NATIONAL CONTINGENCY PLAN

• The planning, readiness and response activities under CERCLA, the CWA and OPA are required to be carried out under a set of guidelines which is the NCP.
• The NCP is a federal regulation.
• NCP consistency is the yardstick against which all response actions are measured and cost recovery is predicated upon.
Consistency with the NCP

- EPA/States can recover “all costs of removal or remedial action…not inconsistent with the NCP” CERCLA Sect. 107
- Courts have followed the NCP as a road map in determining the legality of federal and PRP response actions.
Consistency with the NCP

- Burden of Proof
  - EPA is assumed to have acted consistent with the NCP.
  - EPA is entitled to great deference and must be given broad discretion.
Consistency with the NCP

• Burden of Proof
  – Private party/defendant has burden of showing costs are inconsistent with NCP
    • Defendant must show EPA action was arbitrary and capricious.
  – Where we are vulnerable, EPA will compromise its cost to cost packages
Consistency with the NCP

• Arbitrary and Capricious Standard
  – EPA did not fulfill its statutory duty
    • Entirely failed to consider an important aspect of the problem
    • Relied on factors which Congress has not intended it to consider
    • Offered explanation for its decision that runs counter to the evidence before the agency
Consistency with the NCP

- EPA’s entire response must be viewed as a whole.
- There is no checklist.
- If inconsistencies with the NCP involve only immaterial or insubstantial deviations, costs are probably recoverable.
OSC Responsibilities
Under the NCP

A Survey of Key Provisions in
40 CFR Part 300
OSC General Responsibilities

- OSC directs response efforts and coordinates all other efforts at scene of discharge or release (300.120/300.135(a)).
NCP Organization

• Subpart:
  – A- Introduction
  – B- Responsibility and Organization of Response
  – C- Planning and Preparedness
  – D- Operational Response Phases for Oil Removal
  – E- Hazardous Substance Response
  – F- State Involvement
  – G - Natural Resources Trustees
Subpart A - Introduction

- 300.2 Authority and applicability
- 300.3 Scope (outlines what is covered)
- 300.4 Abbreviations
- 300.5 Definitions
  - applicable reqts, facility, hazardous substance, lead agency, onsite, release, relevant or appropriate reqt
Subpart B - Responsibility & Organization for Response

- 300.110 - National Response Team
- 300.115 - Regional Response Team
- 300.120 - Responsibilities of OSCs/RPMs
- 300.125 - Notification Reqts
- 300.130 - Initiation of Response Actions
- 300.135 - Response Operations
Subpart B - Responsibility & Organization for Response (cont.)

- 300.140 - Multi-regional Responses
- 300.150 - Worker Health & Safety
- 300.160 - Documentation and Cost Recovery
- 300.170 - Fed Agency Responsibilities
- 300.185 - Nongovernmental Participation in Response
OSC’s Principal Mission

- The OSC directs response efforts and coordinates all other efforts at the scene of a discharge or release. 300.120
- The OSC shall be predesignated by the regional/district head of the lead agency.
Response Operations

• First NRT agency official to arrive may initiate action (in consultation w/OSC) until OSC arrives. 300.135(b)

• OSC should ensure that all appropriate public & private interests are kept informed and their concerns are considered. 300.135
Information Gathering
300.135(c)

- OSC shall collect facts about discharge or release including:
  - source and cause;
  - ID of PRPs
  - nature, location and amt of discharged materials
  - probable direction and time of travel of materials
Information Gathering (cont)

- OSC shall collect facts about:
  - whether discharge is a “worst case discharge”
  - pathways to human and environmental exposure
  - potential impact on human health, welfare, safety and environment.

» 300.135(c)
Information Gathering (cont.)

• OSC shall collect facts about:
  – potential impact on natural resources and property;
  – priorities for protecting human health, welfare and the environment;
  – appropriate cost documentation

  – 300.135(c)
Response Operations

• OSC efforts shall be coordinated with other fedl, state, local and private response agencies. OSC may designate others to act as their on-scene representative. 300.135(d)
Consultation Requirements

- OSC should consult regularly with RRT and NSFCC (300.135(e))
Notice Requirements

• OSC shall advise the support agency as soon as possible of reported releases (300.135(f)).

• OSC shall immediately advise FEMA of potential major disaster situations (300.135(g)).
Notice Requirements (cont.)

• OSC shall notify HHS where possible public health emergency exists (300.135(h)).
• OSC shall ensure Nat. Res. Trustees are promptly notified of discharges and releases (300.135(j))
Consultation Requirements

• OSC shall coordinate and consult with Nat Res Trustees (300.135(j))
• OSC shall consult with DOI or DOC and appropriate Fed land management agency if endangered species/habitat (300.135(k))
Worker Safety

- OSC is responsible for addressing worker health and safety concerns at a response scene in accordance with 300.150. 300.135(l)
Documentation and Reporting

- OSC shall submit POLREPs to RRT as developments occur. 300.135(m)
Notice Requirements

• OSC should ensure all public and private interests are kept informed and that their concerns are considered throughout a response consistent w/ 300.155 (300.135(n))
Multi-Regional Responses

• If a discharge or release moves from the area covered by one ACP or RCP into another area, the authority should shift.

• If the discharge is in both areas, response mechanisms of each applicable plan may be activated.

  » 300.140(a)
Multi-Regional Responses (cont.)

• There shall be only one OSC at any time during the course of a response operation.

• The OSC may use a number of OSC reps to handle the response effort. 300.140(b)
Available Resources - 300.145

- National Strike Force
- Environmental Response Team
- Scientific Support Coordinators
Worker Safety

• OSC must assure that an OSHA program is made available at the response site. 300.150
Community Relations

• OSC should ensure that all public and pvt interests are kept informed when an incident occurs. 300.155(a)
• All news should be cleared through the OSC. 300.155(b)
• OSC should ensure coordination with CRPs. 300.155(c)
Documentation and Reporting

• OSC shall complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery. 300.160

• Information and reports shall, as appropriate, be transmitted to the RRT. 300.160
• If the NRT or RRT requests a complete report on the removal operation, OSC shall submit report. 300.165
Worker Safety

• If OSC feels scene is dangerous, volunteers shall be restricted from on-scene operations. 300.185(c)
Subpart C - Planning and Preparedness

• 3 levels of contingency planning. 300.200

• OSC plans shall be coordinated with ACPs.

• While goal is to reach consensus, OSC always retains the authority to take all actions he deems appropriate. 59 FR 47387
Subpart D - Operational Response for Oil Removals

- 300.300 - Phase I - Discovery/Notification
- 300.305 - Phase II - Prelim Assessmnt and Initiation of Action
- 300.310 - Phase III - Containment, countermeasures, cleanup, disposal
- 300.315 - Phase IV - Documentation and Cost Recovery
Oil Removals - General

- OSC must promptly notify state agency of any state affected by a discharge. 300.300
- OSC is responsible for promptly initiating a PA. 300.305
- OSC shall (1) evaluate magnitude of discharge or threat, (2) assess feasibility of removal and (3) attempt to ID responsible parties. 300.305
Oil Removals (cont.)

• OSC may allow responsible party to perform removal, except where OSC is required to direct the response. 300.305(d)

• OSC may remove a discharge and mitigate or prevent discharge threats; direct or monitor all actions to remove discharge
Oil Removal - Nat. Resources

• OSC shall ensure the NR trustees are promptly notified. 300.305(e)

• OSC and trustees shall coordinate assessments, evaluations, investigations and planning w/ respect to the approp. removal actions. 300.305(e)
Oil Removals (cont.)

• OSC shall immediately take defensive actions to prevent, minimize or mitigate threats to public health and welfare. 300.310

• Actions shall be taken to recover oil or mitigate its effects. Chemical and physical prevention actions shall be taken. 300.310
Oil Removal - Nat. Resources

- Docs should be made available to NR trustees. 300.315
- OSC shall submit OSC reports to NRT/RRT if requested. 300.315
- OSC shall ensure necessary collection and safeguarding of info, samples and reports. 300.315
Oil Removal Priorities

• First - Safety of human life.
• Second - Stabilize situation to prevent further damage.
• Third - Coordination of containment, removal and disposal efforts.

» 300.317
Oil Removal - Initiating cleanup
300.320

• General pattern of response:
  – OSC shall investigate.
  – OSC shall classify size and type of discharge and determine course of action.
  – OSC shall immediately notify RRT and recommend activation of RRT if discharge is an actual or potential major discharge.
Oil Removal 300.320 cont.

- OSC must determine whether RP can achieve effective cleanup and if it is being properly carried out.

- OSC may determine whether a state or local entity has capability to carry removal.
Oil Removal - Completion

- OSC, in consultation w/ governor of affected state, shall determine when removal action is complete.
  - 300.320(b)
Specific Oil Spill Scenarios

• Substantial threats to public health and welfare - 300.322
  – OSC should consider size and character of discharge.
  – OSC should consider nature of threat (e.g. Exxon Valdez)
  – OSC shall direct all federal, state and pvt actions to address substantial threat
Specific Oil Spill Scenarios (cont)

• Spills of National Significance (SONS) 300.323
  – extremely rare
  – EPA Administrator classifies inland spills
  – USCG Commandant classifies coastal zone spills
Specific Oil Spill Scenarios (cont)

• Worst case Discharges - 300.324
  – may be either substantial threat or SONS
  – characterized by spill size vis a vis capacity of vessel/facility
  – OSC shall: notify NSFCC; require implementation of approved CWA response plans.
Subpart E - Hazardous Substance Response

- 300.400 - General Requirements
- 300.405 - Discovery or notification
- 300.410 - Removal Site Evaluation
- 300.415 - Removal Actions
- 300.420 - Remedial Site Evaluation
- 300.425 - Priorities list
Removal Actions

- 300.400(a) - determining appropriate extent of response
- 300.400(b) - limitations on response
- 300.400 (c) - fund-financed action
Removal Actions

- 300.400 (d) - entry and access
- 300.400 (e) - permits
- 300.400 (f) - ATSDR health assessment
- 300.400(g) - ARARs
- 300.400 (h) - PRP oversight authority
Access and Entry

• CERCLA Access
  – 104(e)(1) - authority to access site to inspect and take actions deemed necessary.
  – 300.400(d) - authority to conduct, complete, operate and maintain response actions authorized by CERCLA.
Access and Entry

- Denial of access/conditioned access - 300.400(d)(4)
  - issue UAO
  - civil judicial action
    - ex parte warrant for non-intrusive short term investig.
    - Court order for long term removal action
OSC General Responsibilities

- OSC may direct response to CERCLA spills (300.400(i)(3)).
  - This is discretionary
Removal Actions

• 300.405 - Discovery or notification
  – covers criteria for reporting release to NRC and/or OSC
  – requires removal site evaluation - .405(f)
Removal Site Evaluation 300.410

- RSE shall be based on readily available info.
- Results of the RSE shall be documented.
- A removal site inspection may be performed if more info is needed.
- OSC shall promptly notify and coordinate w/ nat res. trustees
Removal Actions -300.415

- Lead agency shall evaluate RSE and current site conditions to determine if a removal is appropriate - 8 factors that must be considered.

- What are these factors?
Removal Actions -300.415

• 1) actual/potential exp. to humans, animals, food chain
• 2) actual/potential contamination of dw supplies or sensitive ecosystems
• 3) haz subs in drums/tanks w/ potential for release
• 4) high levels of haz subs in soils
Removal Actions -300.415

• 5) weather conditions that may cause migration or release;
• 6) threat of fire or explosion;
• 7) avail of other fedl and state response mechanisms; and
• 8) other situations/factors that pose threat to pub health, welfare or envt.
Removal Actions -300.415 (cont.)

• IDs types of “appropriate” removal actions

• If necessary, lead agency shall request that FEMA (Corps) conduct a temp relocation or evacuation
Removal Actions -300.415 (cont.)

• Public Involvement Reqts. 300.415(n)
  – inform community of actions taken, respond to inquiries, provide info concerning release
  – admin record reqts
  – community relations plan
  – EE/CA for NTCR
ARARs

• 300.415(j)
  – comply to the extent practicable considering the exigencies of the situation
Subpart G - Natural Resource Trustees

• Describes who they are and their responsibilities
Subpart H - Participation by Others

- Lists mechanisms for obtaining cost recovery
- Lists NCP provisions which are potentially applicable to private party response actions
- Discusses claims against the Fund
Subpart I - Administrative Records

• CERCLA requires an Admin Record upon which the President shall base the selection of a response action. CERCLA 113(k)

• NCP at 300.800 through .820 discusses establishment and contents of the Admin Record.
Maintaining Records

• Included AR Documents:
  – docs that form the basis for the selection of a response action. 300.800(a)
  – factual info; data; analysis; docs supporting ISE determination; guidance; decision docs; enforcement orders; public partic. docs. 300.810(a)
Maintaining Records (cont.)

• Excluded Documents
  – Docs that do not form the basis of response action: draft docs, internal memos, day-to-day notes. 300.810(b)
  – Privileged docs (generally). 300.810(c) and (d)
Subpart J - Special provisions relating to chemical dispersants

• Reserved
OSC Determinations

• Appendix E - Oil Spill Response
  – Sections 5.0 to 5.8 list patterns of response.
  – Section 6.5 - State OSC discussion
Conclusion

• Being an OSC comes with vast authority, duties and responsibilities in response, coordination and planning activities.

• It is incumbent on all OSCs to know the details of the statute and the NCP to effectively carry out their jobs.