

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

July 15, 2010

CERTIFIED MAIL - FIRST CLASS MAIL  
RETURN RECEIPT REQUESTED

Mr. Paul Turek  
Chemical Waste Management, Inc.  
35251 Old Skyline Road  
P.O. Box 471  
Kettleman City, Ca 93239

RE: **60-DAY NOTICE OF UNACCEPTABILITY**  
Under the CERCLA Off-Site Rule and Opportunity for Informal Conference

Dear Mr. Turek:

This Notice letter (Notice) is to notify you that conditions existing at the Chemical Waste Management, Inc. (CWM) Kettleman Hills Facility may render units at the facility unacceptable for receipt of hazardous substances and pollutants and contaminants generated as a result of removal or remedial activities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This Notice is issued in accordance with the "Procedures for Planning and Implementing Off-Site Response Actions" (Off-Site Rule), 40 C.F.R. §300.440. The determination of unacceptability will become effective on September 13, 2010 unless EPA informs you in writing that EPA is satisfied the facility is operating in compliance with the applicable requirements.

The purpose of the Off-Site Rule is to prevent wastes from CERCLA-authorized or -funded response actions from contributing to present or future environmental problems. The Off-Site Rule requires the proper handling of Superfund waste and requires that these wastes be managed in units that are environmentally sound. The Off-Site Rule became effective on October 22, 1993. A copy of the rule is enclosed for your review.

Pursuant to 40 C.F.R. §300.440(d)(9), this determination of unacceptability becomes effective sixty (60) days from the issuance of the Notice. As the Notice is effective upon issuance and not upon receipt, we have transmitted to you by facsimile a copy of this Notice on the date it was issued.

This Notice is based upon a determination that the facility has not been in full compliance with the applicable requirements of the Toxic Substances Control Act

(TSCA), 15 U.S.C. § 2601 et seq.; TSCA approval conditions; and the California Code of Regulations.

As stated in EPA's July 8, 2010 letter, new data from both EPA and CWM's investigations documented additional PCB contamination at the facility. On June 2, 2010, EPA sampled the concrete pad adjacent to the Kettleman Hills Facility PCB Storage Building and found PCBs on the concrete at a concentration of 24  $\mu\text{g}/100\text{ cm}^2$ . After CWM removed the portion of the concrete pad where EPA had detected PCBs, CWM sampled below the concrete. Preliminary results showed PCBs in soil at concentrations of 2.1, 64, 74 and 440 ppm. Today EPA received confirmation of these results.

Spills and other uncontrolled discharges of PCBs at concentrations of  $\geq 50$  ppm onto concrete or soil constitute the disposal of PCBs in violation of TSCA (40 C.F.R. §761.50(a)(4)).

Based on this evidence of violation, EPA is issuing CWM a Notice of Toxic Substances Control Act Violation (NOV) today, in addition to this OSR Notice. The NOV details EPA's recommendation for returning to compliance.

The Off-Site Rule provides the facility owner or operator with an opportunity for an informal conference with EPA to discuss the basis for the underlying violations and its relevance to the facility's acceptability to receive CERCLA cleanup wastes. Pursuant to 40 C.F.R. §300.440(d)(4), if CWM submits a written request for an informal conference **within 10 calendar days from the issuance of this notice**, EPA Region 9 will provide CWM the opportunity for such conference no later than 30 calendar days after the issuance date of the notice, if possible. CWM may also submit written comments for EPA's consideration. CWM may submit written comments by the 30th day after issuance of the notice, in addition to or instead of requesting an informal conference.

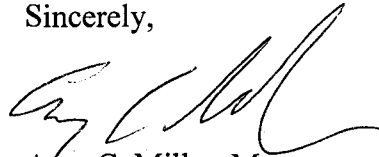
Failure to fully address the circumstances that gave rise to this Notice will result in the Kettleman Hills Facility PCB management units becoming unacceptable to receive CERCLA wastes on the 60<sup>th</sup> day after this notice was issued, September 13, 2010. **The failure to submit a written request for an informal conference, or to submit written comments specifically addressing this unacceptability determination, will not extend the 60 days provided for CWM to satisfy EPA that the Kettleman Hills Facility is operating in compliance with the applicable requirements.** If CWM presents information, either by means of an informal conference or written comments, EPA will inform you in writing as to whether the information is sufficient to show that the facility is operating in compliance with the applicable requirements of TSCA or whether the determination of unacceptability has not been reversed. If the determination of unacceptability is not reversed, responsible agencies and private parties will then cease any transport or authorization of transport of CERCLA PCB wastes to the Kettleman Hills facility on the effective date of this Notice. The facility will remain unacceptable until such time as the EPA notifies CWM otherwise.

Within 10 days of hearing from the EPA after the informal conference or the submittal of written comments, CWM may request a reconsideration of the unacceptability determination by the Director of the Waste Management Division. This reconsideration, if granted, will be made by review of the record, by the Director of the Waste Management Division; reconsideration does not automatically stay the determination beyond the 60-day period. CWM will receive notice in writing of the decision of the Director of the Waste Management Division.

The Director of the Waste Management Division may decide to extend the 60-day period if more time is required to achieve compliance. CWM shall be notified if the Director of the Waste Management Division extends the 60 days.

If you have questions concerning the off-site rule, please contact Kandice Bellamy, Region 9 CERCLA Off-Site Rule Coordinator, at (415) 972-3304. Legal questions should be directed to Rebecca Sugerman, Assistant Regional Counsel, at (415) 972-3893.

Sincerely,



Amy C. Miller, Manager  
RCRA Enforcement Office  
Waste Management Division

Enclosure      Copy of the 9/22/93  
Federal Register Final  
Rule and Preamble

cc:      Jane Diamond, Region 9 Superfund Division Director  
Gale Filter, Department of Toxic Substances Control  
Andrew Kenefick, Senior Legal Counsel, Chemical Waste Management, Inc.

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Wednesday  
September 22, 1993

# Federal Register

Briefings on How To Use the Federal Register  
For information on briefings in Washington, DC, see  
announcement on the inside cover of this issue.



Authority: Secs. 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. 6912(a), 6926, and 6974(b).

2. Section 272.2500, State Authorization, is removed.

3. Section 272.2501 is revised to read as follows:

**§ 272.2501 Wisconsin State administered program; final authorization.**

Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b): Wisconsin has final authorization for the following elements as submitted to EPA in Wisconsin's base program application for final authorization which was approved by EPA effective on January 31, 1986. Subsequent program revision applications were approved effective on June 6, 1989, January 22, 1990, and April 24, 1992.

#### State Statutes and Regulations

(a) The Wisconsin statutes and regulations cited in this paragraph are incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(1) EPA Approved Wisconsin Statutory Requirements Applicable to the Hazardous Waste Management Program, (dated August 9, 1993).

(2) EPA Approved Wisconsin Regulatory Requirements Applicable to the Hazardous Waste Management Program (dated August 9, 1993).

(b) The following statutes and regulations concerning State enforcement, although not incorporated by reference for enforcement purposes, are part of the authorized State program:

(1) Wisconsin Statutes, Volume 1, §§ 19.21; 19.31; 19.32(2) and (5); 19.35(3) and (4); 19.36; 19.37(1) and (2); Wisconsin Statutes, Volume 3, §§ 144.69-144.72; 144.73-144.74; 144.76(2) and (3); Wisconsin Statutes Volume 4, §§ 227.07; 227.09; 227.14; 227.51; and Wisconsin Statutes, Volume 5, § 803.09 (1985-86).

(2) Wisconsin Administrative Code, Volume 1, § NR: 2.19; 2.195(1); and 2.195(5) (effective April 1, 1984); Wisconsin Administrative Code, Volume 12, § NR: 680.06(12) (effective March 1, 1991).

4. Appendix A to part 272, State Requirements, is amended by revising the Appendix heading and adding the center heading "Missouri" above the listing, and adding in alphabetical order "Wisconsin" and its listing to read as follows:

Appendix A to Part 272—State Requirements

#### MISSOURI

\* \* \* \* \*

#### WISCONSIN

The statutory provisions include: Wisconsin Statutes, Volume 3, Sections: 144.01; 144.43-433; 144.44 (except 144.44(4)(a)); 144.441(1)-(2); 144.441(3) (b), (f), and (g); 144.441(4) (a) and (c)-(g); 144.441(6); 144.442(1), (4)-(11); 144.443; 144.444; 144.60-144.63; and 144.64 (2)-(3) (except for 144.64(2)(e)(1)).

The regulatory provisions include: Wisconsin Administrative Code, Volume 12, § NR 600.01-600.04(2); 600.06; 600.3-600.11; 605.02; 605.04-605.11; Appendix II, III, IV and V; 610.01-610.09(2); 615.01-615.13(2)(b); 620.01; 620.04-620.10(3); 620.14; 625.04(4); 625.05(1)-625.07(7)(c)12; 625.12(1) and (2); 630.02; 630.04-630.40(3)(c); 635.02; 635.05-635.16(17)(d); 635.17(1), (2) and (3); 640.02; 640.06(2)(b); 640.09-640.22(22); 645.04-645.14; 645.17(1)(a)1-645.17(1)(a)3.e; 650; 655.02; 655.05-655.13(13); 660.02; 660.08-660.20(2); 665.02; 665.05(1)-665.10(2); 670.06-670.11(2)(d)3; 675.01-675.30(6); 680.01-680.51(5); 685.02; 685.05-685.08(13)(b).

[FR Doc. 93-23071 Filed 9-21-93; 8:45 am]

BILLING CODE 6560-60-M

#### 40 CFR Part 300

[FRL-3718-7]

RIN 2050-AC35

#### Amendment to the National Oil and Hazardous Substances Pollution Contingency Plan; Procedures for Planning and Implementing Off-Site Response Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is today amending the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP"). Today's final rule implements the requirements of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA)) and includes certain additional requirements that EPA finds to be appropriate. CERCLA describes procedures that must be observed when a response action under CERCLA involves off-site management of CERCLA hazardous substances, pollutants or contaminants (hereinafter referred to as "CERCLA wastes") resulting from CERCLA decision documents signed after the enactment of SARA (i.e., after October 17, 1986). This rule also makes these procedures

applicable to off-site management of CERCLA wastes resulting from CERCLA decision documents signed before the enactment of SARA. Prior to this rule, EPA managed the off-site transfer of CERCLA wastes according to the May 1985 off-site policy (published in the Federal Register on November 5, 1985), as revised November 13, 1987 (OSWER Directive No. 9834.11).

**DATES:** Effective: The final rule is effective October 22, 1993.

CERCLA section 305 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, EPA will publish notice of clarification in the Federal Register.

**ADDRESSES:** The official record for this rulemaking is located in the Superfund Docket, U.S. Environmental Protection Agency (OS-245), 401 M Street SW., room 2427, Washington, DC 20460 (202/260-3046) and is available for public inspection from 9 a.m. to 4 p.m., Monday through Friday, excluding holidays. The docket number is 121-POS.

**FOR FURTHER INFORMATION CONTACT:** Ellen Epstein, RCRA Enforcement Division, Office of Waste Programs Enforcement (OS-520), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, Phone (202) 260-4849, or the RCRA Superfund Hotline (800) 424-9346 (or (703) 920-9810 in the Washington, DC, metropolitan area).

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I. Authority

Sections 104(c)(3), 105, and 121(d)(3) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") (42 U.S.C. 9604(c)(3), 9605, 9621(d)(3)); section 311(c)(2) of the Clean Water Act (33 U.S.C. 1321(c)(2)); Executive Order 12580 (52 FR 2923, January 29, 1987); and Executive Order 12777 (56 FR 54757, October 22, 1991).

II. Introduction

Today's final rule amends the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR part 300, by adding a new § 300.440. The May 1985 off-site policy (50 FR 45933-45937 (November 5, 1985)), as revised by the Procedures for Implementing Off-site Response Actions of November 13, 1987 (OSWER Directive No. 9834.11), (hereinafter known as the "Off-site Policy"), is superseded by this rule.

The purpose of this off-site regulation is to avoid having CERCLA wastes from CERCLA-authorized or -funded response actions contribute to present or future environmental problems by directing these wastes to management units determined to be environmentally sound. Congress and EPA have always believed that a CERCLA cleanup should be more than a relocation of environmental problems, and have attempted to ensure the proper treatment and disposal of CERCLA wastes removed from a CERCLA site. EPA believes that the process set out in this rule for ensuring that CERCLA wastes are transferred only to properly-permitted facilities that have no relevant violations or uncontrolled releases, assures that the receipt of CERCLA waste will not pose adverse effects on the environment.

The off-site regulation should help prevent the aggravation of conditions at problem sites and reduce the government's and the Superfund's potential liability by establishing criteria governing the off-site transfer of CERCLA wastes from CERCLA-authorized or -funded response actions. The rule should also help to ensure that off-site transfer decisions are made in an environmentally sensible manner, consistent with sound public policy and business practices.

The requirements of this rule are integral components of the "selection of remedial action" provision in CERCLA section 121, and their proper application will help to ensure that response actions selected are protective of human health and the environment (consistent with CERCLA section 121(b)(1) and, more generally, with section 104(a)(1)).

Today's final rule implements the requirements of section 121(d)(3) of CERCLA, which provides that in the case of any CERCLA response action involving the off-site transfer of any hazardous substance, pollutant, or contaminant (CERCLA waste), that CERCLA waste may only be placed in a facility that is in compliance with the Resource Conservation and Recovery Act (RCRA) (or other applicable Federal law) and applicable State requirements. CERCLA requires that for "land disposal facilities," there may be no transfer of CERCLA wastes to a unit with releases, and any releases at other units must be controlled.

Although CERCLA section 121(d)(3) applies compliance criteria to all facilities, it applies "release" criteria only to RCRA subtitle C land disposal facilities. EPA believes, as a matter of policy, that some release criteria should also be applied to all facilities that

receive CERCLA wastes from CERCLA authorized or funded response actions, including RCRA treatment, storage, and permit-by-rule facilities, and any non-RCRA subtitle C facilities (such as subtitle D facilities or facilities permitted to receive hazardous substance wastes under the Toxic Substances Control Act (TSCA))<sup>1</sup>. The Agency believes that such a step will further the protection of human health and the environment, and the development of a sound and consistent public policy; it would also serve to further the goals reflected in CERCLA section 121(d)(3).

Similarly, although SARA section 121(b) provides that CERCLA section 121 (and thus section 121(d)(3)) applies to actions arising from post-SARA decision documents only,<sup>2</sup> EPA believes that it is logical and appropriate to apply this rule to CERCLA wastes resulting from two other categories of similar cleanup actions: those authorized under CERCLA before the enactment of SARA, and those performed under the National Contingency Plan pursuant to section 311 of the Clean Water Act (for non-petroleum products). Accordingly, this rule applies to a number of situations in addition to those expressly set out in section 121(d)(3) of CERCLA.

Today's final rule establishes the criteria and procedures for determining whether facilities are acceptable for the off-site receipt of CERCLA waste from CERCLA-authorized or -funded response actions and outlines the CERCLA wastes and actions affected by the criteria. It establishes compliance criteria and release criteria, and establishes a process for determining whether facilities are acceptable based on those criteria. The rule leaves the final decision of off-site acceptability with EPA, after providing the opportunity for, and encouraging, substantial consultation with the State in which the off-site facility is located.

<sup>1</sup> A TSCA permitted facility's acceptability to receive CERCLA wastes is also based on compliance and release findings. As with a RCRA facility, the compliance finding at a TSCA facility hinges on the absence of relevant violations at or affecting the receiving unit. The release finding for a TSCA facility is based on the presence or absence of environmentally significant releases anywhere at the facility (i.e., not just at the receiving unit). Such releases must be addressed by corrective action under a State or Federal program.

<sup>2</sup> Section 121(b)(1) of SARA provides that the requirements of CERCLA section 121 shall not apply to any remedial action for which the Record of Decision ("ROD") was signed, or the consent decree lodged, before the date of enactment of SARA. SARA Section 121(b)(2) provides that if an ROD was signed, or consent decree lodged, within the 30-day period after enactment of SARA, the remedial action should comply with CERCLA section 121 to the maximum extent practicable.



The final rule outlines the State's role in the off-site acceptability determination and ensures that States will remain active participants in the decisionmaking process. The rule also establishes procedures for notification of unacceptability, appeals of unacceptability determinations, and re-evaluation of unacceptability determinations.

Under the rule, the policy of applying off-site requirements to actions taken under section 7003 of the Solid Waste Disposal Act, as amended by RCRA, is discontinued.

### III. Background

From the beginning of the CERCLA program, Congress has mandated that CERCLA wastes be treated, stored, and disposed of in an environmentally sound manner. Section 104(c)(3) of CERCLA, as originally enacted in 1980, required States to ensure the availability of a hazardous waste disposal facility in compliance with RCRA subtitle C for receipt of hazardous waste from Fund-financed remedial actions.

In January 1983, EPA issued Guidance on the Requirements for Selecting an Off-Site Option in a Superfund Response Action. This first guidance on the off-site transfer of CERCLA wastes required a facility inspection and that all major violations at the facility be corrected in order for the facility to receive CERCLA wastes from remedial or removal actions. EPA's May 1985 "Procedures for Planning and Implementing Off-Site Response Actions" (50 FR 45933) detailed the criteria for evaluating the acceptability of facilities to receive CERCLA wastes.

The NCP, revised in November 1985 (40 CFR part 300), incorporated requirements for off-site receipt of CERCLA waste. The NCP, at 40 CFR 300.68(a)(3), required that facilities have permits, or other appropriate authorization to operate, in order to be acceptable for receiving off-site CERCLA waste.

SARA reaffirmed the rationale embodied in CERCLA section 104(c)(3) and the May 1985 Off-site Policy. Section 121(d)(3) of CERCLA, as added by SARA, explicitly provides that in the case of any CERCLA "removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant off-site," such transfer shall only be to a facility operating in compliance with the Solid Waste Disposal Act (as amended by RCRA and the Hazardous and Solid Waste Amendments (HSWA)), or, where applicable, the Toxic Substances Control Act (TSCA), or other applicable Federal law, and all applicable State

requirements. The section also requires that receiving units at land disposal facilities have no releases of hazardous wastes or hazardous constituents and that any releases from other units at a land disposal facility be controlled by a RCRA corrective action program.

Finally, EPA issued revised procedures for implementing off-site response actions on November 13, 1987, as a memorandum from J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, to the EPA Regional Administrators (OSWER Directive No. 9834.11) (the "Off-site Policy"). These procedures, which were effective immediately, provided guidance on complying with the SARA requirements, updated the 1985 Off-site Policy, and provided detailed procedures for issuing and reviewing unacceptability determinations.<sup>3</sup>

The Agency proposed amendments to the NCP on November 29, 1988 (53 FR 48218) to implement the requirements of CERCLA section 121(d)(3), and to add certain appropriate requirements contained in the Off-site Policy. EPA received over 75 specific comments on the proposed rule and has carefully analyzed those comments and made changes as appropriate in promulgating today's rule. Today's final rule (the "Off-site Rule") implements and codifies the requirements contained in CERCLA section 121(d)(3), and incorporates many provisions of the Off-site Policy. Specific responses to the comments received are set out below, or in the "Comment-Response Document" to this rule, which is available from the Superfund Docket.

### IV. Discussion of Final Rule

The Off-site Rule generally provides that a facility used for the off-site management of CERCLA wastes must be in physical compliance with RCRA or other applicable Federal and State laws. In addition, the following criteria must be met:

- Units receiving CERCLA wastes at RCRA subtitle C facilities must not be releasing any hazardous wastes, hazardous constituents or hazardous substances;
- Receiving units at subtitle C land disposal facilities must meet minimum technology requirements;
- All releases from non-receiving units at land disposal facilities must be addressed by a corrective action program prior to using any unit at the facility; and
- Environmentally significant releases from non-receiving units at

<sup>3</sup> For additional discussion on the background of this rule, see the proposed rule at 53 FR 48219-20 (November 29, 1988).

Subtitle C treatment and storage facilities, and from all units at other-than-Subtitle C facilities, must also be addressed by a corrective action program prior to using any unit at the facility for the management of CERCLA wastes.

The Rule provides procedures for EPA to notify the facility if EPA determines that the facility is unacceptable. It also provides an opportunity for the owner/operator to discuss the determination with the appropriate government official, and if still unsatisfied, to obtain a review of the determination by the Regional Administrator.

The following discussion of today's rule describes the new § 300.440 requirements and responds to public comments received on the proposal. Two major changes have been made from the proposed rule as a result of the comments received: (1) EPA—not the States—will make the final determinations as to whether off-site facilities are "acceptable" under this rule to receive CERCLA wastes, with States being active participants during the decision-making process, and (2) the distinction between criteria for CERCLA wastes resulting from pre- and post-SARA decision documents has been removed. These changes, as well as other comments received on the proposed rule, are discussed below.

#### A. Applicability

##### 1. CERCLA Wastes Affected

*i. Laboratory samples.* The proposed rule provided that the transfer of CERCLA site samples to an off-site laboratory for characterization would not be subject to the rule based on the small size of lab samples, the need for prompt and frequent laboratory analysis, and the high level of confidence that lab samples—due to their value to the sending facility—will be properly handled (53 FR 48220). Several commenters contended that the exemption should be enlarged, such that off-site requirements would also not apply to sample shipments from labs to ultimate disposal or treatment facilities. The commenters argued that requiring labs to segregate the small volumes of CERCLA wastes sent to labs for analysis for separate handling under the Off-site Rule would be burdensome, and unnecessary to protect public health. A number of commenters also questioned the wisdom of preventing labs from sending tested samples back to the site, as is common practice. EPA has evaluated these comments, and agrees that it is not necessary to require transfer of lab sample CERCLA wastes from labs to meet the full requirements

of this rule for reasons discussed above and in the preamble to the proposed rule. However, today's rule is predicated on the principle that CERCLA actions should not contribute to existing environmental problems, and that materials generated from CERCLA actions should be transferred only to environmentally sound facilities. Thus, EPA does not believe it is appropriate for labs to routinely send CERCLA waste samples back to CERCLA sites.

Accordingly, EPA has identified two options for the proper disposal of lab-tested samples of CERCLA wastes. The Agency believes that these options, included in the final rule, respond to commenters' concerns that unnecessary obstacles not be placed in the way of lab testing, while ensuring that CERCLA wastes are handled in an environmentally-sound manner.

First, labs may send the tested samples and their residues to an appropriate facility (i.e., they may treat it as material not subject to this rule and transfer it to any facility that may legally accept such wastes); the Agency expects that the vast majority of the materials sent to labs from CERCLA sites will be handled under this first option. Second, the lab may return the CERCLA waste sample to the site from which the sample came if the Remedial Project Manager (RPM) or On-Scene Coordinator (OSC) agrees to assume responsibility for the proper management of the sample and gives permission for the sample to be returned to the site.

One commenter requested that a similar exemption be applied to CERCLA wastes sent off-site for treatability studies. The commenter reasoned that information on treatability is valuable, resulting in a high confidence level that these CERCLA wastes will be properly handled and managed, and that treatability studies promote treatment rather than disposal of CERCLA wastes; treatment is a preferred waste management option under CERCLA. Finally, the RCRA program has exempted treatability study wastes from most hazardous waste management requirements.

EPA agrees with the commenter that an exemption from this rule for treatability CERCLA wastes is appropriate, and that it is consistent with the approach taken in the final rule for Identification and Listing Hazardous Waste Treatability Studies Sample Exemption (53 FR 27290, July 19, 1988). Thus, those hazardous wastes at a CERCLA site that are being sent off-site for treatability studies and that meet the requirements for an exemption from RCRA under 40 CFR 261.4(e), are also

exempt from today's rule. CERCLA wastes, residues and other materials that are not RCRA hazardous wastes resulting from treatability studies are subject to the same disposal options as materials from lab characterization samples. Again, EPA believes that this approach will help to facilitate prompt site cleanups while ensuring that CERCLA wastes are managed in an environmentally-sound manner. Non-RCRA hazardous wastes that are being sent off-site for treatability studies and that are below the quantity thresholds established in the Treatability Studies Sample Exemption Rule are similarly exempt from the requirements of the Off-site Rule.

*ii. LDR residues.* One commenter objected to applying the requirements of the rule to transfers from a CERCLA site of CERCLA waste residues meeting treatment standards established by the land disposal restrictions (LDRs), believing that these residues no longer posed a hazard. EPA maintains that RCRA hazardous wastes or waste residues meeting LDR treatment standards are still considered hazardous under RCRA, unless they no longer exhibit a characteristic of hazardous waste, or if appropriate, are delisted. Moreover, even if a CERCLA waste meeting LDR treatment standards is found not to be a RCRA hazardous waste, it may still be CERCLA waste. Under today's rule, CERCLA waste that is not a RCRA hazardous waste may be sent to other than a RCRA subtitle C facility for disposal (if that facility meets the requirements of the rule), e.g., a RCRA subtitle D landfill. EPA believes that the rule as it stands should not prove burdensome and that it should be relatively easy to find capacity for such CERCLA wastes. Therefore, the final rule does not exempt CERCLA waste residues meeting LDR treatment standards when they are transferred from the CERCLA site.

*iii. Clarification on Subsequent Transfers of CERCLA Wastes.* The prior comment raises the related issue of how the Off-site Rule applies to subsequent transfers of CERCLA waste. When a CERCLA waste is to be transferred off-site as part of a CERCLA funded or authorized cleanup, the contract implementing the decision document should identify the final disposition point for the CERCLA waste (i.e., the final treatment or disposal facility), and any intermediate facilities that will store or pre-treat the wastes (e.g., waste brokers, blenders). All such facilities would be required to be acceptable under the final rule.

Once the CERCLA waste is finally disposed of off-site, or treated off-site to

BDAT levels or in the absence of BDAT, treated to substantially reduce its mobility, toxicity, or persistence, it is no longer considered a CERCLA waste and subsequent transfers of the waste would not be regulated under this rule.

However, if residues derived from the treatment of the CERCLA waste are RCRA hazardous wastes, they must be managed as such under RCRA.

## 2. Actions Affected

*i. Enforcement Activities.* EPA would like to clarify and respond to several commenters' questions concerning which enforcement activities are affected by today's rule. The Off-site Rule applies only to those actions being taken under a CERCLA authority or using CERCLA funds. These include actions taken under section 104, CERCLA consent agreements, decrees (including special covenants under section 122(f)(2)(A)), Records of Decisions (RODs), section 106 orders, and actions taken under pre-authorization CERCLA decision documents. State response actions conducted under a CERCLA cooperative agreement, are also subject to the off-site requirements.

Actions which would not trigger the off-site requirements include notification of a spill of a reportable quantity under CERCLA section 103, cleaning up a site using only State authority and State funds (whether or not the site is listed on the Superfund National Priorities List (NPL)), and conducting a voluntary cleanup involving government oversight (e.g., by the U.S. Coast Guard), unless under CERCLA or a CERCLA order or decree.

In one commenter's example, if a PRP has taken a voluntary response action (not under a CERCLA order and without CERCLA funds), that action is not subject to the Off-site Rule; thus, in a cost recovery action under CERCLA section 107(a)(4)(B), the PRP may demonstrate action "consistent with the NCP" without having to show compliance with the Off-site Rule requirements.

*ii. Actions under CERCLA section 120.* The proposed rule states that the requirements of this rule do apply to all Federal facility actions under CERCLA, including those taken by EPA and/or another Federal agency under CERCLA sections 104, 106, and 120 (53 FR 48220). One commenter objected to applying this rule to Federal facilities, arguing that this was not equitable because the rule covers private party actions at NPL sites only. The commenter asked that the rule only be applied to EPA-funded or Federal-

agency-lead CERCLA actions taken at NPL sites.

In response, EPA does take CERCLA actions at private facilities that are not on the NPL (e.g., enforcement actions and removals) and these actions are subject to the Off-site Rule when they are conducted under CERCLA authority or using CERCLA money. Consistent with CERCLA 120(a), EPA does not believe it is appropriate to treat CERCLA actions at non-NPL Federal facilities differently. Thus, if a Federal agency plans to transfer CERCLA wastes off-site from a Federal facility under a CERCLA authority or with CERCLA funds (as compared to being transferred under another statutory authority), the Federal agency may transfer CERCLA wastes only to facilities found to be acceptable under this rule. Federal facilities may transfer CERCLA wastes off the CERCLA site to treatment, storage or disposal units on the same Federal property, but only if the other units (and the larger Federal facility or installation) meet the requirements of this rule.

iii. *Federally-permitted releases.* In the proposed rule, the Agency stated that Federally-permitted releases should not be routinely included within the concept of "release" for the purposes of section 121(d)(3). For "Federally-permitted releases," as defined in NCP, § 300.5 (1990 ed.) and CERCLA section 101(10), the government has specifically identified the types and levels of hazardous substances that may safely and appropriately be released (e.g., a NPDES water discharge permit), and it would not make sense to find a facility unacceptable based on the existence of such an authorized and planned release. Of course, unauthorized releases that are being studied, cleaned up, or controlled under a corrective action portion of a permit, would not be considered to be "Federally permitted" for the purposes of this rule.

The Agency further stated in the proposed rule that although Federally permitted releases would not routinely be considered to be a "release" for the purpose of acceptability under this rule, if the permitted release comes to constitute a threat to human health and the environment, the release can and should be considered under this rule (53 FR 48224).

One commenter argued that EPA should not limit the exemption for Federally-permitted releases. If a permit is not sufficiently protective it should be altered, rather than determining that the facility is unacceptable under the Off-site Rule. If the Agency were to decide not to fully exempt Federally-permitted releases from this rule, the commenter asked EPA to narrow the limitation from

"threat" to "significant threat," and to clarify circumstances under which a release is considered a threat.

EPA agrees that permits that are not sufficiently protective should be upgraded. However, upgrading of permits may not address past contamination and the upgrading may take time to accomplish. Thus, until such permits are upgraded, or until the threat to human health and the environment is otherwise addressed (e.g., through a corrective action order), EPA will not send CERCLA wastes to such facilities and thereby contribute to an unsound environmental situation. Similarly, EPA believes it is appropriate to cease sending CERCLA wastes to facilities with Federally-permitted releases if a threat to human health or the environment is posed by the release. This approach is consistent with Agency policy and the goals of CERCLA section 121(d)(3). It also maintains consistency with practices under the NCP in its handling of Federally-permitted releases. For example, the Agency lists certain sites on the NPL where an "observed release" has been documented, even if that release was Federally permitted and was within regulatory limits (47 FR 31188, July 16, 1982; 48 FR 40665, September 8, 1983).

iv. *Definition of site.* One commenter requested a definition of the term "site" (in order to understand what is "off-site"), and asked that the definition include property in the immediate vicinity of the cleanup.

In the recent revisions to the NCP, 55 FR 8840 (March 8, 1990), EPA defined "on-site" to include all suitable areas in very close proximity to the contamination necessary for implementation of the response action, 40 CFR 300.400(e)(1) (1990); this additional space would be available for treatment systems that require considerable area for construction, and for staging areas. Areas not covered by this definition come, by extension, within the definition of "off-site."

EPA believes it is essential for the sound operation of the CERCLA program to define "on-site" and "off-site" in a concerted manner. Were EPA not to apply the general definition of "on-site" to this rule, an anomalous situation would result in which CERCLA wastes transferred to the "on-site," proximate area used for implementation, would constitute an off-site transfer. Moreover, such transfers might be disallowed in many cases where the non-receiving unit (the "waste portion" of the site) had releases that were not yet controlled for purposes of the Off-site Rule.

### 3. RCRA Section 7003 Actions

EPA received three comments on the proposal not to extend this rule to cover cleanup actions carried out under RCRA section 7003 (53 FR 48221). All three commenters agreed with EPA that the rule should not apply to off-site disposal associated with RCRA section 7003 actions. Therefore, the Agency will not require RCRA section 7003 actions to comply with the off-site requirements as part of this CERCLA rulemaking.

### 4. Removals

Three commenters supported the proposed rule's exemption from the regulation for emergency removal actions in situations posing a significant threat (53 FR 48220). One of these commenters asked EPA to extend the exemption to remedial actions taken in situations of immediate and significant threat. Two commenters asked that the language be modified to confirm that private parties, as well as government entities, are eligible for the exemption.

EPA believes that an exemption for emergency removals is appropriate, and should also apply to emergencies occurring during remedial actions (e.g., occurrence or substantial threat of occurrence of fire or explosion); the final rule reflects that change. However, the Agency does not believe it is appropriate to allow private parties to use the emergency exemption without obtaining approval from a CERCLA On-Scene Coordinator (OSC). This prior approval requirement will avoid the possibility of a responsible party abusing the emergency exemption in order to use unacceptable off-site facilities which may be less environmentally sound. Note that the Off-site Rule only applies to private parties engaged in response actions that are funded or ordered under CERCLA.

Another commenter stated that it was not clear what criteria the OSC should use to determine that a facility in noncompliance with the rule can be used for off-site disposal.

EPA believes that the OSC should weigh, to the extent practicable: exigencies of the situation; the availability of alternative receiving facilities; and the reasons for the primary facility's unacceptability, their relation to public health threats, and the likelihood of a return to compliance. In some situations (e.g., fire, explosion), it may be necessary to remove materials off-site before an off-site facility's acceptability may even be reviewed.

### 5. Pre-SARA v. Post-SARA Actions

In the proposed rule, EPA explained the evolution of a system under which

different off-site requirements were applied to CERCLA wastes, depending upon whether the CERCLA decision document was signed pre- or post-SARA (53 FR 48220). One commenter argued for eliminating the confusing distinctions between pre- and post-SARA CERCLA wastes. Although the statute applies only to post-SARA decision documents, the commenter saw no reason why these requirements could not be extended to CERCLA wastes from pre-SARA decision documents, particularly given the ambiguity of the May 1985 off-site policy. Several other commenters supported simplifying the Rule generally.

EPA agrees that eliminating the different criteria for CERCLA wastes from pre- and post-SARA decision documents would simplify the understanding and implementation of the rule. The Agency's experience with the revised Off-site Policy (since 1987) has been that the dual system is confusing, and potentially subject to inconsistent interpretation. The original reason for having different requirements for CERCLA wastes from pre- vs. post-SARA decision documents was to avoid disrupting contracts and actions already in place at the time SARA (and section 121(d)(3)) were enacted. However, in response to the commenter's suggestion, EPA has surveyed the existing pre-SARA ROD contracts and the acceptability status of facilities currently receiving CERCLA wastes from pre-SARA actions. The information gathered indicates that few if any CERCLA waste transfers resulting from pre-SARA decision documents would be disrupted by application of the newer criteria.<sup>4</sup> Indeed, most facilities receiving CERCLA waste already meet both the pre- and post-SARA criteria, in order to be acceptable to receive all CERCLA waste. The elimination of separate standards for CERCLA wastes from pre-SARA decision documents would be neither burdensome nor disruptive. Therefore, in the final rule, CERCLA wastes from pre-SARA actions and CERCLA wastes from post-SARA actions are treated the same.

#### B. Determining Acceptability

In its November 29, 1988, Federal Register notice, EPA proposed, and requested comment on, allowing States that were authorized to carry out the corrective action portions of RCRA, to make off-site acceptability determinations for RCRA subtitle C

<sup>4</sup> A Memorandum summarizing the information collected is included in the docket of this rule.

facilities within their respective jurisdictions. The Agency noted that the "States often have the most direct responsibility over the potential receiving facilities \* \* \*, and thus may be in the best position to make the findings required under the Off-site Rule." (53 FR 48221) However, at the same time, EPA noted that retaining the off-site decision in the EPA Regional Offices would offer the advantages of "more easily assuring consistent application of the rule, and avoiding conflicts between the Region and the State regarding the acceptability of a facility." (53 FR 48222) Thus, the Agency specifically requested comment on whether qualifying States should make off-site acceptability determinations, or whether EPA Regions should exercise that decision-making authority.

EPA received eight specific comments on the State decision-making issue. Six of the comments objected to allowing States to make the off-site determinations, based on the need for national consistency and concerns that some States might use the off-site authority to prohibit the receipt of out-of-state CERCLA wastes. Two of these six commenters added that States should be allowed to make acceptability determinations only if they agree to follow the notice and re-qualification procedures that apply to EPA. A seventh commenter (a State) criticized the proposed approach on the grounds that it would effectively deny any input on the acceptability determination from most States, since most States are not authorized to carry out corrective action under RCRA; the commenter recommended that States be given at least 30 days to comment on a proposed decision before the facility is notified of the final acceptability status. A second commenting State suggested that the agency inspecting the facility for RCRA compliance should make the off-site acceptability determination; however, it added that "it appears obvious that it should be a joint determination."

The Agency also received four comments on a related point—the difficulty of receiving ready access to a list of acceptable facilities.<sup>5</sup> In effect, these comments indicate that it has been difficult for the public to quickly and accurately determine what facilities are

<sup>5</sup> Several commenters suggested that the present system of having ten EPA regional contacts should be replaced by a more easily implemented system under which one consolidated list would be made available to the public. However, the Agency recognizes that it would be impossible to publish a list of acceptable facilities nationwide (or even regionally), as the off-site status of facilities is constantly changing, and any such list would be outdated before it was distributed.

acceptable under even the present Off-site Policy, under which one need check with only ten regional off-site contacts. EPA has reviewed this comment in light of the issue of whether States should make final off-site determinations, and has concluded that the problem identified by the commenters would grow dramatically if the public were required to verify off-site acceptability with up to fifty State contacts. Further, allowing the State to make off-site acceptability determinations as proposed would not eliminate the need for the EPA Regional contacts; a State could not make determinations for other Federal programs, such as the Toxic Substances Control Act (TSCA). Thus, the public would be required to check with State contacts and EPA Regional contacts in order to determine which facilities are acceptable to receive certain types of CERCLA wastes. The prospect of requiring interested parties to check acceptability status with all fifty states (for portions of RCRA) and all ten EPA Regions (for other portions of RCRA, and TSCA, etc.) would place an unreasonable burden on the people who need to locate acceptable capacity.

Based on a careful review of all the comments received on the proposed rule, as well as a review of the Agency's experience to date in implementing the Off-site Policy, EPA still believes that it is essential for the off-site acceptability process to take into account the important role of the States in making compliance findings (and, in some States, release findings) under RCRA; however, the comments received and EPA's experience also demonstrate a strong need for national consistency, and for facilitating timely public access to acceptable capacity. Thus, while the basic approach and structure of the rule remains unaltered, the Agency is making several important changes in the language of the rule, in order to help make States active participants in off-site determinations, while at the same time preserving final off-site determination authority within EPA.

#### 1. State Role

The off-site acceptability determination for a facility is based, in large part, on a compliance finding and a release finding. Authorized States may make the initial compliance findings for those parts of the program for which they are authorized. If a State finds a violation at a unit of a facility, EPA will evaluate the finding for "relevance" under the rule (e.g., whether the violation occurred at the receiving unit and thus is "relevant" under the rule; "relevant" is discussed in more detail in section IV.C.4 of this preamble). If the

Agency concludes that the violations are relevant, it will issue an initial determination of unacceptability, meaning that the facility will be unacceptable to receive CERCLA wastes in 60 days unless EPA finds that the facility is operating in physical compliance with applicable law at that time.

If a State is authorized to carry out the corrective action authorities of RCRA sections 3004 (u) and (v), it may also make initial findings regarding releases at the facility. Again, EPA will evaluate such findings and, if it finds the releases are relevant under the rule, will issue an initial determination that the facility will be unacceptable in 60 days unless EPA finds that there are no uncontrolled releases at the facility at that time.

In order to further increase the States' role throughout the process, the Agency will also take the following steps:

- Encourage the free exchange of information between States and EPA Regional offices concerning violations and releases at facilities;
- Afford States the opportunity to participate in all meetings with EPA and the facility owner/operator regarding the facility's acceptability;
- Provide States with copies of all initial and final unacceptability determinations as soon as they are issued;
- Provide States with the opportunity to call for additional meetings with Regional officials to discuss the off-site acceptability of a facility, and whether a facility has returned, or can return, to compliance within the 60-day review period; and
- Provide in the rule that if the State disagrees with the EPA Region's determination (after the informal conference), it may obtain review of that decision by the Regional Administrator.

## 2. EPA's Role

Where a State does not have authority to carry out portions of the RCRA program, EPA will make the initial compliance and/or release findings. In addition, EPA will make the compliance and release finding with respect to applicable regulations under other Federal Statutes (e.g., TSCA). EPA may also make findings at facilities where the State has programmatic authority, as a supplement to State oversight. (However, in such cases, the Agency expects most findings to be made by the States.) Further, as noted above, EPA will evaluate all initial findings of violations or releases to determine whether they are "relevant" under today's rule.

Although States will make many of the initial RCRA findings for off-site

unacceptability determinations, EPA will retain the ultimate decision-making authority for all off-site determinations, including those at RCRA facilities. EPA Regional Offices, having collected information on the compliance and release status of a RCRA facility, and having consulted with the State in which the facility is located, will be responsible for determining whether a facility is operating in compliance with applicable law (and thus has no relevant violations) at the end of the 60-day period, and whether there are any uncontrolled relevant releases at the end of the 60-day period; if EPA finds that the relevant violations or releases alleged in the initial notice are supported by the facts and are continuing, the unacceptability determination will take effect, as provided below. The Regions will also be responsible for keeping up-to-date records of those RCRA facilities that are acceptable and those that are not. As discussed above, these steps will help to ensure national consistency in off-site decisions, and will facilitate timely public access to off-site acceptability information.

The Agency believes it is appropriate for EPA to retain the final authority for making off-site acceptability determinations. Because CERCLA cleanups are generally ordered or funded by EPA, the off-site determination is, in effect, EPA's business decision as to where CERCLA wastes under the Agency's control should be sent.

It is also important that EPA issue the final, consolidated acceptability determinations in order to retain control over, and help fulfill, the Agency's programmatic responsibilities. In order to plan CERCLA cleanup actions on reliable schedules, and proceed with them quickly, EPA needs to resolve off-site issues relatively quickly, and make alternative contracts and plans as appropriate. As the proposed rule explained, this was a major reason for the establishment of a 60-day period in which to discuss acceptability with the relevant parties. EPA is also sensitive to the need to afford owner/operators a reasonable opportunity to contest the violation/release finding, or to return to compliance, within this 60-day review period.

## 3. Disputes Between States and EPA

EPA intends to issue initial unacceptability determinations in cases where States have made initial findings of violations or releases that EPA finds are relevant under the final rule; thus, States may play a major role in initiating the off-site review process. EPA

Regional officials, officials from the State in which the off-site facility is located, and representatives of the facility owner/operator will then have the opportunity to meet during the 60-day review period to discuss: (1) The basis for the finding of a violation or release, (2) the relevance of the violation/release under the Off-site Rule, and (3) what steps are necessary for the facility to return to compliance or control releases within the 60-day review period (or whether sufficient steps have already been taken). After the informal conference with the owner/operator, at which the State may be present, EPA will notify the State of its program level determination; the Agency will decide whether the initial finding of a relevant violation or release was supported by the facts, and whether the violation or release is continuing (or has been controlled). If the State (or the owner/operator) disagrees with the decision by the EPA Regional staff, it may obtain a review of the decision by the EPA Regional Administrator.

EPA expects that in most cases, there will be no dispute between it and the State over these issues. However, the Agency recognizes that there may be instances where disagreements could arise with the State, or where the Agency must act independently. Following are three major examples of situations where a disagreement might occur between State and EPA officials.

First, there may be instances where the State is unable or unwilling to meet with EPA and the affected facility within the 60-day period (e.g., where the case is in litigation and the State chooses not to meet separately with one potentially responsible party). Similarly, EPA must act in certain situations without full participation from the State, such as during emergency cleanup actions. In such cases, in order to fulfill its mandates to accomplish planned CERCLA cleanups and to administer the Off-site Rule, the EPA Region may need to meet with the owner/operator independently to resolve the compliance or release problems expeditiously.

Second, a State may disagree with certain findings committed to the discretion of the Agency under the Off-site Rule, such as the finding that a violation or release is (or is not) "relevant" under the rule, or that a facility has (or has not) taken adequate steps to resolve a violation or control a release. Such findings are integral parts of the off-site determination, and must be consistently applied to facilities regulated under RCRA, TSCA, or other applicable laws. The Agency believes that in the interest of national



consistency, it is appropriate for EPA to retain the final decision-making authority in these areas. However, as with all Off-site Rule issues, the States will be invited to discuss these issues with EPA, and will be afforded an opportunity to obtain review of such decisions with the Regional Administrator.

Third, there may be isolated cases where EPA and the State disagree on the initial finding of violation or release. (This could generally be expected to arise during the review period, as EPA plans to initiate the off-site review process where the State makes a finding that EPA determines is relevant under the rule.) In such cases, EPA will consult with the State, and the State may request additional meetings with the Agency. However, in order to fulfill its obligations under the statute, EPA must have the ability to make an independent assessment of the facility's status at the end of the 60-day period to determine if the facility is currently operating in compliance and/or has any uncontrolled relevant releases, for the limited purpose of the Off-site Rule. These judgments do not prevent the State from pursuing an enforcement action for past violations, or even arguing that violations are continuing.

It is important to note that the question of whether or not a unit is operating in compliance, or has returned to physical compliance, is an issue separate and distinct from the question of whether an enforcement action for past violations is appropriate. The statute clearly focuses the acceptability determination on present compliance: CERCLA wastes "shall only be transferred to a facility operating in physical compliance with" RCRA or other applicable law (CERCLA section 121(d)(3)). Thus, where a facility has returned to compliance and, where appropriate, changed its operations to prevent recurrence, the facility "is operating" in compliance and should not be unacceptable under the Off-site Rule simply because a complaint for past violations is still pending.<sup>6</sup>

#### 4. No Cooperative Agreement Requirement

Under the proposed rule, EPA had suggested allowing States that were authorized to carry out RCRA corrective

<sup>6</sup>Of course, in some cases, the violation cannot be undone and may be argued to be a "continuing violation." EPA has already addressed this case by providing a mechanism for returning to compliance by resolving the violation, including penalties and any enforcement actions brought by EPA. See proposed rule at 53 FR 48229, November 29, 1988; see also discussion below, at section IV.C.4, and IV.H.4.

action to make the off-site determinations if they were found to be capable, under a CERCLA Core Cooperative agreement, of carrying out certain functions. Because the Agency has decided to retain the authority to make the final determination, and use State findings as a basis for the initial determinations, there is no longer a need for States to enter into such agreements for the purpose of the Off-site Rule.

#### 5. Facility Acceptability Status

Section 300.440(a)(4) of the proposed rule (53 FR 48232) stated that "[a] facility is acceptable until the responsible Agency notifies the facility otherwise"; the scope of this section needs to be clarified. For facilities that have already been notified that they are acceptable under the rule (or the preceding policy), the facility would remain acceptable until EPA determines otherwise according to the provisions of final rule § 300.440(d). This allows both receiving facilities and CERCLA site managers adequate time to respond to new circumstances. By contrast, the language quoted above was not meant to apply to facilities for which EPA has never made a determination of acceptability under this rule (or the preceding policy), and at which CERCLA wastes are not likely to be in transit; for such facilities, EPA believes that affirmative determinations of "compliance" and "control of releases" are necessary before a facility may be deemed acceptable for the receipt of CERCLA wastes, consistent with the language of CERCLA § 121(d)(3).<sup>7</sup> Final rule § 300.440(a)(4) has been revised to clarify this point.

#### C. Determining Acceptability-Compliance Criteria

##### 1. Inspection Requirements

Section 300.440(c)(1) of the proposed rule provided that a facility "must have received an appropriate facility compliance inspection within six months prior to receiving CERCLA waste" (53 FR 48232). Three commenters expressed concern that a receiving facility, which would otherwise be in compliance, could be penalized because of the failure of the

<sup>7</sup> Although EPA will meet with the owner/operators of such facilities during the 60-day period after a relevant release or violation is found, the Agency does not believe that it would be appropriate to accord a 60-day period of acceptability to such facilities, where the available information indicates non-compliance or uncontrolled releases, and no disruption to on-going CERCLA cleanups would be occasioned by the finding. Final rule section 300.440(d)(3) has been revised to clarify this point.

regulatory agency to conduct inspections at the required frequency. One of these commenters objected to being penalized for EPA or State tardiness, and believed that the rule suggested that EPA could not conduct an inspection during the 60-day period following a Notice of Unacceptability.

EPA continues to believe that periodic inspections to update information on facilities receiving CERCLA wastes are important to the effective implementation of this rule, and the Agency will address the recommended frequency of inspections in guidance. The Agency notes that inspections are already carried out under a number of regulatory programs, such as RCRA. EPA agrees that the absence of an inspection six months prior to the receipt of CERCLA waste (or the absence of a CME or O&M inspection for RCRA land disposal facilities within one year prior to the receipt of CERCLA wastes) should not in itself be grounds for unacceptability, unless the facility refused to allow an inspection to be performed. The requirement for updating inspections within a defined time frame has thus been eliminated from final rule § 300.440(c). (Of course, as discussed above, final rule § 300.440(a)(4) maintains the requirement for an affirmative determination of acceptability when a facility first seeks to receive CERCLA wastes under this rule, and this may involve a compliance and release inspection.) In response to the last comment, EPA would like to clarify that the language in the proposal was not meant to suggest that EPA could not, if appropriate, conduct an inspection during the 60-day review period.

##### 2. Receiving Unit

Several commenters supported the definition of "receiving unit" as that unit which directly received the waste in question (53 FR 48222). This definition remains the same in the final rule.

##### 3. Facility

Three commenters supported the proposed definition of "facility" (53 FR 48222); however, one commenter questioned the concept of facility-wide violations that could render the entire facility unacceptable, rather than just the violating unit. The commenter asked for a clear and precise example of both unit-specific and facility-wide violations.

Examples of facility-wide violations include the failure to have or comply with the facility's waste pre-acceptance procedures, waste analysis plan, contingency plan, financial



responsibility requirements, and the closure plan. Criminal violations also create a lack of confidence in a facility's ability to handle waste at any unit, and thus may also be considered "facility-wide." Unit-specific violations include failure to comply with the design and operating requirements.

#### 4. Relevant Violations

Numerous commenters asked for clarification concerning the definition of relevant violations, as set out in the proposed rule (53 FR 48223-48232), and more precise guidance regarding what constitutes a relevant violation. Many commenters also had suggestions on what the definition of relevant violation should include.

One commenter suggested that relevant violations be limited to violations that pose a threat to the physical integrity of the disposal unit; EPA finds this suggestion unacceptable. The environmental laws and regulations contain many requirements, all of which have been determined to be important to assuring the protection of the environment. For example, financial assurance requirements and ground-water monitoring are critical to a facility's safe operation, although neither involves a present threat to the physical integrity of the disposal unit. The legislative history specifically refers to excluding only minor paperwork violations when determining whether a facility is in compliance. H. Rept. 962, 99th Cong., 2nd sess. at 248 (1986). The statute specifies that the facility must be operating in compliance with RCRA (or, where applicable, with TSCA or other applicable law) and all applicable State requirements. Therefore, it would not be reasonable for EPA to offer broad generic exclusions, like those proposed by commenters, for "isolated instances of noncompliance," violations which do not threaten human health and the environment, or violations that are not of an "ongoing nature." These suggestions are not consistent with the mandate of the statute. Further, these types of relatively minor violations may often be resolved within the 60-day review period, before a determination of unacceptability would take effect at the violating facility. The definition of relevant violation from the proposed rule is retained without change (Section 300.440(b)(1)(ii).) In general, EPA believes that relevant violations will generally be Class I violations by high priority violators (HPVs). Guidance for determining what is a Class I violation or HPV can be found in the Revised RCRA Enforcement Response Policy (OSWER Directive No. 9900.0-1A). Criminal violations (after the issuance of

an indictment) are also generally relevant violations.<sup>8</sup>

One commenter asked the Agency to delete the word "include" from the first sentence of the discussion of relevant violation in § 300.440(b)(1)(ii), as it implies that matters not listed in the section may also be included as relevant violations. The Agency has decided to retain the word "include" in the final rule, as deleting the word could unnecessarily limit the Agency's discretion in making determinations regarding what constitutes a relevant violation under the rule. Although EPA has attempted to describe the type of violation that would be deemed relevant, it cannot foresee all possible circumstances. EPA will evaluate findings of violation and determine if they are relevant under the rule on a case-by-case basis; parties will have an opportunity to discuss that decision with EPA during the 60-day period for the review of the unacceptability determination.

Another commenter maintained that the prohibition on relevant violations should apply to the entire facility, rather than just the unit(s) receiving the waste.

EPA has decided to continue to limit the application of relevant violation criteria to the receiving unit except in cases where the violation affects the entire facility. As explained in the proposed rule, EPA believes that this interpretation is consistent with Congressional intent that response actions be designed to ensure that no new environmental problems are created; this goal is accomplished by sending CERCLA wastes only to units that are in compliance with applicable Federal and State requirements (and at which releases are controlled). See 53 FR 48223-48224. In addition, this interpretation furthers the Congressionally-mandated preference for treatment by allowing the use of incinerators and alternative treatment technologies even if there is some violation elsewhere on the property. See 53 FR 48222-23. At the same time, the release criteria do apply to non-receiving units, and ensure that CERCLA wastes will not be sent to facilities where significant, uncontrolled releases are occurring at any unit.

Another commenter objected to requiring facilities to meet any requirements, other than compliance with a RCRA permit. In response, the rule does not impose any direct requirements on RCRA facilities; it

simply provides that CERCLA wastes may not be transferred to a RCRA facility that is out of compliance or that has uncontrolled releases. Congress specifically recognized that leaks at RCRA facilities might not constitute violations, and thus a requirement to control releases was added. See 53 FR 48219-48220 (proposed rule).

Finally, one commenter asked EPA to clarify what an applicable State environmental law was and who (EPA or the State) has the final say over whether a particular environmental law is applicable.

EPA, after conferring with the State, will determine what State and Federal laws are applicable, and if the facility is operating in compliance with those laws. In most cases, EPA expects to reach consensus with the State as to a facility's compliance with State requirements. However, EPA will make its own independent determination on a facility's return to compliance for the purpose of the Off-site Rule. EPA emphasizes that a facility will be deemed acceptable under the rule if it demonstrates to EPA's satisfaction that it is operating in compliance with applicable laws and has addressed all relevant releases. EPA can be satisfied that a facility has returned to physical compliance with State law even if there is an outstanding State enforcement action. The only situation in which off-site acceptability will be conditioned upon resolution of all legal actions is where the violation cannot be "undone." For example, if a facility had incinerated wastes not specified in its permit, or disposed of unpermitted wastes in a manner that to require their removal would cause harm, EPA will not require recovery of the waste as a condition for returning to acceptability; however, in such cases EPA would not consider the facility to have returned to compliance until certain steps were taken, such as the payment of penalties, thus removing any economic advantage the facility may have enjoyed during the period of violation. See 53 FR 48229. (A similar approach may be appropriate for facilities with criminal violations; the payment of penalties, institution of new training procedures, and other such steps may be necessary in order to restore confidence that the facility can again safely handle CERCLA wastes.) Conversely, a facility that had been out of compliance with ground-water monitoring or financial assurance requirements, but that had brought the ground-water monitoring system back into physical compliance or met its financial assurance obligations could be considered to have returned to physical compliance even if legal actions were

<sup>8</sup> See the proposed rule, 53 FR 48224; Off-site Policy, at p. 18; and Memorandum from Bruce M. Diamond, "Off-site Policy Implementation Issues," (August 29, 1988).

outstanding or penalties had not been paid.

"Physical compliance" does not include being in compliance with a schedule to return to physical compliance.

#### 5. Minimum Technology Requirements (MTRs)

EPA received conflicting comments on the proposal to require a RCRA Subtitle C land disposal unit to comply with the more rigorous minimum technical requirements of RCRA § 3004(o) in order to be acceptable to receive RCRA hazardous wastes from a CERCLA cleanup (53 FR 48224). EPA believes that this requirement is appropriate in order to assure that CERCLA waste that are RCRA hazardous wastes remain safely disposed of in the future. HSWA established minimum technology standards for new land disposal facilities (i.e., facilities commencing construction after Nov. 8, 1984). These standards are more stringent than the requirements for existing (i.e., pre-1984) land disposal facilities because Congress considered existing requirements to be inadequate to prevent hazardous waste from entering the environment. Of course, waivers from MTRs are allowed if the owner/operator can show that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous waste constituent into the ground water or surface water at least as effectively as the required liners and leachate collection system. (40 CFR 264.301) An MTR unit is less likely to have future problems than a non-MTR unit, and therefore the requirement that receiving RCRA Subtitle C land disposal units must meet MTRs is consistent with Congressional intent not to send CERCLA wastes to land disposal units that may leak.

#### 6. Facilities Operating Under a RCRA Exemption and Non-RCRA Facilities

One commenter suggested that a facility operating under a RCRA exemption should still have to meet certain conditions, such as justifying the exemption, obtaining all necessary permits, and passing an inspection. EPA agrees that facilities subject to a RCRA exemption are still covered by the Off-site Rule. CERCLA wastes may be transferred to such a facility only if the facility is operating in compliance with applicable law (which for some facilities operating under a RCRA exemption may still include some provisions of RCRA), has obtained all necessary permits (if any), and has controlled any

environmentally significant releases. EPA will rely upon information developed during inspections in making such determinations. These requirements were specifically set out in the proposed rule for other-than-RCRA facilities, and remain in the final rule as requirements (53 FR 48225-26; proposed §§ 300.440(b)(1), 300.440(b)(2)(D)).

#### D. Determining Acceptability-Releases

##### 1. Identifying Releases

For all RCRA Subtitle C facilities, a facility-wide investigation (e.g., a RCRA Facility Assessment (RFA) or a Preliminary Assessment/Site Investigation (PA/SI)) by the responsible Agency is necessary to determine if a release has occurred, or if there is a substantial threat of release, prior to its initial use for the receipt of off-site CERCLA wastes. (Once a facility has been found to be acceptable, it remains acceptable until EPA notifies the facility otherwise, as provided in § 300.440(a)(4) of the rule.) If a release has been identified outside the scope of such an investigation, completion of the investigation is not necessary prior to issuing a notice of unacceptability or initiating a corrective action program (in such situations, the corrective action program should be designed to include a facility-wide investigation). Although the performance of a facility-wide investigation is no longer discussed in the rule (see proposed rule § 300.440(c)(2)), it remains an important part of the off-site evaluation program.

One commenter objected to including "substantial threat of a release" in the definition of release (53 FR 48224), claiming that this exceeds EPA's statutory authority.

Although CERCLA section 121(d)(3) does not specifically state whether or not a "substantial threat of release" is intended to be covered by the terms of the provision, EPA believes that the inclusion of substantial threats is consistent with the intent of the section that CERCLA wastes be transferred only to environmentally-sound facilities, and that they not add to environmental problems. Where there is a substantial threat of a release, e.g., a crack in a containment wall, the transfer of CERCLA wastes to the site would not be environmentally sound.

Even if the statute is not read to compel this result, EPA believes it is a sound one as a matter of policy under CERCLA. It is within the Agency's authority to respond to both releases and "substantial threats of release" under CERCLA section 104. It would be inconsistent with the purposes of

CERCLA sections 104 and 121(d)(3) and the goal of protecting health and the environment, for EPA to transfer CERCLA wastes to facilities where a substantial threat of release has been identified, and thus where the threshold for a CERCLA response action has been met. The general position that both "releases" and "substantial threats of releases" are serious causes of concern is reflected in the definition of "release" in the NCP revisions (40 CFR 300.5), which states that for the purposes of the NCP, release also means threat of release.

Three commenters questioned the criteria EPA will use to determine whether a release exists. One commenter asked EPA to provide more specific criteria for when the Agency may find a site to be unacceptable based on a relevant release, while two other commenters asked that determinations of unacceptability be grounded on very firm evidence, using objective criteria.

In evaluating releases and threatened releases, the Agency believes that it should rely on all available information, including information on the design and operating characteristics of a unit. The determination that there is a release (including a substantial threat of a release) may be made based on sampling results or may be deduced from other relevant information. For instance, as discussed in the proposed rule at 53 FR 48225, a broken dike may be evidence of a release (or of a substantial threat of release). In order to protect public health and the environment, and prevent CERCLA cleanups from contributing to future problems, the Agency needs to consider relevant information in addition to sampling data.

However, EPA does not have "unfettered discretion" in this regard, contrary to the comments of one party. The Agency will first make findings based on available information; the owner/operator will then have 60 days to offer evidence to the contrary if the facility disagrees with the Agency's findings. Finally, if the owner/operator disagrees with EPA's final decision, it may request a review by the Regional Administrator.

The final rule, therefore, will continue to allow the Agency to make release determinations based on information other than sampling data.

##### 2. De Minimis Releases

In the proposal, the Agency interpreted the concept of release in section 121(d)(3) not to include *de minimis* releases (53 FR 48224). Several commenters supported the *de minimis* exemption, but disputed the narrow

scope of the exemption. One commenter argued that only those releases that pose a threat to human health and the environment should render a facility ineligible. Two commenters disagreed with the example of a non-*de minimis* release between landfill liners, and asked EPA to correct this misunderstanding when issuing the final rule, by stating that accumulations of liquids between the liners are not "releases into the environment."

The statute directs EPA not to transfer CERCLA wastes to a unit of a land disposal facility that is releasing "any" hazardous waste, or constituent thereof, into the environment (CERCLA section 121(d)(3)(A)), and to control "all such releases" from non-receiving units (section 121(d)(3)(B)). Contrary to the suggestion of the first commenter, the language of the statute does not provide that "only releases that pose a threat to human health and the environment" should render a land disposal facility unacceptable under the Off-site Rule. As explained in the proposed rule, 53 FR 48219-48220, Congress was very concerned about leaking land disposal units, and set out in section 121(d)(3) a very stringent standard for the transfer of CERCLA wastes to such units. (The Agency has greater discretion for setting a standard for units that were not addressed by the statute.)

EPA recognized, however, that there are releases of such a minor nature as to be considered "*de minimis*," or of such a trifling nature that the law does not take notice of them. See *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979); Black's Law Dictionary (4th ed.), West Publishing, 1968, at p. 482. EPA considers a *de minimis* release as substantially less than a release that poses a threat to human health and the environment. Releases will be considered to be *de minimis* only in exceptional cases. To aid the public, the Agency has attempted to identify some examples: releases to the air from the temporary opening and closing of bungs, and emissions of non-toxic and non-regulated substances from units not otherwise subject to Federal or State permits.<sup>9</sup> *De minimis* releases will be exempt from the definition of release.

However, as two of the commenters noted, one example in the proposed rule was incorrect: "releases" between

liners. The accumulation of liquid between liners that are controlled by leachate collection systems does not involve a release to the environment; thus the presence of leachate between liners will not necessarily make a unit unacceptable.

### 3. Releases to the Air

Two commenters stated that until the promulgation of regulations for the control of air emissions from hazardous waste management units (under RCRA section 3004(n)), it is impossible to tell what releases are normal during hazardous waste management operations. Thus, they argued that air releases should not be considered as a basis for unacceptability under the Off-site Rule at this time.

In response to the comments, EPA agrees that standards do not yet exist for differentiating between acceptable releases to the air and air releases that may pose a threat to human health and the environment. Because almost all liquids evaporate or volatilize, air releases of some kind may be expected at almost every site, making a "no release to air" standard unrealistic. Indeed, the statute does not restrict the use of units with releases to the air. See section 121(d)(3)(A). Thus, as a matter of policy, air emissions not otherwise permitted that result from hazardous waste management units will be considered releases under this rule only if they exceed the standards promulgated under RCRA section 3004(n) (when they have been promulgated). However, until the section 3004(n) rule is final, air emissions from such units will be considered releases where they are found to pose a threat to human health and the environment. Similarly, air emissions that are not covered by RCRA section 3004(n) standards will be considered releases under this rule only where they are found to pose a threat to human health or the environment.

### 4. Other Releases

One commenter was concerned that releases from non-receiving units at RCRA Subtitle C land disposal facilities could result in unacceptability of the entire facility. Specifically, the commenter stated that § 300.440(b)(2)(B) could preclude the use of an incinerator at a land disposal facility where a non-receiving unit has a release. The commenter agreed with prohibiting the use of a land disposal unit in a land disposal facility with a leaking non-receiving unit, because there are likely to be similar problems with other units. The commenter argued that these

problems have no relation to incinerators.

The legislative history (see, e.g., 53 FR 48219-48220), shows that Congress was very concerned about releases to the land. That concern was reflected in the statute by providing special statutory requirements for the transfer of any hazardous substance or pollutant or contaminant from a CERCLA site to a land disposal facility. By providing that EPA may not use land disposal facilities with uncontrolled releases at non-receiving units, the statute suggests that EPA should not, through CERCLA cleanups, do business with facilities that have leaking land disposal units. Sending CERCLA wastes to facilities at which relevant releases have been controlled avoids adding to environmental problems, and furthers the Congressional policy to reward only the best facilities with CERCLA contracts.

The fact that the receiving unit may be an incinerator does not change this analysis. The environmental damage from leaking units is still present. Further, unlike receiving units at a land disposal facility which must eliminate all releases, non-receiving units need only "control" their releases in order to be acceptable, a reasonable step to require before deeming the facility acceptable to receive the government's CERCLA waste. Finally, as RCRA regulations make clear, the presence of a single land disposal unit makes a facility a land disposal facility (see proposed rule, 53 FR 48225); therefore, where an incinerator is part of a facility with land disposal units, the final rule still requires compliance with the release requirements for land disposal facilities in order for the incinerator to be acceptable to receive CERCLA wastes.

### E. Notification of Acceptability

#### 1. Management Options for Loss of Acceptability

Two commenters asked EPA to discuss the ramifications on a cleanup contract if the disposal facility becomes unacceptable during a remedial action. They also asked that claims from a contractor be made an eligible cost of the action.

Loss of acceptability during a response action constitutes an implementation problem that will be handled on a case-by-case basis through the contracting process with the individual facility. EPA does not believe that this needs to be addressed in the rule. There are, however, several points to note.

<sup>9</sup> One commenter misread language in the preamble to the proposed rule (53 FR at 48224) as saying that *de minimis* releases are "any releases that do not adversely affect public health or the environment" rather than merely minimal releases—with no adverse effect—like those set out in the examples in the preamble. To the extent the prior language was confusing, it is clarified by the discussion in this preamble statement.

In most cases, there will be a 60-day review period before the initial notice of unacceptability takes effect. The facility may use this time to take steps to return to acceptability, and thereby avoid disruption of the remedial action. This 60-day time period was also provided to afford the lead agency the opportunity to arrange for alternative disposal capacity (if the remedy will not be completed within the 60 days, or the facility is not expected to return to compliance in 60 days) (53 FR 48227). Second, the issue of who should bear added costs stemming from a facility's loss of acceptability must be a matter of contract negotiation between the parties. Finally, the Regional Administrator does have the discretion to extend the 60-day period if all factors, such as a lack of available alternative disposal capacity and a low threat to human health and the environment, so warrant.

## 2. Potential Unacceptability

One commenter asked for clarification in both the preamble and the rule on the relationship between the initial notice of potential unacceptability and the ability of a facility to continue to receive CERCLA wastes for 60 days after the notice of unacceptability (§ 300.440(d)(3)). In addition, the commenter believed that a determination of unacceptability should be published in the Federal Register.

The receipt of an initial notice of potential unacceptability does not usually render a facility unacceptable unless or until the final determination has been made and takes effect (usually 60 days after the initial notice, or after an alternative time period as provided under § 300.440 (d)(8) or (d)(9)) (53 FR 48227). As discussed earlier, a facility for which EPA has never made a determination of unacceptability will not be afforded a 60 day period of acceptability after the initial notice. Note that in exceptional cases, unacceptability notices can be made immediately effective. See 53 FR 48227-48228. EPA will not publish unacceptability notices in the Federal Register; because of the ability of a facility to take steps to return to compliance at any time, acceptability status is dynamic, and many such notices will be out of date before they get published. In addition, such a publication requirement would obligate EPA to publish in the Federal Register notices of when facilities returned to compliance; the effort involved would be significant (with little assurance of being timely), and could detract from more important Agency business. Rather, EPA maintains an up-to-date record of the acceptability status of

commercial facilities in each Region. This information is available to parties directly involved in locating sites for disposal, and to the interested public, from the "Regional Off-Site Contact" in each Regional Office. A list of these coordinators and their telephone numbers is included as Appendix I to this preamble, and updated lists will be available from the Superfund Hotline and Superfund docket.

## F. Review Procedures

### 1. Agency Response Time

Two commenters asked EPA to identify a specific time frame for Agency review of a facility's return to acceptability status, and a specified response time for review of unacceptability determinations by the Regional Administrator (the commenter suggested that the appeal to the RA should be completed within the 60-day review period).

EPA does not believe it is feasible or appropriate to establish a specific time frame within which it must respond to a facility's request to return to acceptability (whether that request comes within the 60 day review period or after a final determination of unacceptability has been issued). Although the Agency is committed to making every effort to respond to such requests as quickly as the case allows, the Agency cannot allow its priorities to be driven by artificial deadlines. Further, if the Agency were not able to verify a facility's alleged return to compliance by a required date, and in fact the company had not returned to compliance, CERCLA wastes would be transferred to unacceptable facilities, in violation of CERCLA section 121(d)(3). Companies that are unacceptable must bear some responsibility for their status; EPA will attempt to evaluate a return to acceptability as promptly as practicable.

As to the comment that the appeal to the Regional Administrator should always conclude within the 60-day review period, EPA notes that the statute establishes a critical mandate: the Agency shall not send CERCLA wastes to unacceptable facilities. The Agency has already provided a reasonable period for review and comment after an initial finding of violation, during which time the facility will have an opportunity to meet with Regional officials. As an added protection, EPA has provided a right to appeal the staff-level decision to the Regional Administrator, who will issue a decision as soon as possible. However, EPA cannot allow this process to routinely continue indefinitely, and it cannot violate Congress' clear direction

not to send CERCLA wastes to facilities with relevant violations or releases. For the reasons set out at 53 FR 48227, the Agency believes that a 60-day review period is a reasonable compromise among competing interests. Of course, the Regional Administrator has the discretion to extend the 60-day period, if appropriate, depending on the factors in the case. In deciding whether to extend the 60-day period, the Regional Administrator should, for example, consider the need to proceed with the cleanup expeditiously and the nature of the violations or releases found at the facility (i.e., the potential danger in continuing to send wastes to the site), against the adequacy of the record developed at the staff level and the due process concerns of the facility.

### 2. Notification of Immediate Unacceptability

In the proposed rule, EPA stated that "in case of either an extension or immediate unacceptability, the facility should be notified as quickly as possible" (53 FR 48228). One commenter asked that in cases where immediate unacceptability is triggered, the owner/operator be notified within 24 hours.

The Agency will make every effort to notify a facility as soon as possible after a finding of immediate unacceptability. In many cases, this may be within a 24-hour period. The Agency notes as well that in serious safety or emergency situations, it may be appropriate to make a finding of unacceptability effective in less than 60 days, although immediate unacceptability is not required. The rule has been changed to reflect this fact.

### 3. Potentially Responsible Parties

One commenter asked EPA to ascertain whether a determination of unacceptability might have an impact on removal or remedial actions being conducted by potentially responsible parties (PRPs). The commenter maintained that a representative of the PRPs should be allowed to attend any conference held on the determination of unacceptability.

A determination of unacceptability may have an impact on PRP actions if those actions are being conducted pursuant to a CERCLA authority or using CERCLA funds (e.g., a mixed funding case); in such a case, off-site transfers of CERCLA wastes would be required to comply with this rule.

EPA does not believe that it is necessary to invite PRPs to participate in its deliberation on acceptability determinations (although EPA may do so in appropriate cases). The effect of

acceptability determinations on PRPs involved in CERCLA actions is limited to determining where they can transport their waste. The parties most knowledgeable about the facility's status—the owner/operator, EPA and the State—already participate. The possible need for some PRPs to make alternative arrangements for transport of a CERCLA waste is not a direct element of an acceptability determination.

### G. Due Process Issues

#### 1. Potential Loss of Business

One commenter asserted that the Off-site Rule may infringe on the constitutionally protected interests of private parties; specifically, the commenter argued that the "opportunity" to compete for business is denied whenever EPA determines that a facility is unacceptable. Such decisions have a negative impact on a company's reputation, further subjecting them to a potential loss of business, and therefore, these decisions must be made within the confines of the due process clause.

As noted in the preamble to the proposed rule (53 FR 48226), EPA agrees that facilities with valid RCRA permits are authorized to receive certain types of wastes and have the opportunity to compete for those wastes, but it does not create the right to receive any particular waste shipments, from the government or any other party. EPA is, at the same time, sensitive to the company's concerns that EPA's process for deciding which facilities to use must be a fair one. Thus, Congress has established the parameters for that decision-making process (i.e., no shipments to violating or leaking facilities), and has required a minimal procedural process. In implementing the Congressionally mandated scheme, this rule sets out a 60-day period for a meeting with Regional and State officials, an opportunity for comment, a decision by the appropriate Regional Waste Management Division, and then the opportunity for appeal to the Regional Administrator. The final rule makes review by the EPA Regional Administrator available to the State and the receiving facility owner/operator, as compared to a discretionary matter left up to the Regional Administrator.

EPA has made every effort to establish procedural protection for affected facilities that will ensure that off-site acceptability determinations are made in a careful and consistent manner. The Agency believes adequate due process protection has been provided. With regard to the comment of a negative impact from the off-site determination,

EPA addressed this issue in the proposed rule (53 FR 48226–48227). An EPA decision not to use a facility is simply a response to, and recognition of the finding of a violation or release. The facility must accept some responsibility for its actions (or inactions) and negative impacts which may result.

#### 2. Payment of Penalties

A commenter charged that off-site determinations are a means of forcing the payment of penalties and of forcing an owner/operator to forego the right to appeal corrective action orders or permit provisions; the commenter argued that payment of a penalty should be irrelevant to whether the facility has corrected the violation. Further, the commenter asked that the burden in § 300.440(e) for establishing acceptability during challenges to corrective action decisions, should be reversed to provide that a facility is acceptable during the period of an appeal, unless EPA (rather than the facility) can demonstrate that interim measures are inadequate and that other corrective action measures are necessary to protect human health and the environment.

As stated earlier in this preamble (section IV.C.4), the question of whether or not a facility has returned to physical compliance with applicable laws is generally separate and distinct from the question of whether penalties may be appropriate for past violations; a company's right to appeal any penalties associated with underlying violations is unaffected in most cases. However, EPA has identified one major exception to this rule. Where a violation cannot physically be "undone" (or the Agency has determined that it is safer to leave waste in place), one can argue that the receiving unit is "tainted," and that the violation is a continuing one. In order to avoid such a harsh result, EPA has provided that in such cases, the facility may be said to have returned to physical compliance after any required steps have been taken to prevent recurrence of the violation, and any outstanding penalties to EPA have been paid (see 53 FR 48229). EPA needs assurance that there will be no repetition of the violation, and the payment of a penalty helps provide that needed assurance. In effect, it is the preventive measure plus the penalty that "corrects" the violation in these cases. Thus, the Off-site Rule is not "forcing" the payment of penalties; in most cases, such payment is not required to achieve acceptability. Where physical compliance is not technically achievable, or would be extremely difficult to achieve (e.g., excavating entire landfills or draining entire surface

impoundments at great risk to workers or the environment), the Agency has provided another avenue for correcting violations.

Similarly, EPA is not "forcing an owner/operator to forego the right to an appeal." Congress has directed EPA to clean up Superfund sites expeditiously, and at the same time not to send CERCLA wastes to sites that are in violation of applicable laws or that have uncontrolled relevant releases. Thus, the Agency must make these latter determinations promptly, while allowing the owner/operator a reasonable right to review. EPA believes that the 60-day review period with access to two levels of decisionmakers, as provided under this rule, represents such a balance. However, withholding decisions during months and years of administrative and judicial challenge would not allow the Agency to comply with its statutory mandate, and would encourage dilatory appeals. (See discussion at 53 FR 48228.)

On the appeal issue specifically, EPA has gone even further, providing an additional mechanism for an owner/operator to be considered acceptable during interruptions in corrective action to control releases due to the need to pursue permit modifications. Although the statute conditions acceptability on the "control" of releases, and no corrective action will be on-going under the permit or order during corrective action appeals or permit modifications, EPA will consider the facility acceptable if the Agency is satisfied that sufficient interim corrective action steps are underway, or if it is convinced that no corrective action is needed during the interim period. Thus, a facility wishing to remain acceptable and wishing to appeal may do both. Contrary to a commenter's suggestion, this burden is properly on the owner/operator, if it wishes to remain acceptable during the period of its permit modification appeal. After a certain point, the Agency must be able to get on with its business of cleaning up sites.

#### 3. Review of Determination Decisions

One commenter argued that the procedures set out in the proposed rule for review of off-site unacceptability determinations (53 FR 48227) would not promote consistency in decisionmaking, which a district court found to be a serious flaw in the original Off-site Policy. The commenter requests the right to an expeditious review by an impartial decisionmaker (someone other than the person who originally made the decision), and a right to review of EPA Regional decisions by EPA Headquarters (preferably the General Counsel).

EPA believes that it has established a system of review which will promote consistency in decisionmaking. The procedures to be applied are clearly set out, and will be overseen by coordinators in the ten EPA Regions. The Agency intends to provide training and guidance to these coordinators in order to assure consistent applications. The consistency problem identified by the district court and cited by a commenter, stemmed from implementation of the May 1985 Off-site Policy, which was dramatically more limited in scope and procedures than this final rule. Procedures for notice and opportunity to comment by affected facilities were added by the revised Off-site Policy in November 1987, and those procedures are being expanded by this rule. Moreover, the fact that such procedures will now be legally enforceable regulations—as compared to policy guidance—adds to the certainty that the procedures will be consistently followed.

The request for expeditious review by an impartial decisionmaker, other than the person who originally made the decision, is satisfied by the provision in the final rule for appeal to the Regional Administrator. The Regional Administrator is not involved in the day-to-day compliance and release findings of the Regional Waste Management Divisions, and does not make the initial acceptability determination based on the meetings with the owner/operator within 30 days of the notice letter. Rather, the Regional Administrator supervises all operations of the Region, and is available to hear appeals from those decisions, if requested.

It has been EPA's experience under the revised Off-site Policy that Regional Administrators do not rubber-stamp staff recommendations on off-site acceptability, and have overruled or remanded such recommendations in appropriate cases. The courts have further stated that Agency decisionmakers are presumed to be unbiased. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

#### 4. Review Procedures

One commenter argued that the informal conference and written comment procedure (described at 53 FR 48227) is not sufficient for review, and suggested using the procedures proposed in 40 CFR 32.312 (d) and (e) (52 FR 39202, Oct. 20, 1987). This refers to proposed regulations for Debarment and Suspension under EPA Assistance, Loan, and Benefit Programs, which provide for an informal hearing without formal rules of evidence or procedure;

opportunity to appear with counsel, submit documentary evidence, and present and confront witnesses; and a transcript of the proceedings to be made available to the respondent.

The more complex debarment procedures are not appropriate for the Off-site Rule. The review procedures set out by EPA under the Off-site Rule already provide for an informal hearing, opportunity to appear with counsel, and submission of documentary evidence. EPA does not believe it is appropriate or necessary to call and confront witnesses in order to determine if the facility's operations reveal relevant violations or releases. Moreover, a key distinction between the two sets of rules is that acceptability is within the control of the owner/operator; unlike a disbarment for a set period of up to three years, unacceptability status may be terminated once the facility returns to physical compliance or controls relevant releases.

The informal procedures set out in the Off-site Rule are also consistent with the purpose and terms of the statute. CERCLA requires swift action in these cases; the use of procedures provided in this rule allow relatively quick action, while providing due process. Further, the procedures go well beyond those required in the statute (simple "notification") and those suggested in the Conference report on SARA ("an opportunity to meet informally," and "post-determination dispute resolution procedures" for release determinations). (See 53 FR 48227.)

EPA notes that only one commenter suggested that the rule's review procedures were inadequate.

#### 5. Notification of Decisions

The proposal, at 53 FR 48227, provides that the Agency will inform the owner/operator "in writing" of its decision after the informal conference and review of comments. EPA thus agrees with the comment that the basis for all decisions should be clearly articulated in writing. EPA also agrees that owner/operators should receive responses to their major comments on the acceptability decision. Regions will specify in notices of unacceptability why a facility or unit has been found unacceptable, and in post-conference decisions why a final unacceptability determination has been made. Such steps will also facilitate the review by the Regional Administrator, who may limit review to the underlying record.

#### H. Re-Evaluation of Unacceptability

##### 1. Thresholds/Enforceable Agreements

One commenter asked for a clarification on the threshold that will render a facility inappropriate for accepting waste.

The criteria for determining when a facility crosses the threshold into unacceptability are described in § 300.440(b). In short, for a facility to be acceptable to receive CERCLA wastes, it must have no relevant violations under applicable law, and it must control all relevant releases (and, for certain categories of facilities, eliminate all relevant releases at the receiving units). EPA will determine whether these criteria have been met based on regular inspections.

The commenter also objected to the requirement that a Federal facility must control relevant releases under an "enforceable agreement" in order to be acceptable to receive CERCLA wastes (53 FR 48229). The commenter noted that there may be fully-permitted units at Federal installations that could safely accept CERCLA wastes; however, these units will be unavailable because of the presence of releases elsewhere on the installation that are part of a facility-wide investigation, but not under an enforceable agreement. Thus, agencies would be forced to use facilities off the Federal property for receipt of CERCLA waste, adding to costs and delay.

Congress clearly stated that CERCLA wastes should not be transferred to leaking units at land disposal facilities or to land disposal facilities with leaking non-receiving units that are not being "controlled." EPA maintains that an enforceable agreement is necessary to ensure that such releases are controlled, and to ensure the continued implementation of a corrective action program approved by EPA or, when appropriate, the State. EPA sees no reason why Federal facilities should be treated differently from private parties (see CERCLA section 120(a)). Although it might be easier for some Federal facilities to use active RCRA units on their property to receive CERCLA wastes, they may only do so if those units meet the conditions set forth in this rule. The requirement to have relevant releases at non-receiving units controlled by an enforceable agreement may be satisfied through a permit (e.g., the corrective action portion of the RCRA permit), or consent agreement (e.g., an interagency agreement under CERCLA section 120), both of which are available to Federal facilities.



## 2. Corrective Action/Controlled Releases

One commenter agreed that a facility with a corrective action program in place should be considered acceptable, and supported the broader definition of what constitutes a corrective action program (proposed § 300.440(f)(3)(iii)), including the use of equivalent State authorities.

The final rule continues to provide that corrective action programs must be performed under a RCRA order or permit, or under another appropriate authority if the release is at an other-than-RCRA subtitle C facility. EPA cautions, however, that provisions in State orders or permits issued by States not authorized for HSWA corrective action are generally not acceptable to satisfy this requirement at RCRA facilities. (See 53 FR 48229.) The major exception to this is when States authorized for the base RCRA program have issued a valid permit requiring corrective action for releases from regulated units to the ground water (pursuant to 40 CFR 264.100).

One commenter objected to considering a release at a non-receiving unit to be "controlled" based simply on the issuance of an order or permit; the commenter claimed that in such cases, an owner/operator would not be required to show that the release is actually under control, as called for in the statute.

For purposes of this rule, EPA is considering releases from non-receiving units "controlled" when an enforceable order or permit to study the problem has been issued. The Agency believes that once a facility is under such an enforceable order or permit or agreement, the situation is "under control." (If action is necessary to protect human health and the environment during the term of the study, interim measures may be required.) The situation will be considered under control unless or until the order, permit, or agreement is violated or the document needs to be modified to proceed to the next phase of action. Provided the owner/operator is taking positive action and remains in compliance with the terms specified in an order or permit, the facility may remain acceptable.

In addition, investigations can often take a long time to complete, and most waste treatment, storage and disposal facilities have at least minor releases from non-receiving units; thus, requiring facilities to complete corrective measures before being considered acceptable could severely limit acceptable off-site management

options, effectively reducing the available capacity to nothing.

Requiring the owner/operator to physically eliminate the release at non-receiving units in order to be acceptable would also go beyond the strict terms of the rule to "control" releases. Further, it would be a particularly harsh result given the statute's requirement to control "any" release at a land disposal facility. By encouraging facilities to begin studying and eliminating releases, this rule furthers the control of leaking units. Further, by requiring such work to be conducted under an enforceable order or corrective action permit, EPA has the ability to ensure that the required steps are carried out expeditiously.

## 3. Releases and Regaining Eligibility

One commenter challenged as too inflexible the provision in the proposed rule (53 FR 48229) that requires the elimination of all releases from a receiving unit in order to regain acceptability. The commenter argued that requiring elimination to the extent technically feasible and to a level which poses no threat to human health and the environment, would be more realistic.

In response, *de minimis* releases from receiving units are already exempted from the rule. EPA believes that any further relaxation of the no-release standard for receiving units at RCRA facilities is against the intent of the statute which states that waste may only be transferred to a land disposal unit that "is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil." Congress simply does not want CERCLA wastes sent to leaking RCRA land disposal units. See 53 FR 48219. EPA believes that the same standard should apply to receiving units at RCRA treatment and storage facilities. See 53 FR 48225.

## 4. Regaining Physical Compliance at Treatment and Storage Facilities

In the preamble to the proposed rule, at 53 FR 48229, EPA discussed how a facility could return to compliance after the facility had been found to be unacceptable based on a relevant violation. One commenter supported two of the three conditions under which a unit will be considered to have regained physical compliance, but disagreed with the contention that, "in most cases, physical compliance cannot be regained until all legal proceedings, (etc.) are resolved." The commenter charged that final resolution of disputes regarding what legal consequences should flow from a violation are

irrelevant to the question of whether a unit can safely handle hazardous waste.

This issue has already been largely addressed in this preamble statement at section IV.C.4 ("Relevant Violations") and section IV.G.2 ("Payment of Penalties"). Final resolution of legal proceedings (including payment of penalties) is not a pre-condition to regaining acceptability where the facility can, in effect, undo the violation (e.g., remove improperly disposed waste) and thereby return to physical compliance. However, resolution of penalties and of EPA legal proceedings are generally pre-conditions to regaining acceptability in those cases where a violation cannot be undone. (See examples in the discussion of Relevant Violations, C.4.) In those cases, (especially where a decision has been made to leave wastes in place in a land disposal unit), the Agency is allowing a physical compliance determination to be made despite what some might see as a forever-ongoing violation. For such cases, the Agency has a need for greater certainty that every action has been taken that can be taken to assure that the violation will not recur. In effect, it is the taking of required preventative measures and the payment of the penalty that "corrects" the violation in these cases.

## I. Implementation

Three commenters suggested that in order to facilitate implementation of this rule, EPA should establish a national data base or other mechanism so that off-site contacts and their staff can easily tell which facilities, nationwide, are in compliance with the Off-Site Rule. With such a listing system, EPA and other Agencies could readily know or access a list of approved off-site disposal facilities. One of these commenters also asked EPA to develop a more formalized list which reports which facilities have significant violations under applicable Federal and State laws or regulations.

It has been EPA's experience that off-site acceptability status changes frequently and is difficult to usefully reduce to a published list. Thus, the Agency believes that the only way to ensure up-to-date, accurate information is to continue to rely on the ten Regional Off-Site Contacts (ROCs). The Agency does not believe that it is an unreasonable burden to require interested parties to make one to several phone calls to determine the acceptability status of facilities near a given site or with specialized capacity. The Regional Off-Site Contacts will maintain up-to-date information on the

acceptability of facilities within their Region.

However, in order to ensure that the information is readily available, EPA will strongly encourage the maintenance of a back-up contact for use when the primary Off-Site Contact is unavailable. EPA will keep a copy of the ROCs in the Superfund docket and with the RCRA/CERCLA Hotline (a list is also included as Appendix I to this preamble, although it will obviously become outdated in the future, and interested parties should consult with the sources named for revised lists).

Due to the dynamic nature of the acceptability determinations, EPA has no plans at this time to publish a national list of acceptable (or unacceptable) units. The Agency believes that such lists could serve more as a source of misinformation (or out-of-date information) than reliable information. EPA's recognition of the dynamic nature of acceptability is reflected in the Agency's policy that an off-site facility does not need to be acceptable to bid on accepting waste from a CERCLA clean-up, but must be acceptable under this rule to be awarded such a contract.

In order to avoid problems resulting from contractors whose designated receiving facilities become unacceptable under this rule, agencies and PRPs may want to provide for back-up or alternative facilities in their contracts.

**J. Manifest Requirements**

One commenter objected to the statement in the preamble to the proposed rule (53 FR 48230) that limits the requirement to file a "Uniform Hazardous Waste Manifest" form to CERCLA wastes that are also RCRA wastes; the commenter asked that the requirement cover all types of wastes.

The preamble simply noted that already existing manifest requirements under RCRA must be met. There is no manifest requirement under CERCLA, and this rule does not establish an independent tracking system for CERCLA wastes. Compliance with the rule is assured through inspections, and enforcement of contract provisions.

**V. Regulatory Analysis**

**A. Regulatory Impact Analysis**

Under Executive Order No. 12291, EPA must determine whether a regulation is "major" and thus whether the Agency must prepare and consider a Regulatory Impact Analysis in connection with the rule. Today's rule is not major because it simply codifies an Agency policy that has been in effect since May of 1985 and largely mirrors

a revision of that policy that has been in effect since November of 1987. As discussed in the preamble to the proposed rule (53 FR 48230-48231), this rule contains criteria that EPA will use to determine where it will send waste from Superfund cleanups, but does not regulate or otherwise impose any new requirements on commercial waste handlers. Acceptability under this rule is largely based on compliance with applicable regulations the Agency already enforces. As a result of today's rule some facilities may choose to initiate corrective action sooner than if they waited for the corrective action conditions in their final operating permit pursuant to RCRA 3004 (u) and (v). However, regardless of the requirements of this rule, under the authority of section 3008(h) of RCRA, EPA already compels corrective action at RCRA interim status facilities with known or suspected releases. The rule, then, should not result in increased long-term costs to the commercial waste handling industry.

**B. Regulatory Flexibility Act**

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, at the time an Agency publishes any proposed or final rule, it must prepare a Regulatory Flexibility Analysis that describes the impact of the rule on small entities, unless the Administrator certifies that the rule will not have a significant impact on a substantial number of small entities. Today's final rule describes procedures for determining the acceptability of a facility for off-site management of CERCLA wastes. It does not impose significant additional requirements or compliance burdens on the regulated community. Therefore, pursuant to 5 U.S.C. 601b, I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

**C. Paperwork Reduction Act**

This rule does not contain any new information collection requirements subject to OMB review under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

**VI. Supplementary Document**

**APPENDIX I.—REGIONAL OFF-SITE CONTACTS (ROCS)**

Region	Primary contact/phone	Backup contact/phone
I .....	Lynn Hanifan, (617) 573-9662.	Austine Frawley, (617) 573-1754.

**APPENDIX I.—REGIONAL OFF-SITE CONTACTS (ROCS)—Continued**

Region	Primary contact/phone	Backup contact/phone
II .....	Greg Zaccardi, (212) 264-9504.	Joel Golumbek, (212) 264-2638.
III .....	Sarah Caspar, (215) 597-1857.	Naomi Henry, (215) 597-8338.
IV .....	Edmund Burks, (404) 347-7603.	John Dickinson, (404) 347-7603.
V .....	Gertrud Matuschkowitz, (312) 353-7921.	Uylaine McMahon, (312) 886-4445.
VI .....	Ron Shannon, (214) 655-2282.	Joe Dougherty, (214) 655-2281.
VII .....	Gerald McKinney, (913) 551-7818.	David Doyle, (913) 551-7667.
VIII .....	Terry Brown, (303) 293-1823.	George Dancik, (303) 293-1506.
IX .....	Diane Bodine, (415) 744-2130.	Gloria Brownley, (415) 744-2114.
X .....	Ron Lillich, (206) 553-6646.	Kevin Schanilec, (206) 553-1061.

**List of Subjects in 40 CFR Part 300**

Air pollution control, Chemicals, Hazardous substance, Hazardous waste, Intergovernmental relations, Natural resources, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: September 14, 1993.

Carol M. Browner, Administrator.

40 CFR part 300 is amended as follows:

**PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES CONTINGENCY PLAN**

1. The authority citation for part 300 continues to read as follows:

Authority: 42 U.S.C. 9601-9657; 33 U.S.C. 1321(c)(2); E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

2. Section 300.440 is added to part 300 to read as follows:

**§ 300.440 Procedures for planning and implementing off-site response actions.**

(a) *Applicability.* (1) This section applies to any remedial or removal action involving the off-site transfer of any hazardous substance, pollutant, or

contaminant as defined under CERCLA sections 101 (14) and (33) ("CERCLA waste") that is conducted by EPA, States, private parties, or other Federal agencies, that is Fund-financed and/or is taken pursuant to any CERCLA authority, including cleanups at Federal facilities under section 120 of CERCLA, and cleanups under section 311 of the Clean Water Act (except for cleanup of petroleum exempt under CERCLA). Applicability extends to those actions taken jointly under CERCLA and another authority.

(2) In cases of emergency removal actions under CERCLA, emergency actions taken during remedial actions, or response actions under section 311 of the Clean Water Act where the release poses an immediate and significant threat to human health and the environment, the On-Scene Coordinator (OSC) may determine that it is necessary to transfer CERCLA waste off-site without following the requirements of this section.

(3) This section applies to CERCLA wastes from cleanup actions based on CERCLA decision documents signed or consent decrees lodged after October 17, 1986 ("post-SARA CERCLA wastes") as well as those based on CERCLA decision documents signed and consent decrees lodged prior to October 17, 1986 ("pre-SARA CERCLA wastes"). Pre-SARA and post-SARA CERCLA wastes are subject to the same acceptability criteria in § 300.440(b) (1) and (2).

(4) EPA (usually the EPA Regional Office) will determine the acceptability under this section of any facility selected for the treatment, storage, or disposal of CERCLA waste. EPA will determine if there are relevant releases or relevant violations at a facility prior to the facility's initial receipt of CERCLA waste. A facility which has previously been evaluated and found acceptable under this rule (or the preceding policy) is acceptable until the EPA Regional Office notifies the facility otherwise pursuant to § 300.440(d).

(5) Off-site transfers of those laboratory samples and treatability study CERCLA wastes from CERCLA sites set out in paragraphs (a)(5) (i) through (iii) of this section, are not subject to the requirements of this section. However, those CERCLA wastes may not be transferred back to the CERCLA site unless the Remedial Project Manager or OSC assures the proper management of the CERCLA waste samples or residues and gives permission to the laboratory or treatment facility for the samples and/or residues to be returned to the site.

(i) Samples of CERCLA wastes sent to a laboratory for characterization;

(ii) RCRA hazardous wastes that are being transferred from a CERCLA site for treatability studies and that meet the requirements for an exemption for RCRA under 40 CFR 261.4(e); and

(iii) Non-RCRA wastes that are being transferred from a CERCLA site for treatability studies and that are below the quantity threshold established at 40 CFR 261.4(e)(2).

(b) *Acceptability criteria.* (1) *Facility compliance.* (i) A facility will be deemed in compliance for the purpose of this rule if there are no relevant violations at or affecting the unit or units receiving CERCLA waste:

(A) For treatment to standards specified in 40 CFR part 268, subpart D, including any pre-treatment or storage units used prior to treatment;

(B) For treatment to substantially reduce its mobility, toxicity or persistence in the absence of a defined treatment standard, including any pre-treatment or storage units used prior to treatment; or

(C) For storage or ultimate disposal of CERCLA waste not treated to the previous criteria at the same facility.

(ii) Relevant violations include significant deviations from regulations, compliance order provisions, or permit conditions designed to: ensure that CERCLA waste is destined for and delivered to authorized facilities; prevent releases of hazardous waste, hazardous constituents, or hazardous substances to the environment; ensure early detection of such releases; or compel corrective action for releases. Criminal violations which result in indictment are also relevant violations. In addition, violations of the following requirements may be considered relevant:

(A) Applicable subsections of sections 3004 and 3005 of RCRA or, where applicable, other Federal laws (such as the Toxic Substances Control Act and subtitle D of RCRA);

(B) Applicable sections of State environmental laws; and

(C) In addition, land disposal units at RCRA subtitle C facilities receiving RCRA hazardous waste from response actions authorized or funded under CERCLA must be in compliance with RCRA section 3004(o) minimum technology requirements. Exceptions may be made only if the unit has been granted a waiver from these requirements under 40 CFR 264.301.

(2) *Releases.* (i) Release is defined in § 300.5 of this part. Releases under this section do not include:

(A) *De minimis* releases;

(B) Releases permitted under Federal programs or under Federal programs delegated to the States (Federally

permitted releases are defined in § 300.5), except to the extent that such releases are found to pose a threat to human health and the environment; or

(C) Releases to the air that do not exceed standards promulgated pursuant to RCRA section 3004(n), or absent such standards, or where such standards do not apply, releases to the air that do not present a threat to human health or the environment.

(ii) Releases from units at a facility designated for off-site transfer of CERCLA waste must be addressed as follows:

(A) *Receiving units at RCRA subtitle C facilities.* CERCLA wastes may be transferred to an off-site unit regulated under subtitle C of RCRA, including a facility regulated under the permit-by-rule provisions of 40 CFR 270.60 (a), (b) or (c), only if that unit is not releasing any hazardous waste, hazardous constituent, or hazardous substance into the ground water, surface water, soil or air.

(B) *Other units at RCRA subtitle C land disposal facilities.* CERCLA wastes may not be transferred to any unit at a RCRA subtitle C land disposal facility where a non-receiving unit is releasing any hazardous waste, hazardous constituent, or hazardous substance into the ground water, surface water, soil, or air, unless that release is controlled by an enforceable agreement for corrective action under subtitle C of RCRA or other applicable Federal or State authority. For purposes of this section, a RCRA "land disposal facility" is any RCRA facility at which a land disposal unit is located, regardless of whether a land disposal unit is the receiving unit.

(C) *Other units at RCRA subtitle C treatment, storage, and permit-by-rule facilities.* CERCLA wastes may not be transferred to any unit at a RCRA subtitle C treatment, storage or permit-by-rule facility, where a release of any hazardous waste, hazardous constituent, or hazardous substance from non-receiving units poses a significant threat to public health or the environment, unless that release is controlled by an enforceable agreement for corrective action under subtitle C of RCRA or other applicable Federal or State authority.

(D) *All other facilities.* CERCLA wastes should not be transferred to any unit at an other-than-RCRA subtitle C facility if the EPA Regional Office has information indicating that an environmentally significant release of hazardous substances has occurred at that facility, unless the release is controlled by an enforceable agreement for corrective action under an applicable Federal or State authority.

(iii) Releases are considered to be "controlled" for the purpose of this section as provided in § 300.440 (f)(3)(iv) and (f)(3)(v). A release is not considered "controlled" for the purpose of this section during the pendency of administrative or judicial challenges to corrective action requirements, unless the facility has made the requisite showing under § 300.440(e).

(c) *Basis for determining acceptability.* (1) If a State finds that a facility within its jurisdiction is operating in non-compliance with state law requirements including the requirements of any Federal program for which the State has been authorized, EPA will determine, after consulting with the State as appropriate, if the violation is relevant under the rule and if so, issue an initial determination of unacceptability.

(2) If a State finds that releases are occurring at a facility regulated under State law or a Federal program for which the State is authorized, EPA will determine, after consulting with the State as appropriate, if the release is relevant under the rule and if so, issue an initial determination of unacceptability.

(3) EPA may also issue initial determinations of unacceptability based on its own findings. EPA can undertake any inspections, data collection and/or assessments necessary. EPA will then notify with the State about the results and issue a determination notice if a relevant violation or release is found.

(d) *Determination of unacceptability.* (1) Upon initial determination by the EPA Regional Office that a facility being considered for the off-site transfer of any CERCLA waste does not meet the criteria for acceptability stated in § 300.440(b), the EPA Region shall notify the owner/operator of such facility, and the responsible agency in the State in which the facility is located, of the unacceptability finding. The notice will be sent by certified and first-class mail, return receipt requested. The certified notice, if not acknowledged by the return receipt card, should be considered to have been received by the addressee if properly sent by regular mail to the last address known to the EPA Regional Office.

(2) The notice shall generally state that based on available information from a RCRA Facility Assessment (RFA), inspection, or other data sources, the facility has been found not to meet the requirements of § 300.440; cite the specific acts, omissions, or conditions which form the basis of these findings; and inform the owner/operator of the procedural recourse available under this regulation.

(3) A facility which was previously evaluated and found acceptable under this rule (or the preceding policy) may continue to receive CERCLA waste for 60 calendar days after the date of issuance of the notice, unless otherwise determined in accordance with paragraphs (d)(8) or (d)(9) of this section.

(4) If the owner or operator of the facility in question submits a written request for an informal conference with the EPA Regional Office within 10 calendar days from the issuance of the notice, the EPA Regional Office shall provide the opportunity for such conference no later than 30 calendar days after the date of the notice, if possible, to discuss the basis for the underlying violation or release determination, and its relevance to the facility's acceptability to receive CERCLA cleanup wastes. State representatives may attend the informal conference, submit written comments prior to the informal conference, and/or request additional meetings with the EPA Region, relating to the unacceptability issue during the determination process. If no State representative is present, EPA shall notify the State of the outcome of the conference. An owner/operator may submit written comments by the 30th day after issuance of the notice, in addition to or instead of requesting an informal conference.

(5) If the owner or operator neither requests an informal conference nor submits written comments, the facility becomes unacceptable to receive CERCLA waste on the 60th day after the notice is issued (or on such other date designated under paragraph (d)(9) of this section). The facility will remain unacceptable until such time as the EPA Regional Office notifies the owner or operator otherwise.

(6) If an informal conference is held or written comments are received, the EPA Region shall decide whether or not the information provided is sufficient to show that the facility is operating in physical compliance with respect to the relevant violations cited in the initial notice of unacceptability, and that all relevant releases have been eliminated or controlled, as required in paragraph (b)(2) of this section, such that a determination of acceptability would be appropriate. EPA will notify the owner/operator in writing whether or not the information provided is sufficient to support a determination of acceptability. Unless EPA determines that information provided by the owner/operator and the State is sufficient to support a determination of acceptability, the facility becomes

unacceptable on the 60th calendar day after issuance of the original notice of unacceptability (or other date established pursuant to paragraphs (d)(8) or (d)(9) of this section).

(7) Within 10 days of hearing from the EPA Regional Office after the informal conference or the submittal of written comments, the owner/operator or the State may request a reconsideration of the unacceptability determination by the EPA Regional Administrator (RA). Reconsideration may be by review of the record, by conference, or by other means deemed appropriate by the Regional Administrator; reconsideration does not automatically stay the determination beyond the 60-day period. The owner/operator will receive notice in writing of the decision of the RA.

(8) The EPA Regional Administrator may decide to extend the 60-day period if more time is required to review a submission. The facility owner/operator shall be notified in writing if the Regional Administrator extends the 60 days.

(9) The EPA Regional Office may decide that a facility's unacceptability is immediately effective (or effective in less than 60 days) in extraordinary situations such as, but not limited to, emergencies at the facility or egregious violations. The EPA Region shall notify the facility owner/operator of the date of unacceptability, and may modify timeframes for comments and other procedures accordingly.

(e) *Unacceptability during administrative and judicial challenges of corrective action decisions.* For a facility with releases that are subject to a corrective action permit, order, or decree, an administrative or judicial challenge to the corrective action (or a challenge to a permit modification calling for additional corrective action) shall not be considered to be part of a corrective action "program" controlling those releases and shall not act to stay a determination of unacceptability under this rule. However, such facility may remain acceptable to receive CERCLA waste during the pendency of the appeal or litigation if:

(1) It satisfies the EPA Regional Office that adequate interim corrective action measures will continue at the facility; or

(2) It demonstrates to the EPA Regional Office the absence of a need to take corrective action during the short-term, interim period.

Either demonstration may be made during the 60-day review period in the context of the informal conference and RA reconsideration.

(f) *Re-evaluating unacceptability.* If, after notification of unacceptability and

the opportunity to confer as described in § 300.440(d), the facility remains unacceptable, the facility can regain acceptability. A facility found to be unacceptable to receive CERCLA wastes based on relevant violations or releases may regain acceptability if the following conditions are met:

(1) *Judgment on the merits.* The facility has prevailed on the merits in an administrative or judicial challenge to the finding of noncompliance or uncontrolled releases upon which the unacceptability determination was based.

(2) *Relevant violations.* The facility has demonstrated to the EPA Region its return to physical compliance for the relevant violations cited in the notice.

(3) *Releases.* The facility has demonstrated to the EPA Region that:

(i) All releases from receiving units at RCRA subtitle C facilities have been eliminated and prior contamination from such releases is controlled by a corrective action program approved under subtitle C of RCRA;

(ii) All releases from other units at RCRA subtitle C land disposal facilities are controlled by a corrective action program approved under subtitle C of RCRA;

(iii) All releases from other units at RCRA subtitle C treatment and storage facilities do not pose a significant threat to human health or the environment, or are controlled by a corrective action program approved under subtitle C of RCRA.

(iv) A RCRA subtitle C corrective action program may be incorporated into a permit, order, or decree, including the following: a corrective action order under RCRA section 3008(h), section 7003 or section 3013, a RCRA permit under 40 CFR 264.100 or 264.101, or a permit under an equivalent authority in a State authorized for corrective action under RCRA section 3004(u). Releases will be deemed controlled upon issuance of the order, permit, or decree which initiates and requires completion of one or more of the following: a RCRA Facility Investigation, a RCRA Corrective Measures Study, and/or Corrective Measures Implementation. The release remains controlled as long as the facility is in compliance with the order, permit, or decree, and enters into subsequent agreements for implementation of additional corrective action measures when necessary, except during periods of administrative or judicial challenges, when the facility must make a demonstration under § 300.440(e) in order to remain acceptable.

(v) Facilities with releases regulated under other applicable Federal laws, or

State laws under a Federally-delegated program may regain acceptability under this section if the releases are deemed by the EPA Regional Office not to pose a threat to human health or the environment, or if the facility enters into an enforceable agreement under those laws to conduct corrective action activities to control releases. Releases will be deemed controlled upon the issuance of an order, permit, or decree which initiates and requires one or more of the following: a facility investigation, a corrective action study, and/or corrective measures implementation. The release remains controlled as long as the facility is in compliance with the order, permit, or decree, and enters into subsequent agreements for implementation of additional corrective measures when necessary, except during periods of administrative or judicial challenges, when the facility must make a demonstration under § 300.440(e) in order to remain acceptable.

(4) Prior to the issuance of a determination that a facility has returned to acceptability, the EPA Region shall notify the State in which the facility is located, and provide an opportunity for the State to discuss the facility's acceptability status with EPA.

(5) An unacceptable facility may be reconsidered for acceptability whenever the EPA Regional Office finds that the facility fulfills the criteria stated in § 300.440(b). Upon such a finding, the EPA Regional Office shall notify the facility and the State in writing.

[FR Doc. 93-23069 Filed 9-21-93; 8:45 am]  
BILLING CODE 5560-50-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

#### 45 CFR Parts 205 and 233

RIN 0970-AB14

#### Aid to Families With Dependent Children Program; Certain Provisions of the Omnibus Budget Reconciliation Act of 1990

**AGENCY:** Administration for Children and Families (ACF), HHS.

**ACTION:** Interim final rule.

**SUMMARY:** These interim final rules implement three sections of the Omnibus Budget Reconciliation Act (OBRA) of 1990 that apply to the Aid to Families with Dependent Children (AFDC) program. They are: Section 5053, which deletes all references to

income deeming by legal guardians in minor parent cases; section 5054, which expands State agency responsibility for reporting, to an appropriate agency or official, known or suspected instances of child abuse and neglect of a child receiving AFDC; and section 5055, which adds an explicit reference to title IV-E on the list of programs for which information about AFDC applicants and recipients may be made available.

In addition, we deleted the reference to title IV-C since the WIN program is no longer operative. Other OBRA 90 changes pertaining to the AFDC-UP program and the Earned Income Tax Credit disregard were published July 9, 1992, in the final rules implementing the related AFDC amendments of the Family Support Act of 1988 (57 FR 30408-30409).

**DATES:** Effective Date: September 22, 1993.

**Comments:** Comments must be received on or before October 22, 1993.

**ADDRESSES:** Comments should be submitted in writing to the Assistant Secretary for Children and Families, Attention: Mr. Mack A. Storrs, Director, Division of AFDC Program, Office of Family Assistance, Fifth Floor, 370 L'Enfant Promenade, SW., Washington, DC 20447. Comments may be inspected between 8 a.m. and 4:30 p.m. during regular business days by making arrangements with the contact person identified below.

**FOR FURTHER INFORMATION CONTACT:** Mack A. Storrs, Director, Division of AFDC Program, Office of Family Assistance, Fifth Floor, 370 L'Enfant Promenade, SW., Washington, DC 20447, telephone (202) 401-9289.

#### SUPPLEMENTARY INFORMATION:

##### Discussion of Interim Rule Provisions

*Eliminating the Use of the Term "Legal Guardian" (Section 233.20 of the Interim Rule)*

The Omnibus Budget Reconciliation Act (OBRA) of 1981 added section 402(a)(39) of the Social Security Act to require that, in determining AFDC benefits for a dependent child whose parent or legal guardian is under the age of 18, the State agency must include the income of the minor parent's own parents or legal guardians who are living in the same home.

Section 5053 of Omnibus Budget Reconciliation Act of 1990 (OBRA 90) amended section 402(a)(39) of the Social Security Act by eliminating the use of the term "legal guardian." Section 402(a)(39) provides that in determining AFDC benefits for a dependent child whose parent is under the age of 18, the