

## **Background Information on the Memorandum of Understanding to Coordinate Criminal Investigation, Enforcement, and Environmental Response**

On September 24, 1998, the National Response Team (NRT) established the Criminal Investigation and Environmental Response *Ad Hoc* Committee to facilitate the simultaneous execution of criminal investigation and environmental response actions at the scene of an incident. The Committee considered challenges encountered during past environmental responses and drafted a Memorandum of Understanding (MOU) to address those issues. After the events of September 11, 2001, and the succeeding anthrax incidents, the Committee reviewed the MOU again and concluded that the recent events further supported the need for such an agreement. The MOU was presented to the NRT in substantively the same form at its November 2001 meeting and was approved for submission to the member agencies after minor modifications were made.

The MOU documents the requirements for coordination between criminal investigation and environmental response activities during situations where both activities are ongoing. The MOU is intended to enhance the protection and ensure the health and safety of citizens and responders. The MOU is also intended to improve response operations through prompt notifications, coordination, and communication.

This document consists of four parts: Section I contains a paragraph-by-paragraph analysis of the MOU; Section II contains a summary of the MOU's important features; Section III offers answers to frequently asked questions; and Section IV lists points of contact for additional information about the MOU and this document.

### **Section I: Paragraph-by-Paragraph Analysis**

- *Authority – Paragraph One*

This MOU is consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (the National Contingency Plan or NCP), 40 CFR part 300 (including §300.160 (a)(1)(3)(c)); Section II.H.1. of the United States Government Interagency Domestic Terrorism Concept of Operations Plan (CONPLAN)<sup>1</sup>; Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. §9605; and Section 311 of the Clean Water Act (CWA), as amended, 33 U.S.C. §1321.

- *Purpose – Paragraphs Two, Three, and Four*

The purpose of the MOU is to improve the overall coordination and cooperation of environmental responders and investigative/law enforcement agencies operating at the scene of

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<sup>1</sup> Electronic copies of this document can be obtained from <http://www.fema.gov/rrr/conplan/forword.shtm> or <http://www.fbi.gov/publications/conplan/conplan.pdf>.

an oil, hazardous substance, pollutant, or contaminant release consistent with each agency's legal requirements and responsibilities. The NRT Criminal Investigation and Environmental Response *Ad Hoc* Committee determined that developing a mechanism to potentially reduce intra- and interagency conflicts during both terrorist and non-terrorist events would lead to better overall efficiency. The MOU does not preclude signatory agencies or departments from reaching more detailed agreements and understandings with other federal agencies or departments, or with state or local governments.

- *Protection of the Public is the Highest Priority – Paragraph Five*

For most incidents, there are no conflicts between protection of human life and health and law enforcement. However, where there are irreconcilable conflicts between collection of forensic evidence and law enforcement on the one hand, and protection of public health on the other, the MOU states that the highest priority is protecting health and safety of the public. This is consistent with the NCP and the CONPLAN. This provision does **not** determine which agency or official has the lead in a terrorist incident, spill, or release. Rather, this provision specifies that whichever official or agency is in charge at a site must regard protection of the public as the highest priority.

- *Reciprocal Notice of Agencies' or Departments' Presence at the Site – Paragraphs Six and Seven*

The MOU requires investigative/enforcement personnel and environmental responders to advise each other of their presence during an oil, hazardous substance, pollutant, or contaminant release incident to which both groups are responding. Notification should occur at the earliest appropriate time but no later than the arrival of personnel at the site. Reciprocal notification ensures that criminal investigators and environmental responders are aware of each other's presence on-scene, facilitates coordination among all agencies operating on-scene, and reduces the potential for conflicts. In addition, personnel should report to the command post upon arrival on-site.

The MOU acknowledges situations where it is not practical for law enforcement personnel to notify the Federal On-Scene Coordinator (FOSC) or Local Incident Commander. This notification waiver applies to an undercover investigation or where the FOSC or other federal environmental responder is the subject of the investigation. Additionally, the waiver applies when DEA conducts a raid on a clandestine drug laboratory as these are typically undercover operations in which both law enforcement and (non-DEA) environmental responders are not likely to be jointly involved as set forth in Paragraph 6 of the MOU.

- *Protection of Response and Law Enforcement Personnel – Paragraph Eight*

This section of the MOU recognizes the importance of the health and safety of environmental response and investigative/enforcement personnel working at the site of an oil, hazardous substance, pollutant, or contaminant release. The goal is to help ensure that no one is injured due to exposure or on-scene activities. The MOU references requirements, which are independent of this MOU, for protective equipment and other safety precautions, including Occupational Safety and Health Administration (OSHA) requirements for specific training and medical monitoring of all personnel who need to enter an uncontrolled hazards area (29 CFR 1910.120). This training,

commonly called HAZWOPER training, stands for Hazardous Waste Operations and Emergency Response. In instances in which investigative/enforcement personnel elect not to collect evidence, the FOSC or his/her designee may assist the investigative/enforcement effort by collecting and/or preserving evidence as requested and where practicable.

- *General Provisions – Paragraphs Nine Through Thirteen*

The MOU provides that the signatory agencies agree to coordinate on-scene investigative efforts with environmental response. This section also indicates that the MOU remains in effect for as long as both the environmental response and the investigative case are open. When a case or response is closed and then re-opened, all parties should be advised of new activities.

The MOU does not change any existing legal requirements. It cannot be used to acquire funds outside those designated by applicable requirements, guidelines, authorization, or appropriations. The MOU does not create any rights or benefits enforceable at law by third parties. Additionally, the MOU highlights the need to ensure that the National Response Center is informed of incidents, spills, or releases.

## **Section II: Important Features of the MOU**

- *Clarifies the Importance of Public Health and Safety and On-Scene Coordination*

One of the major concerns that the committee identified was conflicting priorities between law enforcement and environmental response. The MOU addresses this concern by stating that the highest priority is protecting the health and safety of the public. This is consistent with both the CONPLAN's section II.H.1. which states that “[p]reserving life or minimizing risk to health . . . constitutes the first priority of operations” and the NCP, 40 CFR part 300, Appendix E, which provides, at section 2.2, that “[s]afety of human life must be given the highest priority during every response action.” In addition to protecting the public, the MOU also calls for coordination by all parties operating at the site of an oil, hazardous substance, pollutant, or contaminant release.

- *Ensures the Health and Safety of all Personnel*

The MOU acknowledges the importance of protecting environmental response and investigative/enforcement personnel operating at the site of a release. The MOU assumes that all agencies and departments are aware of and in compliance with all applicable safety and health regulations. This includes information on hazards and personal protective equipment.

- *Addresses the Concerns of Law Enforcement in the Area of Undercover Operations*

A major concern of law enforcement and criminal investigation agencies is protecting the integrity of undercover operations. The reciprocal notice provisions of the MOU do not apply to these activities.

### Section III: Frequently Asked Questions

- *What Does the MOU Require?*

Apart from referencing existing regulations and guidance, the MOU acknowledges longstanding policy: 1) in the event of a conflict, human health and safety are deemed more important than evidence collection activities; and 2) environmental responders and criminal investigation/law enforcement personnel should advise each other of their presence at a site. Neither obligation is particularly onerous.

- *Is this MOU Legally Binding, and if so, for How Long?*

The MOU is a commitment between and among the federal agencies and departments who enter into it. Any agency or department which enters into it should do so with the expectation that both it and the other signatory agencies or departments will honor the MOU's requirements. A department or agency that signs the MOU, can, with notice to other signatory agencies and departments, terminate its participation. However, for the provisions of the MOU to be meaningful, such a decision should be made only on a long-term, rather than on a case-by-case, basis. This MOU is **not** enforceable by third parties.

- *Which Organizations are Expected to Sign the MOU?*

It is anticipated that all departments and agencies represented at the NRT will sign the MOU, including the following: Environmental Protection Agency, Coast Guard, Federal Emergency Management Agency, Nuclear Regulatory Commission, General Services Administration, and the Departments of Defense, Energy, Agriculture, Commerce (National Oceanic and Atmospheric Administration), Health and Human Services, Interior, Justice (including the Federal Bureau of Investigation and Drug Enforcement Administration), Labor, Transportation (including the Coast Guard), State, and the Treasury.

- *Will this MOU Require Additional Agency/Department Resources?*

No. This MOU is not intended to impose any additional burdens on the signatory agencies and departments beyond the requirement for initial notification. The major requirements of the MOU deal with notifications, communications, and coordination on-site. With the improvements in productivity of all of the personnel involved, this MOU could reduce the burden on various agencies.

- *What Does ICS/UC Stand For? Why is it in this MOU?*

As identified in Paragraph 4 of the MOU, the Incident Command System/Unified Command (ICS/UC) is the response management system most widely used at incident sites by federal, state, and local emergency responders (*e.g.*, fire, police, emergency medical services, and spill responders) to effectively integrate and coordinate response actions. The ICS/UC provides a standard organizational platform for coordinating large responses. It recognizes the existing authorities and jurisdictions of all agencies involved in the incident. The term "unified command" indicates that there is more than one agency with authority and jurisdiction participating in the response.

It is anticipated that an ICS/UC will be established for the incidents addressed in this MOU. However, this MOU is not intended to mandate its use. Although ICS/UC is not required by this MOU, most federal emergency response agencies currently use or are in the process of implementing ICS/UC to facilitate federal, state, and local coordination. The NRT has recommended the use of an ICS/UC for multi-jurisdictional incidents.

ICS/UC also provides a structure for facilitating and coordinating criminal investigations. For the purposes of this MOU, the position of the Liaison Officer in the Command Staff of the Incident/Unified Command can serve as the bridge between the responders and the various criminal investigative and enforcement agencies. This will ensure communication between these two parties.

- *Does the MOU Require Investigative/Enforcement Personnel to Buy Personal Protective Equipment or Other Equipment?*

No. The requirement that personnel who may be exposed to uncontrolled hazards have appropriate protection as well as appropriate training is set forth in existing federal law and is not part of this MOU. The MOU does not change these provisions.

- *Does the MOU Change Any Existing Legal Requirements?*

No. The MOU references existing legal requirements, but it does not change these requirements. Moreover, Paragraph 13 of the MOU provides that nothing in the MOU shall create any rights in other parties, which are enforceable against the United States.

- *How will this MOU benefit implementation of policy on behalf of DHS?*

This MOU can support the safety and response management aspects of ICS/UC, as required by DHS in the NRP and the National Incident Management System (NIMS), by providing the incident commander with information on agencies present at the site through the MOU reciprocal notice provisions.

#### **Section IV: Points of Contact for Additional Information**

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