



US Coast Guard Federal On-Scene
Coordinator Representative:
Jurisdiction and Authority Review



Learning Objectives

- Comprehensive authorities review for CWA, CERCLA and the NCP
 - Statutes, regulations, guidance, SOPs
 - Legal principles and statutory nomenclature
 - Enforcement mechanisms
 - Common problems, pitfalls and politics
 - OSHA standards and site safety issues

Teaching to PQS is Strictly Prohibited

- PQS is less than foundation/baseline knowledge
- This FOSCR course will help you obtain **minimally qualified FOSCR status**
- FOSC authority requires years of training and experience
- **CG paradigm at odds with nature of FOSC authority**

FOSC-R Training Principles

- PQS presented from both CERCLA & OPA perspective
 - Despite CG's "Go with what you know" concept
- Emphasis on CERCLA authority and policy
 - CERCLA Response Policy (in-depth review)
 - Reference sections within presentation refer to *M16465.29*
 - CGINST released in 25May83, still 99.9% valid
 - Read: Discussion (a); 2.b.(2)
- CWA/OPA-90 authority and policy
 - Review Appendix E to the NCP

Part I: Federal Environmental Response Law

Authorities Related to Environmental
Response and Spill Management for Coast
Guard FOSC-Rs

The Legal Framework

Environmental Law is an organized way of using all of the laws in our legal system to minimize, prevent, punish, or remedy the consequences of actions which damage or threaten the environment, public health, and safety.

The Legal Framework

Environmental Law
US Constitution
Treaties
Federal Statutes
Federal Regulations
State Statues
State Regulations
Local City/County/Parish laws, ordinances and regulations
Case Law (with its own hierarchy)

Important Legal Terms

- Hazardous Materials
 - DOT 49CFR
 - Transportation (products!)
- Hazardous Substances
 - EPA 40CFR
 - CERCLA Defined
- Hazardous Waste
 - EPA 40CFR260
 - RCRA Defined

These terms are not interchangeable!

Important Legal Terms

- **Negligence:** The failure to exercise due care; the omission to do something which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Why should an FOSCR or PI understand negligence?

Important Legal Terms

- **Strict Liability:** Common law theory often applied by the courts in environmental cases to remedy environmental harm; liability for damages to persons or property can be imposed without requiring a showing negligence

Why does strict liability matter when you conduct MER/FOSC missions?

Environmental Law Enforcement

- FOSC/MER mission is a unique combination of roles inside the USCG:
 - **Outreach:** Ensuring the public knows the law
 - **Regulatory Inspector:** Many spills occur because regulations were not followed
 - **Civil Investigator:** PIs/FOSCRs are enforcing Federal Law
 - **Environmental Health Officer:** Many spill require decisions to be made about how clean is clean in order to protect human health, welfare and the environment

Public Welfare Offense Doctrine

As it applies to Environmental Statutes:

Generally, a public welfare statute without a standard for culpability will require the government to only prove the defendant had the responsibility and had either the authority to prevent or the ability to remedy a violation; the government does not have to show that the individual had the intent to violate the law or even any knowledge of the violation.

As defined by the US Supreme Court, a public welfare statute is one that makes criminal an act that a reasonable person should know is subject to stringent public regulations and may seriously threaten the community's health or safety

Public Welfare Offense Doctrine

Public welfare statutes impart strict liability standards, eliminating mens rea requirements even if the individual defendant had no knowledge of the violation or intent to violate the law. Courts have traditionally found that the risk of harm to the public by not holding a party accountable for a hazardous activity outweighs the conventional requirement for criminal conduct-awareness of some wrongdoing. The rationale is the accused, if he does not cause the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion that it might reasonably exact from one who assumed his responsibilities.

How the CG Fails MER

- FOSC authority is very broad in its scope
 - One Strategies: Protect human health, welfare and the environment from spills of oil and hazardous substances
 - 5 Tactics: Outreach, Preparedness, Response, Investigation and Enforcement
- Misunderstanding the role of the FOSCR wrt the regulated community
- Fear of holding the regulated community responsible for their actions
 - Not issuing swift, thorough, fair and exact enforcement actions for ALL cases
 - Believing, in all circumstances, the regulated community

Your Mission as the Sector FOSCR

- Know the NCP and ACP and Attend RRT and ACP meetings
- Attend or establish government led environmental Task Force meetings
- Locally track 'beans' to present at local non-profit meetings, environmental action hearings, RRTs etc.
- Meet and 'play' with state and local regulators, environmental responders, district attorneys
- Meet regularly with your regulated community, conduct regular spot inspections
- Issue Sector policy letters that assists regulated community with compliance
- Advertise your work externally!! (Enforcement number press releases)

Section 1 Review

1. A **Hazardous Waste** may also be a _____ but not a _____.
2. The **Public Welfare Offense Doctrine** speaks of criminal violations and culpability of RPs. Why is this important knowledge for an FOSC-R to have prior to any response?
3. T or F? **Case law** is law set and interpreted by Congress prior to any statute being signed into law.
4. The legal concept of **strict liability** means what for a boat owner when their mechanic accidentally spilled oil into a navigable waterway while conducting routine engine room maintenance?
5. What are the 5 general tactics of the **FOSC-R authority**?

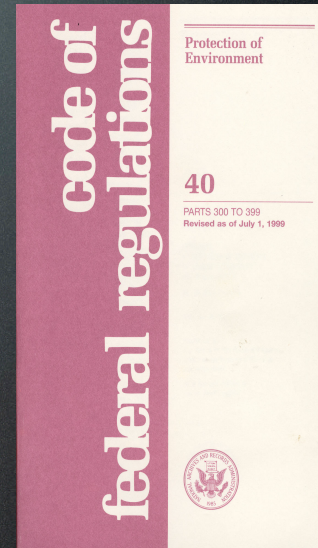
OPA v. CERCLA Response Concepts	CWA/OPA90	CERCLA
Environmental Response Nomenclature	Discharge to Navigable waterway & 5 elements	Release to Environment Imminent and substantial endangerment
How clean is clean?	Straight-forward determination	Applicable, relevant and appropriate requirements (ARARs)
Funding Restrictions	Restoration Vessel destruction* Chemicals containing oils	LPG/LNG & Petroleum Exclusion
Liability	Owner/Operator only liability	Joint, strict, several and retroactive liability

Purpose of the NCP

- ...is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.
 1. To give safety and human health top priority during every response action.
 2. To stabilize the situation in order to prevent the event from worsening.
 3. To use all necessary containment and removal tactics in a coordinated manner to ensure timely, effective response.
 4. To take action to minimize further environmental impact from additional discharges.

The NCP

- Comprehension of full mission authority is key to CG FOSC-R success
- Therefore, All FOSC-Rs should read the NCP cover to cover



FOSC-R Delegated Authorities

Regulatory Cite	Description
40 CFR 300.2	The president delegated to EPA responsibility for NCP amendments
33 CFR 1.01-70	CERCLA delegations to CG
33 CFR 1.01-80	FWPCA & CWA delegations to CG
33 CFR 1.01-85	Redelegation within CG
33 CFR 1.01-90	Delegation of authorities to commissioned, warrant, & petty officers

40 CFR 300.120

- The OSC directs response efforts and coordinates all other efforts at the scene of the discharge or release and oversees the development of the ACP.
- Ensure that persons designated to act as their on-scene representatives are adequately trained and prepared to carry out actions under the NCP (why you are at this training).
- OSC will coordinate, direct and review the work of other agencies, Area Committee members, and contractors to ensure compliance with NCP and other plans applicable to response

NCP Notification Requirements

- Notice of discharges and releases must be made telephonically through a toll free number or a special local number to the National Response Center (NRC).
- In accordance with [33 CFR 153.203](#) and [40 CFR 302](#), the notice of an oil discharge or release of hazardous substances in an amount equal to or greater than the reportable quantity must be made immediately.

What is immediately? Who decides if the RP was negligent in reporting?

Oil Spill Size Classification

Oil Spill Class	Inland (glls.)	Coastal (glls.)
Small	<1000	<10,000
Medium	1-1000	10,000 - 100,000
Large	>10,000	>100,000

NCP Notifications Continued

- 40CFR110.6: Notification of a **discharge of oil in a harmful quantity** must be made to NRC as soon as RP has knowledge.
 - If not practicable, notice may be made to the local OSC.
- 40CFR117.21: Notification of a **discharge of a designated hazardous substance in a harmful quantity** must be made to the appropriate agency as soon as RP has knowledge.
- 40CFR302.6: Notification of a **release of a hazardous substance in an amount over the reportable quantity** must be made to the NRC as soon as RP has knowledge. **No exceptions.**

Phases of Oil Spill Removal Action

- Phase I - Discovery and Notification
- Phase II - Preliminary assessment and Initiation of Action
- Phase III - Containment, Countermeasures, Cleanup, & Disposal
- Phase IV - Documentation and Cost Recovery
- Within all phases:
 - FOSC-Rs shall use NCP language whenever possible: POLREPs and Admin Orders
 - NRDA activities funded by OSLTF, but not under your response FPN

FWPCA/CWA Overview:

- **Objective:** To restore and maintain the chemical, physical, radiological, and biological integrity of the Nation's waters
- **Goals:** Water quality level achievement and Attainment for protection and propagation of fish, shellfish, wildlife, and recreation (interim goal by 1983) and eliminate discharges into navigable waters (by 1985)

FWPCA/CWA Definitions

- **Direct Discharge:** discharge into navigable waters of the U.S.
- **Indirect Discharge:** discharge into POTWs and treated then discharged into Navigable Waters of the U.S.
- **Point Source:** pollution that can be traced to a particular conveyance
- **Non-point Source:** pollution that can not be traced back to a particular conveyance because of its diffuse nature

What is a Pollutant?

- Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste
- The term does not include sewage from vessels


Other Sections of FWPCA/CWA

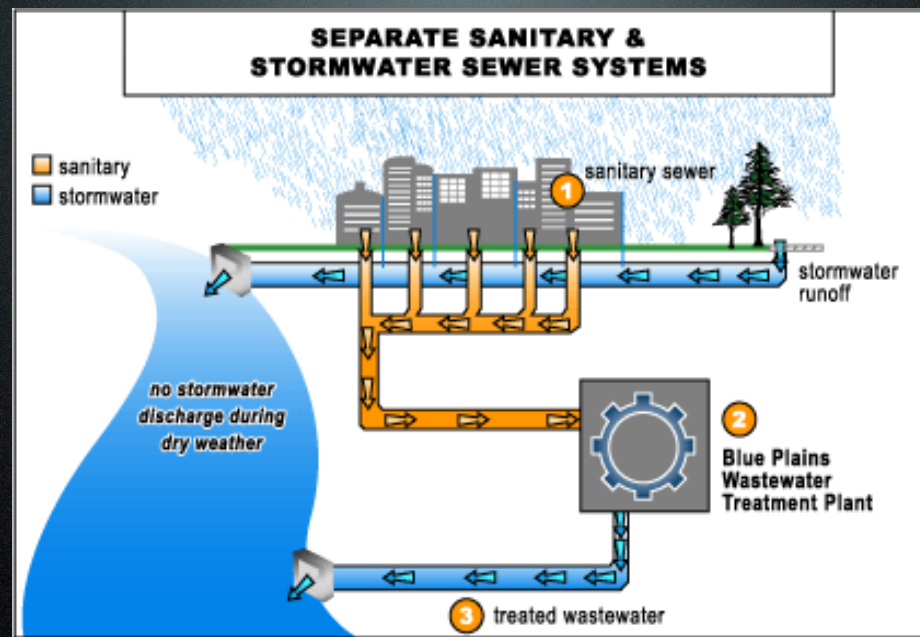
National Pollutant Discharge Elimination System (NPDES) Permit:

- Promulgates a regulatory scheme for
 - Direct discharges
 - Indirect discharges
- §301 CWA makes unlawful:
 - Discharge of any pollutant from a point source by any person

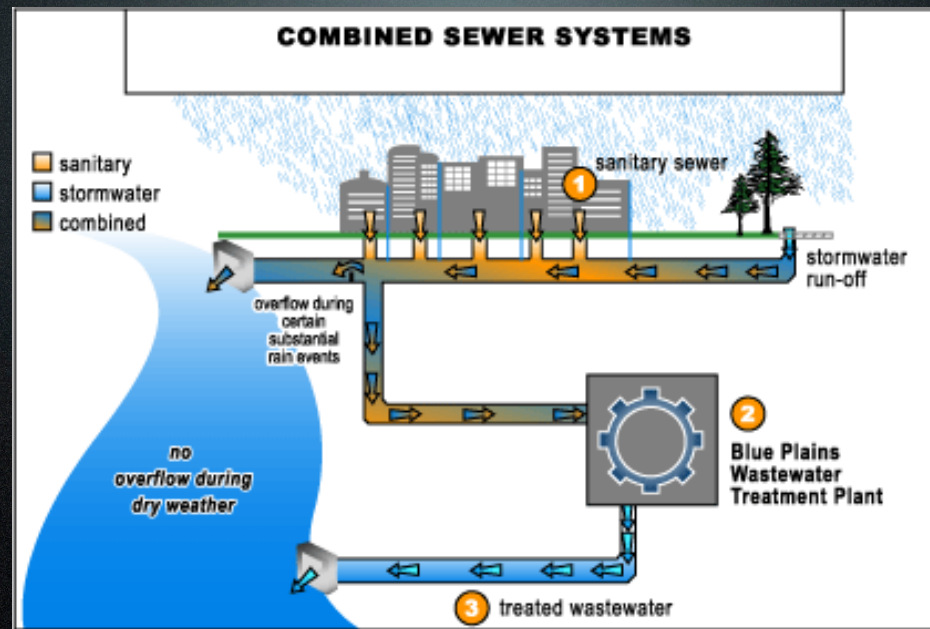


NPDES Controls

- Discharges are only allowed if permitted and then not outside specific conditions of permit
 - NPDES exclusions:
 - Discharges from Ships or Vessels and non-point sources
 - Discharges into Publicly Owned Treatment Works (POTWs) w/ NPDES permit
- 



What does this tell you about your AoR's water quality & frequency of sheen sightings?



What does this tell you about your AoR's water quality & frequency of sheen sightings?

Some Questions

- **Question 1:** Does an FOSC-R concern him or herself with water quality?
- **Question 2:** How does a basic understanding of other aspects of the FWPCA help an FOSC-R do his or her job?

CWA Authority

For each of the following incidents identify when the USCG may assert CWA authority:



1. An accident involving a semi-truck occurs on an interstate discharging over 100 gallons from the trucks saddle tanks, but does not reach the waterway.
2. A vessel has been abandoned on a beach with less than 10 gallons onboard.
3. A FEDEX truck driver falls asleep at the wheel and ends up in a tidally influenced lagoon.
4. Well within EPA's inland zone, a Shell Corp. tank farm secondary containment failed, fuel threatens a nearby stream that feeds a tidally influenced waterway.

EPA/CG Removal & Enforcement Protocols

- Recall goal of CWA was zero discharges by 1985
- Authority to initiate a removal action in response to a 'discharge' of a recoverable amount of petroleum
- FOSC-R should use common sense decision making, and always evaluate in favor of least damage to environment
- Administrative Orders shall be used when directing RP to conduct any removal action 'Ordered' by the Federal Gov't.

FWPCA/CWA Liability Scheme

- Responsible Party (i.e. Owner and/or Operator) liable for any spill that occurs from facility or vessel under their control
- CWA/OPA-90 is a no-fault statute in terms of liability:
 - It doesn't matter that it was an accident
 - It doesn't matter that it was not their fault and discharge was illegal
 - It doesn't matter that they responded quickly
- The above items can contribute to the decision of potential enforcement action (administrative, civil, criminal and/or federal, state, or municipal)

FWPCA/CWA Liability Scheme

- CERCLA Petroleum exclusion prevents CERCLA liability
- Conversely, CWA Hazardous Substances must be responded to using CERCLA authority
- CG responders must investigate each spill thoroughly for cost recovery purposes
- PIs/FOSC-Rs should not confuse cost recovery for enforcement

Military Vessel Discharges

- Uniform National Discharge Standards (UNDS)
 - § 312 preempt state standards
- Incidental discharges from “vessels of the Armed Forces”
- Will require marine pollution control devices
- Joint DOD (USN)/EPA rulemaking
 - www.epa.gov/ost/rules/UNDS/
 - unds.bah.com (official site -no www)
- Other Discharges: Sewage, Greywater, MARPOL, ?

Phases of Hazardous Substance Incident

- Phase I - Discovery and Notification:
- Phase II - Removal Site Evaluation:
- Phase III - Removal Action:
 - *Read: 2-C-1 & -2 pg. 2-2*
- Phase IV - Remedial Site Evaluation
- Phase V - Establishing Remedial Priorities
- Phase VI - Remedial Investigation
- Phase VII - Remedial Action
- Phase VIII - Procedures for Planning & Implementing Off-site Response Actions

CERCLA Paradigm Review

- Inactive hazardous waste sites & intended to complement RCRA
- Legally complex statute
- Comprehensive method of addressing hazardous-waste sites
- Compliments and closes RCRA loophole
- Unprecedented enforcement and liability provisions

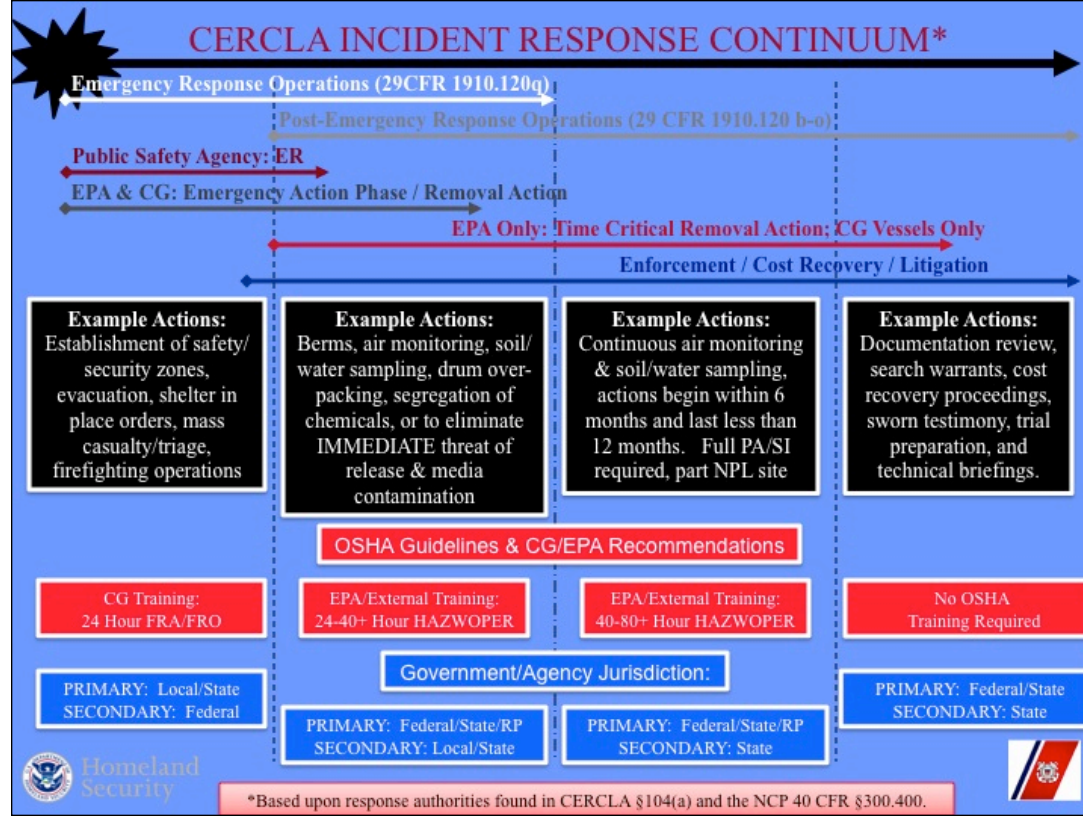
What is a CERCLA Hazardous Substance?

- EPA Title III List of Lists (read: 3-C-4)
- CERCLA hazardous substances
- RCRA hazardous wastes
- Haz-substances & toxic pollutants under CWA
- Hazardous air pollutants under CAA
- Imminently hazardous substances under TSCA
- EPCRA Section 313 Toxic Chemicals

If a marine pollutant spill to a waterway is reported,
what statute would you respond under?

CERCLA Specific CG Policy

- Instrument of Redelgation
 - 1.C pg. 1-1&2
 - Limits CG CERCLA involvement
- D1 CERCLA Decision Memo
 - Documents real world CERCLA example for CG FOSC-Rs
- COMDTINST 16465.29/30
 - Only CG CERCLA Policy (1983)
 - 16465.29 still valid and correct



USCG has response and enforcement authority that begins when Federal jurisdiction is evaluated and assumed and somewhere before a full removal action is completed, except for responses involving vessels.

Pollutant or Contaminant

- Read: 3-D-1,2,3 pg. 3-8,9
- ‘a release or substantial threat of release ... of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare...’
- Such substances will or may reasonably be anticipated to cause certain specified harmful health effects

Substantial Threat

- Read: 3-E pg. 3-10,11
- **Threat of release judgment is critical element in determination**
- **Determining substantial threat is the FOSC's responsibility**

Removal Provisions

- (read: 3.F.1,2,3 pg. 3-11,12)
- Compel cleanups and initiate cost recovery
- Section 104(a)(1):
 - Any haz-sub is released or threat of release
 - Likewise for pollutant or contaminant
- Removal Action
 - Less than 1 year and 2 million
 - Exceptions exist

REMOVAL Action Exemptions: Emergency action, immediate risk to public health and environment, part of larger remedial action, continuation of removal consistent with remedial action...

Removal Provisions

- Need for Prompt Action
- Harm Warranting Removal (4-A-2.a-c. pg. 4-1,2)
- Acting in Doubt (4-B): An OSC need not determine with certainty that a hazardous substance has been released before initiating removal measures

Documenting CERCLA Decisions

- Pollution Report
- Incident Specific Action Plan and Statement of Work
- Finding of Imminent and Substantial Endangerment
 - Responses projected to call less than \$50K
 - Simple documentation based on CERCLA and NCP
- Action Memorandum
 - Every EPA FOSC must do an action memo for removal activities
 - CG FOSC-R must do an Action Memo for any response over \$250K

-Action Memo: Documenting decision key to ensuring that FOSC has established the basis for a response and threat to public health, welfare, and environment

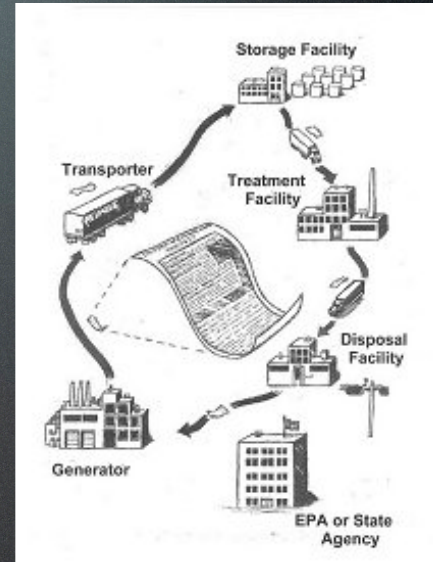
-Review example EPA's FI&E and CG Action Memo

How Clean is Clean?

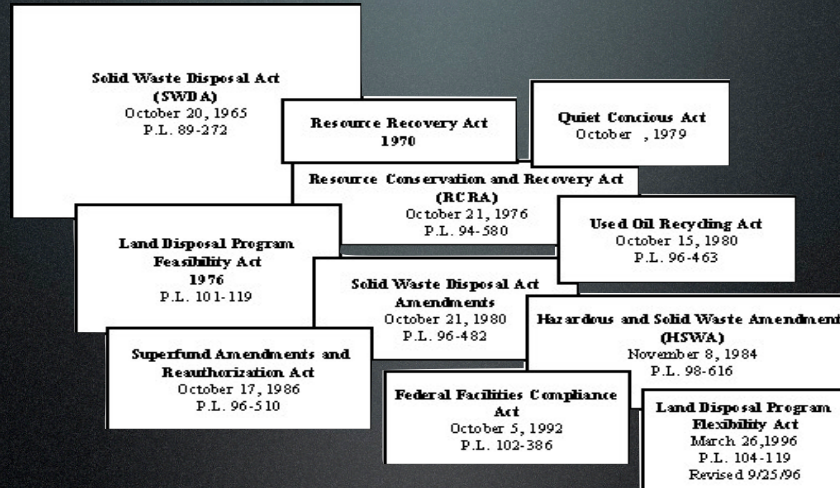
- Appropriate Extent of removal (4-D pg. 4-3)
 - Degree of Harm
- Applicable or Relevant and Appropriate Requirements [ARARs] (§121)
 - Any standard, requirement, criteria, or limitation under any environmental law
 - Or...state environmental or facility siting law that is more stringent than any federal standard
 - Case by case determination using best judgment
 - Consultations with stakeholders

Resource Conservation and Recovery Act

- RCRA is primary on-site ARAR
- RCRA designed as a “cradle to grave” regulatory scheme
- RCRA applies to ACTIVE facilities that generate hazardous waste



RCRAs Origins



The Solid Waste Disposal Act of 1965 and its Amendments

RCRA Implementation

- RCRA is not a self-implementing statute
- Extensive regulation
 - 40 CFR 261-299
 - Divided into 10 subtitles A-J
- Major Regulatory programs:
 - Solid Waste (Subtitle D)
 - Hazardous Waste (Subtitle C)
 - Underground storage tanks (Subtitle I)

Subtitle 'C' for Dummies

- Provides statutory framework for hazardous waste regulatory program
 - Identification
 - Management
 - Corrective Action
- 40CFR Parts 260-279

RCRA Table of Contents

Waste Management Topic	40 CFR
Definitions, Petitions, and Variances	Part 260
Waste Identification	Part 261
Generator Standards	Part 262
Transporter Standards	Part 263
TSDF Standards	Part 264 (permitting) Part 265 (interim status)
Specific Waste and Facility Standards	Part 266
LDRs	Part 268
Permit Program	Part 270 and 124
State Programs/Authorization	Part 271
Universal Waste Standards	Part 273
Used Oil Standards	Part 279

For Generators, RCRA...

- Defines hazardous wastes via
 - Listing specific hazardous wastes
 - Establishing characteristics of hazardous waste
- Requires generators of hazardous wastes to
 - Handle wastes properly
 - Prepare manifests to track shipments

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For Transporters, RCRA...

- Requires
 - All hazardous waste transportation companies obtain HW ID#
 - Hazardous Waste Manifest (initiated by generator)
 - Compliance with DOT hazardous materials transportation regulations

Types of RCRA Hazardous Waste

- Three hazardous waste lists
 - 'F'-wastes
 - 'K'-wastes
 - 'P' and 'U'-wastes
- Four types of characteristic hazardous waste: 'D'-wastes
 - Ignitability, Corrosivity, Reactivity, and Toxicity

F-listed waste: hazardous waste from non-specific sources...spent solvents MEK or toluene

K-Listed Wastes: specific sources...bottom sediment sludge from the treatment of wastewaters by the wood preserving industry

P-listed wastes: are acutely hazardous wastes that require substantial management

U-Listed wastes: are considered toxic, and hazardous when discarded.

Generator Requirements

- First step in Cradle to Grave scheme
- All RCRA related records shall be retained for minimum 3 years
- EPA ID Number
- Initiation of Hazardous Waste Manifest
- Ensure all DOT regulations are met
- Manifest signatories
- Record keeping extremely important

Uniform Hazardous Waste Manifest



UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator Name: **Paracell Products Co.**
2. Main ID: **PA 14344**
3. Facility Name: **Working**
4. Generator ID: **PA 14344**
5. Waste Reg. Co. Name: **Waste Reg. Co.**
6. Manifest ID: **PA 14344**

7. Waste Description: **Marfa Regener. A.T. UN 1809, PG III**

8. Waste Quantity: **2000**

9. Waste Code: **2000**

10. Manifest Date: **11/17/11**

11. Manifest Status: **11/17/11**

Emergency Response Tel. # 1-800-424-9300

Signature: *[Handwritten Signature]* Date: **11/17/11**

Signature: *[Handwritten Signature]* Date: **11/17/11**

Must Meet All DOT/EPA Requirements

Signed by Hand Dated

Hazardous waste manifest, New York State Dept. of Environmental Conservation

48-16.1 (EHS)-17

STATE OF NEW YORK
 DEPARTMENT OF ENVIRONMENTAL CONSERVATION
 DIVISION OF HAZARDOUS WASTE MANAGEMENT
HAZARDOUS WASTE MANIFEST

Please print or type. Do not staple.

Form Approved OMB No. 2050-0030, Expires 9-30-91

2 Page 1 of 1 Information on this "quick access" form is not required by a federal law.

UNIFORM HAZARDOUS WASTE MANIFEST

1 Generator's US EPA No. Manifest Document No. N.Y.D.12|3|4|5|6|7|8|9|3|8|7|5|2

2 State Manifest Document No. NY B 203875 2

3 Generator's Name and Mailing Address: XYZ Corp, 1234 Fifth Ave., NY, NY 13201

4 Generator's Phone (212) 555-1234

5 Transporter 1 (Company Name) ARC Trucking

6 US EPA ID Number N|J|D|0|0|1|2|3|4|5|6|7

7 Transporter 2 (Company Name)

8 US EPA ID Number

9 Designated Facility Name and Site Address: Chemical Disposal Services, Inc., Syracuse, NY 13201

10 US EPA ID Number N|Y|D|0|0|0|1|2|3|4|5

11 US DOT Description (including Proper Shipping Name, Hazard Class and ID Number)

No.	Type	Quantity	Container	Label	Waste No.		
						12	13
a	Hazardous Solid Waste	0.2	D.M.	2.1	2.0	K	EPA STATE NY B007
b							EPA STATE
c							EPA STATE
d							EPA STATE

12 Additional Descriptions for Materials Listed Above: Soil/PCBs

13 Handling Codes for Wastes Listed Above

14 Special Handling Instructions, and Additional Information

15 GENERATOR'S CLASSIFICATION: I hereby declare that the contents of this assignment are fully and accurately described above by proper shipping name and are contained, packed, marked and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations and orders and regulations.

If I am a large quantity generator, I certify that I have programs in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment. If I am a small generator, I have made a good faith effort to minimize my waste and select the best waste management method that is available to me and that I am able to effect.

Printed/Typed Name: John Smith, Agent for XYZ Corp. Signature: [Signature] Mo. Day Year: 10.6.13.09.2

17 Transporter 1 Acknowledgment of Receipt of Materials: Printed/Typed Name: Signature: Mo. Day Year:

18 Transporter 2 Acknowledgment of Receipt of Materials: Printed/Typed Name: Signature: Mo. Day Year:

19 Discrepancy Indication Space

20 Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in item 19. Printed/Typed Name: Signature: Mo. Day Year:

EPA Form 8700-22 (Rev. 9-88) Previous editions are obsolete.

COPY 1—Disposer State—Mailed by TSD Facility

NY B203875 2

Uniform Hazardous Waste Manifest

The image shows a Uniform Hazardous Waste Manifest form with several sections. Yellow arrows point to the following sections:

- Shipper (Generator)
- Carrier 1
- Carrier 2
- Carrier 3

A yellow box on the right side of the form contains the text: Retain for three years

The form includes the following information:

- 1. Shipper (Generator): **WILSON HAZARDOUS WASTE**, **Procell Products Co.**, 2 Main St., **Lebanon, Mo 64501**, 1-800-555-4789, HUC 99942
- 2. Carrier 1: **ABC Trucking**, 1234 Main St., **Lebanon, Mo 64501**, 1-800-555-4789, HUC 99942
- 3. Carrier 2: **XYZ Trucking**, 5678 Main St., **Lebanon, Mo 64501**, 1-800-555-4789, HUC 99942
- 4. Carrier 3: **DEF Trucking**, 9012 Main St., **Lebanon, Mo 64501**, 1-800-555-4789, HUC 99942
- 5. Emergency Response Tel.: 1-800-426-9300
- 6. Shipper Signature: **W. J. Miller**
- 7. Carrier Signature: **B. Shires**

Referring Releases to EPA

- Develop relationships with EPA OSCs (task forces, exercises, Area Committees, RRTs)
- EPA operates differently; ensure expectations are defined prior to potential issues
- Initiate interaction early during an incident were hand-off may be required
- Four occasions exist for which the CG may refer to EPA for action
 - Read: 4-F-1,2,3,4 pg. 4-8,9

CERCLA § 106 Administrative Orders

- Conditions for Issuance (Read: 5-A-1 pg. 5-1)
 - Does not extend to releases from vessels
 - Exception to this rule defines 'facility' as where vessel releases come to rest
- Unilateral Administrative Orders
 - Largest contributors of waste at a site
 - Financially viable
 - Substantial evidence of liability
- Failure to comply up to \$37,500/day of violation
- Defenses to Admin orders and liability

Defenses to Admin orders: A party must show that the applicable provisions of CERCLA EPA regs and policy statement, and any formal or informal hearings or guidance the EPA may provide, give rise to an objectively reasonable belief in the invalidity or inapplicability of the cleanup order....

Only few cases to date have had occasion to construe the term sufficient cause. Defense to

Liability: An act of God, an act of War,

An act of omission of a third party (as long as the defendant exercised due care and took precautions against foreseeable acts of the third party)

CERCLA § 107 Liability Scheme

- Response actions occur and liability attaches:
 - A release or substantial threat of release into the environment from vessel or facility
 - Any quantity, however small, triggers CERCLA Response; versus RQ trigger
 - Substantial threat of release interpreted broadly by EPA
 - Facility and vessel is broadly defined

CERCLA § 107 Liability Scheme

- Strict, Joint and Several, and Retroactive
 - NO requirement that a party's hazardous substance have been the cause for the response
 - Liability found for actions taken prior to CERCLA
 - An individual corporate officer or a parent corporation can be found liable if either has exercised control of hazardous waste handling
 - Sometimes just control over environmental concerns is enough
 - Simply having the authority to control is enough

Other FOSCs

- USCG: Discharges of oil; release of hazardous substances, pollutants and/or contaminants into the environment in the coastal zone
- US EPA: Discharges of oil; release of hazardous substances, pollutants and/or contaminants into the environment in the inland zone
- **Department of Defense:** Discharges of oil; release of hazardous substances, pollutants and/or contaminants into the environment **from military operated facilities, installations, munitions and/or military vessels (COI must be in-place)**
- **Department of Energy:** Discharges of oil; release of hazardous substances, pollutants and/or contaminants into the environment **from DOE facilities or non-DOD radiation sources**

Discussion should center around DoD and DoE FOSC authority: Vessels being assembled for DOD are NOT DOD vessels until their CoI is in place by the USCG.

Non-military, non-nuclear radiation sources should be treated like any other chemical response EPA/USCG authority.

NRC is not a bureau for the DOE, NRC regulates Nuclear Power facilities and will take lead on response...but no FOSC authority.

Sources of FOOSC Authority

- Statutory Authority:
 - Federal Water Pollution Control Act as amended by Clean Water Act and Oil Pollution Act
 - Comprehensive Environmental Response, Compensation, and Liabilities Act as amended by Superfund Amendments and Reauthorization Act
- Regulatory Authority
 - 40CFR300 The NCP
 - 33CFR
- CG Policy Guidance
 - MSM Volume 9, Chapter 5 (outdated)
 - M16465.29 (still accurate review of CERCLA authority)

COTP Authority

- 33 CFR 6.04-5 (“Super 6”): The COTP may prevent any person, article, or thing from boarding or being taken or placed on board any vessel or entering or being taken into or upon or placed in or upon any waterfront facility whenever it appears that such action is necessary in order to secure such vessel from damage or injury or to prevent damage or injury to any vessel, or waterfront facility or waters or the US, or to secure the observances of rights and obligations of the US.
- The COTP regulates access of personnel, movement of vessels and operations of facilities in order prevent or minimize damage or injury.

FOSC v. COTP

- Preventing access of personnel to vessels or waterfront facilities
 - COTP can take possession of any vessel...
 - FOSC may enter private property to evaluate spill...
 - FOSC may obtain Admin Order

To minimize the possibility of a spill

To minimize the damaging effects of a spill

To determine the severity of a spill

To determine the source of a spill

To decide possible courses of action to mitigate spill damage

FOSC v. COTP

- Controlling vessel and facility operations
 - 33CFR160 subpart B: The vessel or any transfer can be stopped if...
 - FOSC entry onto private property
 - Read: 6-A-1, 2, 3, 4 pg. 6-1, 2

the history of the vessel creates reason to believe that the vessel is unsafe or poses a threat to the environment,
the vessel/transfer fails to comply with regulations,
oil or hazardous material is discharged,
the vessel does not comply with vessel traffic service requirements,
operates without a deck officer who speaks English.

FOSC v. COTP

- Controlling vessel movement
 - 33CFR6.04-8 and 33CFR160 subpart B
 - Control of Private Activities and Property
 - Read: 6-C-1, 2 pg. 6-2, 3

The COTP may supervise and control the movement of any vessel and shall take full or partial possessions or control of any vessel or any part thereof...

For all actual or potential releases the FOSC may:

curtail or prohibit private activities, such as near-by plant operations or use of a railway line...

control the movement, or use, of the source of a release, or potential release, and undertake any corrective measures...

If a release or threatened release poses an imminent threat of substantial harm, the FOSC may:

Requisition private property...

Destroy the facility or vessel which is the sources of the release...

FOSC v. COTP

- Enlisting aid from OGA's
 - The COTP may enlist the aid and cooperation of federal, state, county, municipal, and private agencies to assist in the enforcement of regulations of 33 CFR 6.04-11.
 - 40CFR300.175 During preparedness planning or in an actual response, various federal agencies may be called upon to provide assistance in their respective areas of expertise...consistent with agency legal authorities and capabilities.
 - Special Teams & Resource Trustees: DOD, USACE, DOI/NPS/BLM/USFW, SUPSALV, FEMA, USDA, DOC/NOAA, HHS/CDC/ATSDR, DOJ, DOL/OSHA, NRC

Safety Zones

- **Safety Zones** protects the area outside the zone from danger within the zone.
 - Limiting access and providing for site control
 - Human Health/Welfare and environmental protection
- **Security Zone** protects the area inside the zone from danger outside zone.

Guidance for drafting a Safety Zone or COTP Order can be found in Marine Safety Manual vol. VI and 33 CFR 165.5 (Establishment Procedures for Regulated Navigation Areas and Limited Access Areas).

Flight Restriction Zone

- Obtained via FAA by coordinating with local CG AirSta/Sector
- Difficult to justify and obtain
- Enforcement conducted by FAA

Draft a COTP Order

- COTP order is authority to enforce Super 6 authorities (through safety zones or independent order)
- COTP Order designed to restrict activities
- CANNOT be used to compel clean-up activities

Draft an Administrative Order

- CERCLA or OPA Administrative Orders are clean-up and abatement documents that allow the RP to conduct clean-up operations under specific circumstances and timeframes in accordance with the NCP
- Violation of Order will lead to fines and defaults clean-up to FOSC
- Administrative Orders may be either oral or written: If oral, follow up with written version

NCP Removal Action Concepts

- FOSC-Rs shall use NCP language whenever possible: POLREPs and Admin Orders
- NRDA activities funded by OSLTF, but not under your response FPN
- Document your decisions and 'Orders' to RP
- Respond in conservative favor of protecting Human Health, Welfare and the Environment

Questions?



Part II: HAZWOPER Standard Review

Practical Application of 29CFR1910.120
to Worksite Response and Cleanup
Activities

FOSC Responsibility for On-Site Safety

- The OSC is ultimately responsible for the health and safety of personnel at a discharge/release site.
- Upcoming slides will help explain the conditions in which a response or cleanup activity may fall under the requirements of HAZWOPER.

EMERGENCY RESPONSE: If OSHA considers a worksite response activity a "HAZWOPER Emergency Response," then employers with employees at the site performing emergency response must comply with HAZWOPER paragraph (q) and all other General Industry (1910) or Construction Industry (1926) standards. The term "emergency response" has a very specific meaning and application under HAZWOPER. Employers often apply this term to any activity requiring immediate attention. However, under HAZWOPER this term applies specifically to response activities where there is an uncontrolled release of a hazardous substance, as defined by HAZWOPER in paragraph (a) (3), or where an uncontrolled release is likely.

When the following conditions, or similar conditions, may develop as a consequence of a release of hazardous substances or threat of release, such situations would be considered emergency situations requiring an emergency response effort:

High concentrations of toxic substances.

Immediately Dangerous to Life and Health (IDLH) environments.

Situations that present an oxygen deficient atmosphere.

Conditions that pose a fire or explosion hazard.

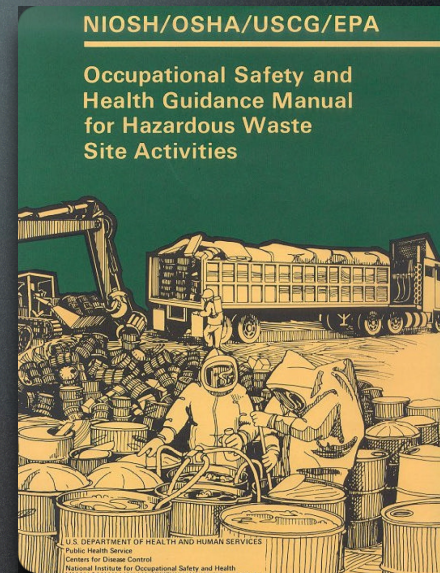
Situations that require an evacuation of the area.

Situations that require immediate attention because of the danger posed to employees in the area.

As shown in Figure 1, response activities at worksites may be considered "emergency response" activities, if these conditions apply.

29CFR1910.120

- Defines PPE levels A thru D
- **.120(q)** Defines Emergency Responder (24+hrs.)
 - Awareness
 - Operations
 - Technician
 - Specialist
 - On-Scene Commander
- **.120(b-o)** Defines Site Worker (40+ hrs.)



Incidental Releases

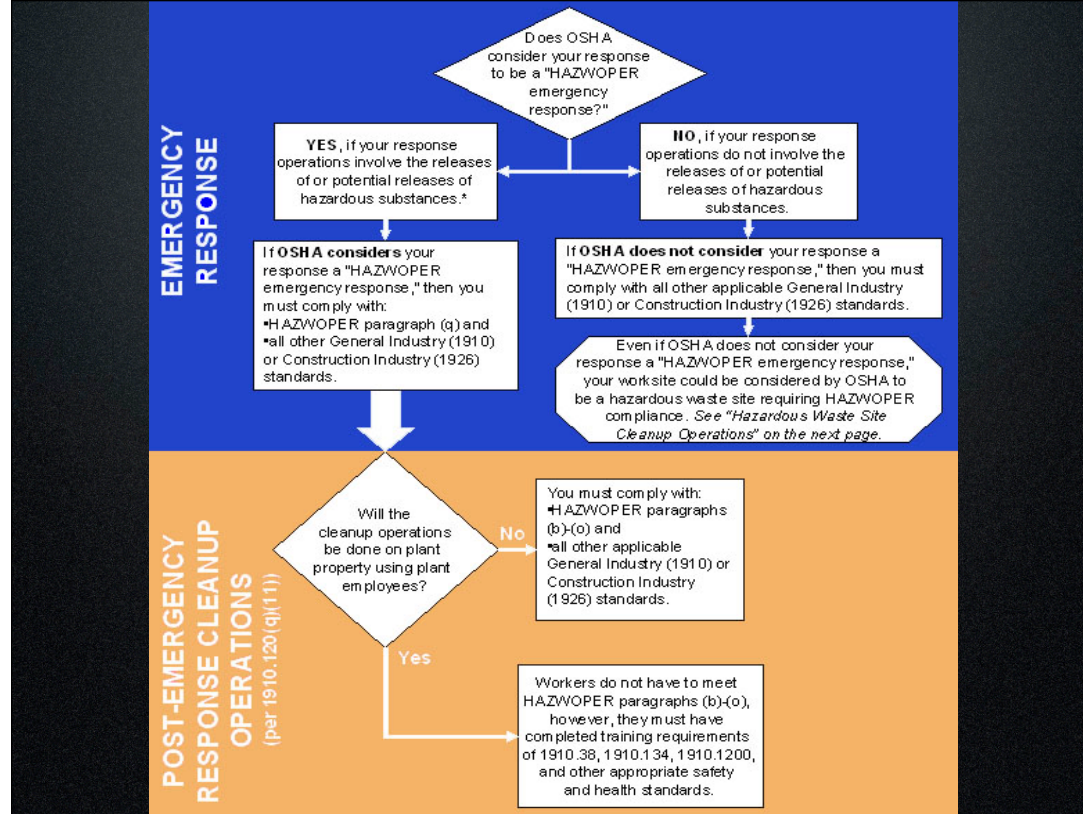
- Limited in Quantity
- Pose no safety and health threat to employees working in the immediate vicinity of the spill
- Can be controlled or absorbed at the time of the release by employees in the immediate vicinity
- Does NOT have the potential to become an emergency within a short time

If an incidental release occurs, employers do not need to implement HAZWOPER

NOTE: The HAZWOPER standard does not cover the inevitable release of a hazardous substance that is limited in quantity, exposure potential, or toxicity, and poses no emergency or significant threat to the safety and health of employees in the immediate vicinity or to the employee cleaning it up. These incidental releases also do not have the potential to become emergencies within a short time frame. For example, an incidental release may include a spill at a tanker truck loading station in which the product can be contained by employees in the immediate vicinity and cleaned up utilizing absorbent without posing a threat to the safety and health of employees. Conversely, a release of chlorine gas that is immediately dangerous to life and health, obscuring visibility, and moving through a facility would require an emergency response under HAZWOPER. Although HAZWOPER may not apply to incidental releases, other OSHA standards may apply such as Hazard Communication, 29 CFR 1910.1200. Furthermore, the employer must provide the appropriate training and necessary personal protective equipment (PPE) in order to minimize the risks to employees when they are expected to handle incidental releases. Appendix E of OSHA Instruction CPL 02-02-059 provides more information regarding how to differentiate between incidental releases from those that require HAZWOPER emergency responses.

OSHA Standards Flowcharts

- RESPONSE OPERATION TYPES:
 - Differentiates between Emergency Response and Post-Emergency Response Operations
 - Determines OSHA standards that must be followed at Hazardous Waste Site Clean-up Operation



CLEANUP

A cleanup operation at a worksite may also fall under the requirements of the HAZWOPER standard. This may occur as a Post-Emergency Response Cleanup Operation as shown in Figure 1, or as a completely separate Hazardous Waste Site Cleanup Operation as shown in Figure 2. Again, there are specific conditions that must be met and those conditions are explained in the following sections and illustrated in the figures.

*Hazardous substance means any substance designated or listed under (A) through (D) of this definition, exposure to which results or may result in adverse effects on the health or safety of employees.

[A] Any substance defined under section 101(14) of CERCLA.

[B] Any biologic agent and other disease-causing agent which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any person, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunction in reproduction) or physical deformation in such person or their offspring.

[C] Any substance listed by the U.S. Department of Transportation as hazardous materials under 49 CFR 172.101 and appendices; and

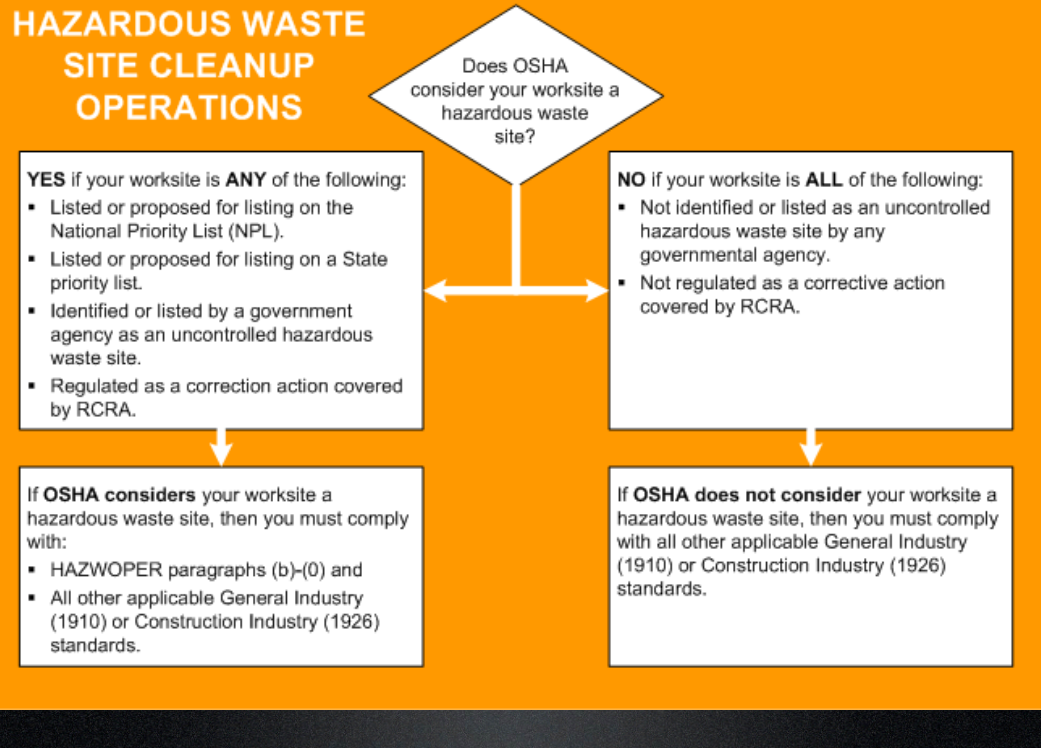
[D] Hazardous waste as herein defined.

Hazardous waste means —

[A] A waste or combination of wastes as defined in 40 CFR 261.3, or

[B] Those substances defined as hazardous wastes in 49 CFR 171.8.

HAZARDOUS WASTE SITE CLEANUP OPERATIONS



POST-EMERGENCY RESPONSE CLEANUP OPERATION

Upon completion of an emergency response, any subsequent cleanup involving hazardous substances must be performed in accordance with sections (b) through (o) of the HAZWOPER standard. If, however, the employees conducting the cleanup operations are employees of the plant property where the work is being performed, those employees may be trained according to OSHA's Emergency Action Plan standard, 29 CFR 1910.38 and 1926.35, OSHA's Respiratory Protection standard, 29 CFR 1910.134 and 1926.103, Hazard Communication standard, 29 CFR 1910.1200, and other appropriate safety and health training in lieu of complying with HAZWOPER (b)-(o).

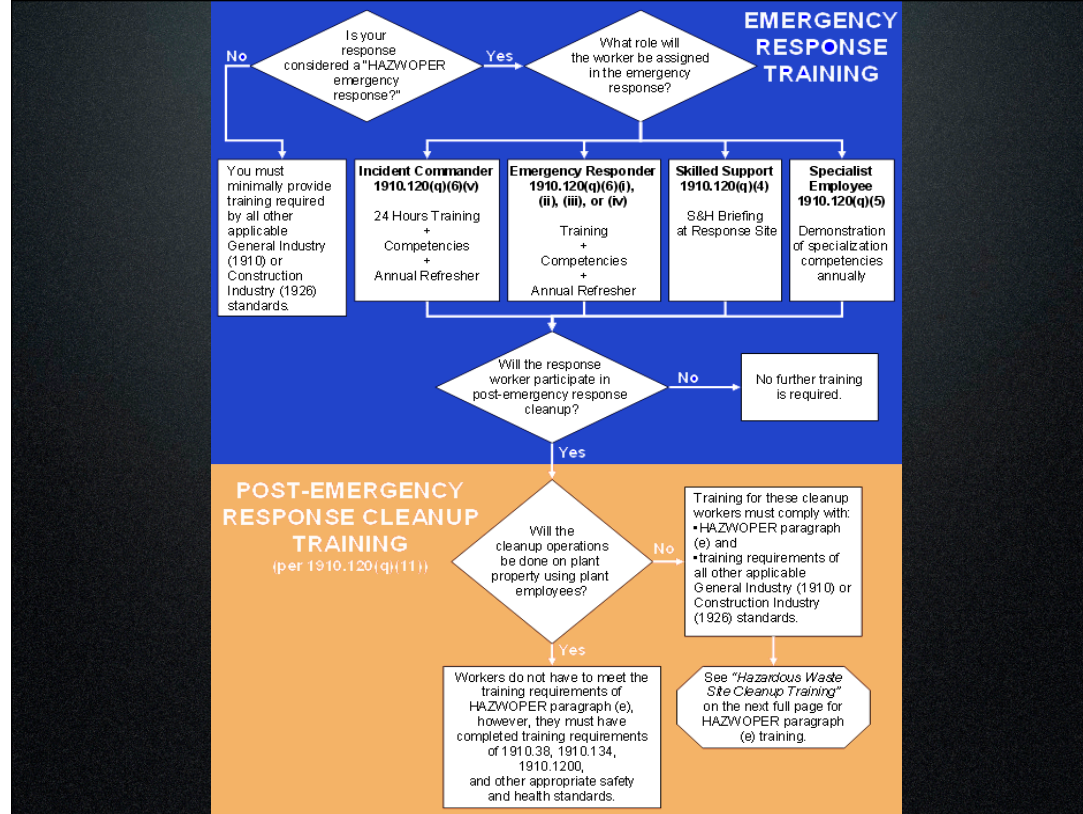
HAZARDOUS WASTE SITE CLEANUP OPERATIONS

Even if the cleanup activity did not originate from an "emergency response" effort, the activity may fall under HAZWOPER as a hazardous waste site cleanup operation (Figure 2). A site is considered a hazardous waste site if it is:

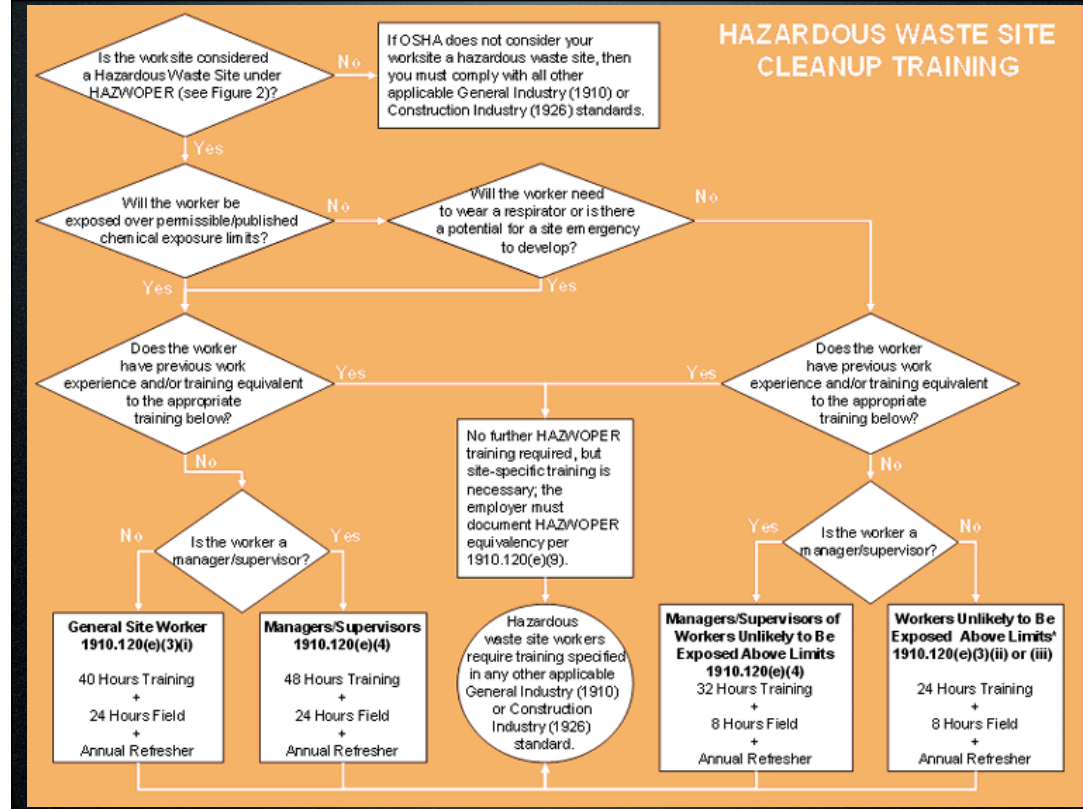
- Identified or listed by a government agency as an uncontrolled hazardous waste site.
- Listed or proposed for listing on the National Priority List (NPL).
- Listed or proposed for listing on a State priority list.
- Regulated as a corrective action covered by the Resource Conservation and Recovery Act (RCRA).

OSHA Standards Flowcharts

- TRAINING FOR RESPONSE-OP TYPES:
 - Differentiates between Emergency Response and Post-Emergency Response Operations
 - Determines OSHA standards that must be followed at Hazardous Waste Site Clean-up Operation



POST-EMERGENCY RESPONSE CLEANUP TRAINING: All workers performing post-emergency response removal of hazardous substances, health hazards, or materials contaminated with them must receive training as required by 1910.120(q)(11), as shown in Figure 3. Upon completion of the emergency response, workers involved in subsequent cleanup or removal of hazardous substances must be trained according to HAZWOPER paragraph (e), unless they are conducting the cleanup operations at the plant property where they work. These plant employees may be trained according to 29 CFR 1910.38, 29 CFR 1910.134, and 29 CFR 1910.1200 and other appropriate safety and health training in lieu of complying with HAZWOPER (b)–(o).



HAZARDOUS WASTE SITE CLEANUP TRAINING: For worksite cleanup activities that did not originate from a "HAZWOPER emergency response" but are determined to be hazardous waste site cleanups, workers must be trained according to 1910.120(e). As with emergency response training, the level and type of training is dependent upon on the workers' expected duties and level of exposure as shown in Figure 4.

*Workers who are to be trained for a specific oil spill cleanup that involved task with minimal exposure (e.g., beach cleanup workers) may possibly be trained under a reduced OSHA training provision described in OSHA Instruction CPL 02-02-051. This instruction applies only to oil spills and is limited in circumstances.

OSHA & Oil Spills

- Training Marine Oil Spill Response Workers Under OSHA's Hazardous Waste Operations and Emergency Response Standard: OSHA 3172
- Train workers to the **HIGHEST LEVEL** of responsibility you may assign them.



Response Site & Volunteers

“Volunteers frequently participate in marine oil spill response, but Federal OSHA standards do not cover uncompensated workers. In states approved to manage their own occupational health and safety program (called OSHA state plan states), volunteers are often covered under state plan HAZWOPER requirements. In states administered by Federal OSHA, volunteers are covered by the EPA HAZWOPER standard (40 CFR 311). EPA's HAZWOPER standard has identical requirements, but the coverage is different from Federal OSHA standard coverage. The EPA standard covers local and state government employees, both compensated and volunteers.”

What Can Volunteers Do?

- Command Post activities?
- Logistics/Support (Red Cross, Faith Based Orgs.)
- Pre-SCAT & clean up/debris removal
- To work with wildlife:
 - USFW and State Conservation and DNR agencies may have volunteer organizations like California's Oiled Wildlife Care Network that has their own training program to meet OSHA requirements
 - <http://www.vetmed.ucdavis.edu/owcn/>

Volunteer Problems

- Response agency utilization of volunteers may be the problem AFTER training...
 - Contact Volunteer Coordinator Associations
 - Get your ACPs ready for Volunteers

Volunteer Training

- Volunteers should receive Incident Specific Hazard Communication as per OSHA 29CFR1200 HAZCOM standards
- Under OSHA Directive CPL 2-2.51 and OSHA Standards Interpretation and Compliance Letters (dated 02/13/1992), “a minimum of four hours [of training] would be appropriate in most situations.”

Volunteers Can Be Used; Provided...

- The job site is in an area where a qualified person has decided that the exposure potential is expected to remain under PEL
- Health risks from skin absorption are minimal
- Workers have been trained on procedures in the event of an emergency and hazards associated with the hazardous substances in their workplace
- Workers have completed training including topics such as decontamination procedures, heat stress, hypothermia, water safety, and operating procedures
- Supervisors have received a minimum of 24 hours of training

Confined Space

- Many workplaces contain spaces that are considered "confined" because their configurations hinder the activities of employees who must enter, work in, and exit them
- <http://www.osha.gov/SLTC/confinedspaces/index.html>

A confined space has limited or restricted means for entry or exit, and it is not designed for continuous employee occupancy.

Confined spaces include, but are not limited to underground vaults, tanks, storage bins, manholes, pits, silos, process vessels, and pipelines.

OSHA uses the term "permit-required confined space" (permit space) to describe a confined space that has one or more of the following characteristics: contains or has the potential to contain a hazardous atmosphere; contains a material that has the potential to engulf an entrant; has walls that converge inward or floors that slope downward and taper into a smaller area which could trap or asphyxiate an entrant; or contains any other recognized safety or health hazard, such as unguarded machinery, exposed live wires, or heat stress.

Site Safety Plan

- The e-HASP2 software
 - <http://www.osha.gov/dep/etools/ehasp/index.html>
- Includes 15 chapters

Organizational Structure

Job Hazard Analysis

Site Control

Training Program

Medical Surveillance Requirements

Personal Protective Equipment (PPE)

Exposure Monitoring

• Thermal Stress

• Spill Containment Program

• Decontamination Program

• Emergency Response Plan

• Standard Operating Procedures

• Confined Space Programs

• Hot Work

• Lockout/Tagout

Disposal Plan

- RCRA Regulated Hazardous Waste
- Consistency with PPE OSHA requirements
- Maintain Positive Control
- Minimize Exposure Pathways

Decon Plan

- Decontamination Location/Pad?
- Collecting Decon Runoff?
- Sampling Decon Runoff?
- POTW and Other Liquid Waste Issues

When should you begin thinking about a Decon, Disposal and Demob plan?

Additional Resources

<http://www.clu-in.net>

<http://www.trainex.org/>

<http://response.restoration.noaa.gov/index.php>

<http://www.nrt.org/>

[http://www.ert.org/mainContent.asp?
section=About&subsection=Overview](http://www.ert.org/mainContent.asp?section=About&subsection=Overview)

<http://cameochemicals.noaa.gov/>

<http://epaossc.net>

<https://www.netionline.com/Default.asp>

Questions?

