existence of an imminent and substantial endangerment is an important component in selecting the response action. Therefore, all documents considered or relied on in making that determination, including any risk assessment, and its supporting documentation, must be included in the administrative