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Office of
Solid Waste and
Emergency Response

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Superfund

EPA

# Response to Comments on the 1988 Proposed NCP Deferral Policy Concept

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# RESPONSE TO COMMENTS ON THE 1988 PROPOSED NCP DEFERRAL POLICY CONCEPT

Office of Emergency and Remedial Response
U.S. Environmental Protection Agency
Washington, D.C. 20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1995

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

9375.6-11A

**MEMORANDUM**

**SUBJECT:** Transmittal of the "Response to Comments on the 1988 Proposed NCP Deferral Policy Concept" (OSWER Directive 9375.6-11A)

**FROM:** Stephen D. Luftig, Acting Director
Office of Emergency and Remedial Response

Steve Luftig

**TO:** Director, Waste Management Division
Regions I, IV, V, VII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Regions III, VI, VIII, IX
Director, Hazardous Waste Division
Region X
Director, Environmental Services Division
Regions I, VI, VII

**PURPOSE**

This memorandum transmits the Environmental Protection Agency's "Response to Comments on the 1988 Proposed NCP Deferral Policy Concept."

**BACKGROUND**

In 1988, the Environmental Protection Agency (EPA) introduced a deferral policy concept in the proposed National Oil and Hazardous Substance Pollution Contingency Plan (NCP) and requested public comment. When the Agency promulgated the final NCP in 1990, EPA did not expand its deferral policy, but committed to respond to comments received on the proposed concept, if in the future, the Agency decided to expand this policy.

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**IMPLEMENTATION**

EPA is now issuing the "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Directive 9375.6-11), which establishes the Superfund State deferral program. The "Response to Comments on the 1988 Proposed NCP Deferral Policy Concept" fulfills the Agency's commitment to respond to the comments received regarding the deferral policy concept introduced in the 1988 proposed NCP. This document only addresses comments that refer specifically to EPA's proposal to expand deferral authorities to States.

For further information regarding the Superfund State deferral program, contact Murray Newton, Chief of the State and Local Coordination Branch, Hazardous Site Control Division (703-603-8840) or Steve Caldwell, Acting Chief of the Site Assessment Branch, Hazardous Site Evaluation Division (703-603-8860).

Attachment

## TABLE OF CONTENTS


INTRODUCTION . . . . . 1

BACKGROUND . . . . . 1

COMMENTS AND RESPONSES . . . . . 2

I. General Concept of Deferring Sites to States . . 2

II. Legal Basis for EPA's Deferral Listing Policy . . 3

III. Deferring Sites Based on Petition and/or Certification . . . . . 10

IV. Timing for Deferring Sites . . . . . 11

V. Deferring Sites Involving Indian Lands, Water, or Other Resources . . . . . 12

VI. Cleanup Levels at Deferred Sites . . . . . 12

VII. Permit Exemptions for Deferred Sites . . . . . 13

VIII. Notifying Natural Resource Trustees . . . . . 14

IX. Oversight of State Authorities . . . . . 14

X. Federal Resources to Implement State Deferral and Mixed Funding Settlements . . . . . 15

XI. Stipulating Public Participation Requirements . . 16

XII. ATSDR Health Assessments . . . . . 17

XIII. Terminating Deferral Status . . . . . 18

**RESPONSE TO COMMENTS ON THE**
**1988 PROPOSED NCP DEFERRAL POLICY CONCEPT**

## INTRODUCTION

In the preamble to the 1988 proposed National Oil and Hazardous Substance Pollution Contingency Plan (NCP) for implementing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, the Environmental Protection Agency (EPA) announced it was considering expanding the existing policy of deferring sites from inclusion on the National Priorities List (NPL) (See 53 FR 51418-19, Dec. 21, 1988). The Agency requested and received public comments on its proposal to defer sites to other Federal authorities, States, and/or potentially responsible parties (PRPs). However, in the 1990 preamble to the final NCP, EPA stated that it would not decide the issue of deferral at that time (See 54 FR 8667, Mar. 8, 1990). The Agency noted that, should EPA "decide in the future to consider establishing an expansion to deferral policies," it would respond to the comments received (Id.). Because EPA is issuing the "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Directive 9375.6-11), the Agency believes it is appropriate to address the comments that it received regarding EPA's proposal to expand its deferral policy to include deferral to State authorities.

## BACKGROUND

The State deferral policy proposed in 1988 described a program in which EPA would broaden the then-existing deferral approach to include State corrective action authorities that are capable of addressing CERCLA releases. In addition to various other components, the proposed policy presented the following general two approaches for deferring a site, that was eligible for listing on the NPL, to a State:

> Petition. Under this option, the State would assume total responsibility for the response at a site using its authorities. This option did not intend to ensure equivalence to CERCLA, and minimal EPA oversight would be required. For EPA to consider deferring a site which was eligible for listing on the NPL, a State would petition EPA assuring that it:
>
> - had provided reasonable notice to the public that the State was seeking deferral;
> - would provide for public participation during the remedy selection process; and

- would hold a public meeting regarding a deferred site, if requested.

Certification. With this approach, EPA would defer from listing individual sites on the NPL where the State provided a more detailed certification of its ability and committed to perform corrective action according to certain CERCLA standards. This option would require greater EPA oversight than the petition option. Under this option, a State would certify that it:

- had sufficient regulatory response and enforcement authorities;
- had sufficient State personnel and funds to address the site;
- had a satisfactory schedule to address the site;
- was committed to provide status reports to EPA and the public;
- would include public participation in the remedy selection process; and
- was committed to select a remedy consistent with CERCLA Section 121.

The Agency requested comments from the public on these two options as well as on the general concept of deferring to State authorities. EPA also specifically requested comments on the cleanup levels that should be required at deferred sites, the timing for deferring sites, and public notification procedures at deferred sites.

EPA is now issuing the "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions," which establishes the Superfund State deferral program. The following responses fulfill EPA's commitment to respond to the comments received on the 1988 proposed deferral policy, but only comments that refer specifically to EPA's proposal to expand deferral authorities to States are addressed. Major comments are summarized by subject, and responses reflect EPA policy as presented in the guidance. Throughout this document, the term "State" refers to States, Territories, Commonwealths, or Federally-recognized Indian Tribes who may be eligible to participate in the deferral program.

## COMMENTS AND RESPONSES

### I. General Concept of Deferring Sites to States

EPA received 77 written comments on the 1988 proposed policy from industry and trade associations (37), Federal, State, local, and Tribal governments (29), environmental and citizen groups (7), and individuals (4) regarding deferral to State authorities.

Over ·rcent of the comments generally supported the proposed State ·rral policy, while roughly 15 percent generally opposed the p . The remainder neither supported nor opposed the propc ·olicy.

rally, the supporters of the proposed policy believed that rring sites to State authorities would provide an effec way to expedite the remedial process and maximize the numbe sites addressed. Many commenters believed that defe ·ould save Superfund resources and reduce duplicative effor / both the State and EPA. A further advantage offered by de ıl supporters was that a deferral policy would provide State :h greater leverage in PRP negotiations because deferral could ·r PRPs a faster and less costly cleanup process, reduc ·ersight costs, and freedom from two different sources of re ·ory control.

·neral, commenters who opposed the deferral policy did so fc : following reasons: 1) deferral was not legally suppo 2) efforts to remediate sites under State laws would not b effective as responses under CERCLA; 3) public parti ion would suffer under the direction of various States; and 4 oversight would be inadequate for any deferral progr

: **nse.** In the June 23, 1994, "Superfund Administrative Impro ts, Final Report," EPA stated its intention to develop a def program that would "reduce the number of sites now in EPA's ing queue, thereby accelerating cleanup, minimizing the risk plicative State/Federal efforts, and offering PRPs a measu confidence that only one agency will address the site. is goal is consistent with the deferral policy proposed in 19 nd the Agency believes that implementation of the de ·er uidance will have this impact. Comments expressing co ·e out the deferral policy proposed in 1988 will be ado ·e in the following comment sections.

## II. gal Basis for EPA's Deferral Listing Policy

. al of 23 commenters specifically agreed or disagreed with : assertion that the proposed deferral policy is consis with CERCLA and legislative intent. Nineteen comme agreed that the policy is consistent with congr· ıal intent. Four commenters disagreed with EPA's inter :ion of legislative intent and argued that the policy is il based upon their interpretation of CERCLA Section 105(a ) that the NPL must be based solely on the Hazard Ranki ·tem (HRS) and risk-associated factors, statements by ongr during the passage of CERCLA and the Superfund Act eaut ·tion Amendments of 1986 (SARA), and the defeat of

Reagan administration amendments to CERCLA that would have enacted a similar deferral policy.

Eighteen industry/trade association commenters and one local government agreed with EPA that the proposed deferral policy was consistent with CERCLA and legislative intent. Eleven of these commenters repeated one or all the arguments for this interpretation that EPA provided in the preamble. Seven commenters provided additional justifications. Four commenters referenced Eagle Picher v. EPA, 759 F. 2d. 922, 934 (D.C. Cir. 1985) or City of Stoughton v. EPA, 858 F 2d. 747 (D.C. Cir. 1988), asserting that Congress gave EPA broad discretion in determining whether to list a site on the NPL. Two commenters cited statements by Representative Florio and Senator Randolph during floor debates in 1980 stressing that CERCLA was enacted in response to the lack of statutory authority that existed before 1980 to remediate uncontrolled hazardous waste sites. They concluded that the Superfund program was designed strictly to "provide cleanup funds and enforcement authority for sites that cannot be addressed under other authorities." These two commenters also noted that in the years since CERCLA was enacted many Federal and State corrective action programs have been developed to close the regulatory gaps that existed before CERCLA.

One commenter noted that CERCLA Section 105 calls for selection of sites "which pose substantial danger" [CERCLA Section 105(a)(8)(A)], "taking into account the potential urgency of the action" [CERCLA Section 105(a)(8)(A)]. This commenter asserted, therefore, that sites that do not pose "substantial danger," because they are adequately addressed under other authorities, can be deferred, in complete accordance with CERCLA.

Three commenters also pointed out that the funding and cleanup schedules Congress developed for Superfund would cover only a small portion of all potential hazardous waste sites, indicating that Congress intended EPA to establish priorities. Expansion of the deferral policy is a "rational and necessary approach to establishing priorities," said one commenter, while another said that deferral will best achieve the SARA cleanup schedule without depleting Superfund. In addition, two commenters argued that the fact that Congress did not specifically amend CERCLA Section 105(a)(8)(A) through SARA to limit deferral, even after EPA expressed its intent to establish a deferral policy (in a 1984 OSWER "Effectiveness of the Superfund Program" report), is an indication that Congress did not intend to limit deferral. One commenter also noted that deferral is consistent with the intent of SARA Section 121(f) to increase State participation in the remediation process.

Three environmental and citizen groups and one State asserted that the proposed deferral policy would be illegal based

on statutory language and legislative history. Two commenters held that CERCLA's national priority system was intended to be based solely on relative risk, citing a 1980 Senate report on the enactment of CERCLA (S. Rep. No. 96-848, 96th Cong., 2nd Sess. 60 (1980).

These commenters argued that, under principles of statutory construction, the term "other appropriate factors," when following a listing (such as that in Section 105(a)(8)(A) for the HRS), should apply only to things of the same general kind or class as specifically mentioned. Since only risk factors are mentioned in Section 105(a)(8)(A) (with the exception of "State preparedness to assume costs," which the commenters argued is not relevant for reasons stated below), EPA could not interpret the term "other appropriate factors" to apply to non-risk factors. The commenters also suggested that this interpretation is supported further by congressional action under SARA. Congress added two "appropriate factors" to the HRS under SARA, both of which were risk based. In the commenters' view, including a non-risk-based factor, and allowing that factor to overrule all other risk-based factors is a direct contradiction to CERCLA Section 105(a)(8)(A).

Commenters also argued that the factor of State preparedness to assume costs and responsibilities was included as an incentive for States to assume the roles and responsibilities set forth in the rule as a prerequisite to remedial action, not as a prelude to deferring sites to States with sufficient funds available. In support of this view, the commenters cite the Senate Report on S.51, which states that the "requirement that the State first agree to assume its responsibilities . . . <u>before remedial actions begin</u> . . ." serves two purposes. First, it allows States to halt further Federal action until there is agreement over priority and extent of the remedy; second it better assures the public that adequate arrangements have been maintained to accomplish the remedy and maintain its effectiveness over time. Senate Report 96-848, 98th Congress, 2d. Sess. 57 (1980).

In addition, EPA's broad construction of the "other appropriate factors" criteria to allow deferral to States would nullify other critical provisions of CERCLA, and thus would be illegal. Provisions cited by commenters include Section 105(c) which directs EPA to assure that the HRS accurately assesses the "relative degree of risk to human health and the environment" posed by sites subject to review. By considering other factors not related to risk, EPA's deferral policy would render Section 105(c) meaningless. Other CERCLA provisions mentioned as being written out of the law by the deferral policy include Sections 122 (settlements), 117 (public participation), 117(e) (technical assistance grants), and 121 (cleanup standards).

Two commenters cited a 1985 House Public Works Committee report that asserts that "Superfund incorporated under one Federal law a program for responding to releases of hazardous substances into the environment." SARA did not change the focus or scope of the program, as evidenced by the defeat of an amendment to the 1986 CERCLA reauthorization bill, proposed by the Reagan administration, calling for other Federally permitted sites to be excluded from CERCLA authority. Congress did support excluding naturally occurring releases from CERCLA, but specifically opposed excluding sites that can be remediated under other Federal authorities, according to three commenters.

One commenter also addressed the issue of the ability of Superfund to respond to all potential sites. This commenter agreed with EPA that Congress understood the enormity of the problem to be addressed by Superfund, but asserted that Congress responded to this problem by strengthening Superfund through SARA. Congress expected the SARA provisions to allow Superfund to address all of the worst hazardous waste sites, and did not anticipate or favor reduction of the Superfund agenda through deferral.

Two commenters also pointed out that the passage that EPA cites from the 1987 House Appropriations Committee report, as evidence of legislative approval of deferral, is concerned with the use of Fund money, and does not refer to the listing of sites on the NPL. The commenters also stressed that the report raises questions about the effectiveness of deferral to Resource Conservation and Recovery Act of 1976 (RCRA) corrective action authorities, and calls on EPA to "examine the full universe of hazardous waste sites and develop methods to ensure that the tools available under Superfund are put to full use to clean up the most serious cases" [HR Rep. No. 100-189, 100th Cong., 1st Sess. 28 (1987)].

**Response.** In the preamble to the proposed NCP, EPA determined that a program of deferral to States is within its discretion under CERCLA. See 53 F.R. 51415-16. That analysis supports the Agency's adoption of the policy for deferring sites to States being issued along with these responses to comments. In summary, CERCLA only requires the listing of priorities "among" the known releases and not a listing of all releases. EPA is, thus, not obligated to list all releases or threatened releases of hazardous substances, pollutants, or contaminants. The "overriding principle of the legislation [is] that Superfund should be reserved for the most serious sites not otherwise being addressed." 53 F.R. 51416 (emphasis added), citing H.Rep. 189, 100th Cong., 1st Sess. 27-28(1987). The interpretation that EPA has broad discretion with respect to NPL listing is supported by the criteria to be considered under CERCLA Section 105(a)(8)(A), which include relative risks, State preparedness to assume State costs and responsibilities, and "other relevant factors."

Further, in writing the statute, Congress was concerned that Superfund be operated to produce maximum environmental benefit for the investment.

EPA agrees with the comments of those who support the legality of deferral to the extent the commenters support the general view that CERCLA gives the Agency broad discretion in that area.

In addition, EPA notes that the deferral program is consistent with the discretion authorized under the NCP, in particular that part known as the "national hazardous substance response plan," which as required under CERCLA Section 105(a) is to "establish procedures and standards for responding to releases of hazardous substances, pollutants and contaminants, . . . ."

The two NCP subparts of the national hazardous substance response plan relevant to State deferral for NPL listing are Subparts E and F. NPL listing is discussed in Subpart E of the NCP -- Hazardous Substance Response (40 CFR 300.400 through 300.440). Subpart F (40 CFR 300.500 through 300.525) is titled "State Involvement in Hazardous Substance Response."

Section 300.400(i)(3) states that "activities by the Federal and State governments in implementing this subpart [Subpart E] are discretionary governmental functions." These activities include listing on the NPL. Section 300.425(c) further emphasizes the discretionary nature of the NPL listing process by providing that EPA "may" list a release if it meets one of the following three criteria: 1) a sufficiently high Hazard Ranking System (HRS) score, 2) State designation, and 3) a health advisory issued by the Agency for Toxic Substances and Disease Registry (ATSDR) recommending dissociation of individuals from the release. EPA is not <u>obligated</u> to list a release even if it meets one of the three criteria. Before listing using the ATSDR advisory, EPA must find that the release poses a significant threat, and that it is more cost effective to use remedial rather than removal authority under CERCLA.

Under Subpart F on State involvement, EPA "<u>shall</u> ensure meaningful and substantial State involvement in hazardous substance response." (40 CFR 300.500(a)). Such involvement means any of the activities described in Subpart E, including NPL listing and, by implication, decisions to defer listing. While criteria established in Subpart F are generally for actions under CERCLA (<u>see</u> Proposed NCP at 53 FR 51418) -- in particular, State assurances for Fund-financed actions (40 CFR 300.510) and requirements for State involvement in CERCLA remedial and enforcement response (40 CFR 300.515) -- Subpart F also provides that States are to be involved in NPL listing activities under both general agreements (40 CFR 300.505(d)(2)(ii)) and in specific listing decisions (40 CFR 300.515(c)).

EPA also is encouraged under Subpart F to enter into Superfund Memoranda of Agreement (SMOAs) (40 CFR 300.500(a)). These SMOAs, incidentally, are recommended as an important implementing tool for State deferrals under the final policy being issued. SMOAs deal with the entire range of response activities (See 40 CFR 300.505(a)(1), (a)(3) and (d)(1)). Further, even if EPA does not have a SMOA with a State, the Agency still may initiate and document SMOA-like activities in the absence of a SMOA. See 40 CFR 505(d)(2).

For reasons stated in the December 1988 preamble to the proposed NCP, the deferral policy, and in the various comment responses in this document, the Agency believes its new State deferral policy is both within its discretion under CERCLA and meets the goals of the statute, as well as the goals of Subparts E and F. The reasoning supporting the deferral policy, in summary, allows the Agency to establish priorities rationally among the known releases of hazardous substances, taking into account meaningful and substantial State involvement.

EPA disagrees with the comments that State deferral is not authorized by CERCLA Section 105 because it is a not a "risk-based" factor. First, assuming State willingness to undertake cleanup responsibilities is not "risk-based," CERCLA Section 105(a)(8)(A) could be construed explicitly to recognize at least one "non-risk-based" factor, in particular, ". . . State preparedness to assume State costs and responsibilities." Thus, "other appropriate factors" that are "non-risk-based" certainly could be relevant to an NPL listing determination.

Section 105(a)(8)(A), furthermore, does not state how the "State preparedness" criterion is to be used, or what constitutes "State costs and responsibilities." It would not preclude EPA from deciding that, if a State was willing to assume full responsibility for a release, the release should not be considered a national priority.

The legislative history cited by the commenters regarding State preparedness to assume costs and responsibilities even indicates that one purpose of this criterion is to allow States "to halt [emphasis added] further Federal response actions until disagreements over priority and the extent of the remedy are agreed upon" [Senate Report 96-848, 98th Congress, 2d. Sess. 57 (1980)]. This statement actually refers to the provisions of CERCLA Section 104(c)(3) that deals with performance of remedial actions. This legislative history, therefore, may not have any relevance to NPL listing. NPL listing occurs at a preliminary phase, and does not mean that a remedial action will take place at the site. However, it is clear that a provision that requires Federal action to be dependent on consideration of State willingness to assume costs of that action could lead to deferral of the Federal action (or possibly a halt to that action).

In any event, EPA disagrees that State deferral is not a "risk-based" factor. As noted above, legislative history indicates that CERCLA should be reserved for the most serious sites not otherwise being addressed. If a State is willing to oversee the response at a site, the need to designate the site as a national priority may be lessened, because the "relative risk" of the site, or its "danger to public health or welfare," is reduced as compared to other sites not otherwise being addressed. Furthermore, the deferral policy affects EPA's ability to allocate Superfund resources, which may also be considered a "risk-based" factor. Because States will oversee the response actions at deferred sites, EPA will be able to focus Superfund resources at sites not otherwise being addressed, thereby reducing the risks which these sites present. Inability to use Federal monies at these other sites actually could increase risk.

EPA also disagrees with the comments that claim the deferral policy would render meaningless, or "write out" of the law, any provision of CERCLA. State deferral does not render meaningless the Section 105(c) directive that assures that the HRS accurately assesses the "relative degree of risk to human health and the environment." Relative risk is, of course, a factor to consider in listing a facility on the NPL but, as noted above, the statute requires the Agency to list national priorities "among" known releases. The regulations do not obligate EPA to list all facilities that could score "sufficiently" under the HRS.

With respect to other provisions mentioned by commenters as being written out of the law by the deferral policy, EPA simply states that any State deferral policy could not cover all sites. Those sites that fall directly under CERCLA requirements will still be subject to any of the provisions to which the commenters refer.

Rejection of legislative proposals under the Reagan administration to exclude from CERCLA those sites regulated under other Federal authorities does not support the view that State deferral is not authorized. First, these proposals did not refer to States. Moreover, the fact that Federally permitted sites (or even State controlled sites) are not excluded by law does not eliminate EPA's discretion to defer to other Federal authorities or States as a matter of policy so long as CERCLA does not explicitly prevent the deferral.

Finally, the remainder of the legislative history citations submitted by commenters who oppose State deferral are general statements that CERCLA is meant as a tool to clean up the most risky sites. Commenters cited no dispositive statement that relates to State deferral. Because CERCLA and the NCP provide broad discretion for dealing with NPL listing, it would be incongruous to use these legislative history arguments to narrow Agency discretion.

## III. Deferring Sites Based on Petition and/or Certification

Of the 39 comments received regarding the petition option for deferring sites, virtually all preferred this option or supported the availability of both the petition and the certification options. Supporters generally agreed that the petition option would ease the deferral process by imposing the least amount of procedural burden on the State, allowing the State flexibility in cleaning up sites, and maximizing the number of sites States would be able to address. Although general support for the petition option nearly was unanimous among commenters, several revisions were recommended. Commenters suggested that States should have: the legal authorities to clean up sites; goals consistent with CERCLA; programs that can address deferred sites; and responses that are consistent with the NCP. In addition, commenters recommended that States submit annual progress reports to EPA; that greater discourse occur between the Regional Office and State to identify deferral candidates; and that EPA conduct active oversight.

Most of the 25 commenters who addressed the certification option either opposed this option or supported the availability of both options. Commenters who did not support certification generally argued that the approach contained too many requirements. They suggested that certification would be costly to meet, would be overly burdensome to States, and would not relieve duplication of effort by EPA and States. Those who supported certification or both options suggested modifications to the certification approach that would allow more flexibility in regard to conforming to CERCLA procedures and oversight requirements. One commenter was opposed to any option that required deferral on a site-specific basis, arguing that such an approach would be highly duplicative and would require additional, unnecessary resources.

**Response.** Under the Superfund State deferral program, EPA has combined both approaches proposed in 1988 and expects that the deferral program will not be burdensome. States have the opportunity to participate in the deferral program on an "area-wide" or site-specific basis. Under the area-wide approach, an EPA Regional Office and a State will agree that the State program is capable to address deferred sites, based on several criteria. The State will need to demonstrate that it has: provisions assuring that CERCLA-protective remedies are selected; legal authority to pursue enforcement actions; and expertise and resources to conduct enforcement, monitoring, oversight, and community involvement activities.

Under the site-specific approach, a State that does not meet all of the criteria for implementing the program on an area-wide basis may enter into agreements for site-specific deferrals.

Under either approach, sites themselves must meet specific criteria to be eligible for deferral, and States must assure to implement CERCLA-protective remedies and provide for appropriate public involvement. The Regional Office and each interested State will mutually determine, generally based on an annual submission of deferral site candidates proposed by the State, which sites should be deferred. Furthermore, the Regional Office will meet with a State, at least annually, to assure progress is being made at deferred sites and may make arrangements for additional oversight as provided for in agreements with the State.

## IV. Timing for Deferring Sites

The proposed NCP described two approaches for deciding when EPA should defer potential NPL sites to States: 1) before NPL proposal; or 2) after NPL proposal but before final listing. Under the proposed policy of 1988, EPA would employ one or both of these options for managing deferred sites and requested comment on the issue.

Of 22 comments received related to timing for deferring sites, a large majority (including five States) supported the first option because: 1) it offered an incentive for PRPs to initiate early discussions with the State; 2) it did not require Agency for Toxic Substances and Disease Registry (ATSDR) health assessments; and 3) it conserved EPA resources that would otherwise be used for proposing the site on the NPL.

The few commenters (including four States) supporting the second option argued that deferral after listing: 1) defines eligibility for the NPL in the event of deferral termination; 2) assures public involvement; 3) provides for ATSDR health assessments; and 4) allows affected communities to be eligible for technical assistance grants (TAGs).

**Response.** Under the deferral guidance, a site is eligible for deferral until an assignment to develop the site-specific Hazard Ranking System (HRS) scoring package has been tasked. Where development of an HRS package has been initiated, a State must provide a compelling argument why the listing process should be halted. Sites listed on the final NPL are not eligible for deferral.

The Agency believes that this cut-off for deferral eligibility is appropriate because it provides an incentive to PRPs to enter into early negotiations with States to defer sites, thereby encouraging more timely responses. The deferral program is not intended to coerce uncooperative PRPs to conduct cleanups, but to encourage interested PRPs to expedite response actions under State authority. Additionally, restricting eligibility

prior to submission of an HRS scoring package to Headquarters allows EPA to conserve and redirect Superfund resources to other sites that are not deferred.

With respect to comments in support of the first option, EPA expects that site assessments will be completed at most deferred sites before a response action is taken. These assessments will ensure that the Agency will have the basic information necessary to determine eligibility for scoring on the NPL in case the deferral status of a site is terminated. EPA acknowledges that, while ATSDR health assessments will not be required at deferred sites, site-specific ATSDR assistance is available to communities and States upon request. Although TAGs may not be awarded to communities at deferred sites, the Agency believes that the guidance has effective provisions to assure that a State provides for appropriate public participation at deferred sites (these are described in the section on "Stipulating Public Participation Requirements).

## V. Deferring Sites Involving Indian Lands, Water, or Other Resources

Three commenters (Tribal governments) strongly protested deferring to State authorities any site involving Indian lands or other resources. They argued that EPA's deferral of such sites to States would "violate the Agency's fiduciary responsibilities to Indian Tribes by ... allowing State cleanup without CERCLA cleanup criteria or requirements for public participation." The commenters suggested that if a deferral policy is adopted, EPA should develop a screening mechanism to ensure that such sites are not deferred from listing on the NPL.

**Response.** EPA agrees that the deferral program should respect Tribal interests at any site that is on or involves Indian lands or other resources. The Agency also believes that Indian Tribes should have the opportunity to participate in the deferral program as appropriate. The guidance specifies that EPA may defer a site on or involving Indian lands or other resources to a Federally-recognized Tribe provided that other guidance criteria are met. The guidance prohibits deferral of such a site to a State unless the affected Tribe(s) agrees to the deferral through a three-party agreement with the State and EPA.

## VI. Cleanup Levels at Deferred Sites

Twenty-two commenters addressed the issue of requiring States to meet CERCLA standards at deferred sites. Nine of the commenters supported requiring CERCLA standards to be met at all potential NPL sites. These commenters generally agreed that remedial actions undertaken by States should at least meet the

quality of cleanup required under CERCLA. Other commenters encouraged the deferral program to embrace the principle of attaining applicable or relevant and appropriate requirements (ARARs) to the fullest extent practicable. One commenter supported developing a test for State equivalency with Superfund to assure PRPs conducting cleanups that deferrals would be carried out in conformance with CERCLA objectives, thus eliminating the possibility of Federal intervention at deferred sites.

Eight commenters opposed the application of CERCLA cleanup standards, generally arguing that the appropriate level of remediation is that which is provided by the applicable State authority so long as it is protective of human health and the environment. Three commenters opposing the application of CERCLA cleanup standards also argued that required conformance to CERCLA standards would to some degree defeat the purpose of the deferral policy and substantially reduce the number of sites deferred.

Five commenters opposed the deferral concept arguing that deferral to States would lead to many inadequate cleanups and undermine CERCLA objectives of providing for standardized and permanent cleanups.

**Response.** The Agency believes that the quality of response actions at deferred sites should be substantially similar to response actions required under CERCLA. Although States will oversee response actions using their own authorities under the deferral program, they will be required to conduct "CERCLA-protective cleanups" at all deferred sites. The guidance defines a CERCLA-protective cleanup as a response that is protective of human health and the environment, generally defined by a $10^{-4}$ to $10^{-6}$ risk range and a hazard index of one or less. Remedies selected at deferred sites also must comply with all applicable State and Federal requirements and should provide a level of protectiveness comparable to relevant and appropriate Federal requirements. In addition to these requirements regarding cleanup levels, the deferral program contains other safeguards, including State capability criteria and provisions for public involvement, EPA oversight, and deferral termination. The Agency believes that these safeguards will ensure that response actions at deferred sites will be CERCLA-protective.

## VII. Permit Exemptions for Deferred Sites

Sites addressed under the authority of CERCLA are exempt from obtaining permits for activities conducted on-site. Five commenters suggested that permit exemption privileges also should be available at deferred sites.

**Response.** The Agency has determined that CERCLA does not authorize permit exemptions for response actions carried out under the deferral program. CERCLA exempts on-site remedial action that is selected and carried out in compliance with CERCLA Section 121 from Federal, State and local permit requirements. Deferral response actions, however, will be conducted under State authority and therefore cannot use the exemption provision.

## VIII. Notifying Natural Resource Trustees

Two commenters expressed concern that natural resource trustees may not be alerted to potential injuries to the natural resources that they are designated to protect at sites that are not placed on the NPL.

**Response.** EPA affirms that Federal and State trustee involvement is critical to assure that injured natural resources are restored or replaced under CERCLA's natural resource damage provisions. Therefore, at every deferred site, the deferral guidance requires a State to notify the appropriate State and Federal natural resource trustees of discharges or releases that may injure natural resources related to a deferred site, and include the trustees, as appropriate, in PRP negotiations.

## IX. Oversight of State Authorities

Under the proposed policy, EPA oversight would vary depending upon whether the certification or petition option for deferring sites was chosen. Under the State certification option, considerable EPA oversight would be required to review documentation of State capabilities and monitor cleanup progress. Less oversight would be required under the State petition option.

Among eight commenters who addressed the issue of EPA oversight, six commenters supported deferral generally, but differed in their support for EPA oversight. While two of the six respondents supporting deferral agreed that EPA must maintain an active oversight role to ensure timely, consistent, and protective response actions, the others argued for minimal CERCLA oversight. One of the six commenters suggested that once a site is deferred to an approved State program, the State should be assumed capable of ensuring adequate remedial responses. Two commenters opposed deferral altogether and generally argued that deferral of any kind would reduce or eliminate EPA's role in overseeing cleanup decisions. Thus, deferral would undermine Congress' goal of a coordinated national cleanup policy.

**Response.** An important objective of the deferral program is to reduce duplication of effort and clearly identify one agency who will be responsible for a site. The Agency believes that

once a site is deferred to a State and the necessary requirements have been met, the State, with minimal EPA involvement, has responsibility to provide for a timely and CERCLA-protective cleanup. The State also has the responsibility to support the public's right of participation in the decision-making process at deferred sites.

To ensure that these responsibilities are met, EPA has developed several criteria for determining State capability. The guidance requires EPA Regional Offices and States to enter into agreements that clearly identify and distinguish roles, responsibilities, and schedules for implementing response actions at deferred sites. In addition, States and Regional Offices will meet and review specific site progress at least annually. However, EPA also recognizes that site conditions and State capabilities vary. Therefore the deferral guidance allows flexibility for Regional Offices and States to develop area-wide or site-specific agreements that accommodate differing needs for oversight. The Agency believes that implementation of the guidance will provide for a coordinated national cleanup policy, while not encumbering the program with requirements that may impede its effectiveness and efficiency.

## X. Federal Resources to Implement State Deferral and Mixed Funding Settlements

Under the 1988 proposed deferral policy, CERCLA funding would not be available for State management and oversight at sites deferred prior to proposal on the NPL. Six commenters expressed concern that States may not be interested in seeking the deferral of sites to State authority without receiving CERCLA funding. Four commenters supported the provision of limited CERCLA funding to facilitate State oversight of deferred sites. Two other respondents suggested that, as incentives for State participation, permit exemptions currently limited to CERCLA actions should be extended to include deferrals to States (see the section on "Permit Exemptions for Deferred Sites").

Additionally, the proposed policy did not make mixed funding available for sites that are deferred prior to proposal on the NPL. Of eight commenters addressing this issue, five stated that EPA should consider allowing mixed funding settlements for all sites that are deferred prior to proposal on the NPL. Three commenters stated that deferral would not preclude mixed funding settlements from being conducted under State law.

**Response.** A fundamental expectation of the deferral program is that viable PRPs will reach settlements with States to respond to deferred sites. A site that does not have viable PRPs who are willing to provide for a full response action should not be eligible for deferral unless the State has other non-Federal

sources of funding for the response. However, EPA recognizes that under certain circumstances, provision of limited funding to a State to assist in its implementation of the deferral program may be needed. The guidance allows a Regional Office to award, through cooperative agreements, site-specific funds to a State to conduct enforcement and oversight-related activities or non-site-specific funds to improve its overall capability to implement the program. EPA also may provide deferral-specific funding for site assessments where such assessments have not been conducted and removal funding, as appropriate, when PRPs become recalcitrant or bankrupt.

In response to comments regarding mixed funding settlements, EPA reiterates its position not to allow Federal Trust Fund resources to be used for response actions at deferred sites; thus EPA will not enter into such agreements to allow for mixed funding using Federal resources. However, EPA agrees that the deferral program does not preclude a State from using its own authority and resources to enter into agreements where the State and PRPs share the costs of response at a deferred site.

## XI. Stipulating Public Participation Requirements

The proposed policy required States to notify the public of a deferral and to conduct public participation activities during the remedy selection process at a deferred site. Technical Assistance Grants (TAGs) would only be available at deferred sites that had been proposed for NPL listing.

Twelve commenters specifically addressed the issue of public participation requirements. Seven of these commenters supported deferral generally: three commenters supported the proposed public participation requirements; three argued for greater assurance that States provide for public involvement; and one remarked that public participation requirements should not be required at sites that have not been placed on the NPL. Five commenters opposed any deferral policy because States could not guarantee the same level of public participation as mandated in the Superfund Amendments Reauthorization Act (SARA), especially without support from TAGs.

Fifteen commenters specifically addressed the availability of TAGs at deferred sites: five supported a policy to defer sites proposed to the NPL, which would make TAGs available at those sites; six opposed any deferral policy that did not allow TAGs to be made available; two advocated the development of State-funded grant programs similar to the TAG program; and one suggested that EPA make other forms of funding available to communities. All the commenters were concerned that the deferral policy ensure public participation in the remedial process.

**Response.** EPA regards community involvement as a critical component of response actions at deferred sites and believes that States that are committed to public involvement can achieve an impact similar to that desired under the NCP. To that end, the deferral guidance requires States to have the capability and commitment to involve communities at deferred sites; requires States to notify affected communities of proposed deferrals; and incorporates community acceptance as a criterion for deferral. Once a site has been deferred, the guidance requires the State to ensure that the impact of the State's efforts to involve the public will be substantially similar to the intended effect of implementing the NCP public involvement requirements. Finally, the guidance instructs Regional Offices to consider community concerns regarding termination of the deferral status of a site.

While EPA does not have authority to provide TAGs to communities at deferred sites, because they have not been proposed to the NPL, under the deferral program, States should provide resources or direct assistance to affected communities at deferred sites, as appropriate. To acquire resources or assistance for communities, the guidance also encourages a State to seek funding from the PRPs at a site if the State cannot provide funding to a community itself. EPA believes that with these multiple safeguards, public involvement will be adequately provided for at sites that are deferred.

## XII. ATSDR Health Assessments

Of 18 commenters who addressed the issue of health assessments, nine favored having ATSDR health assessments performed at deferred sites. Three commenters stated that health assessments at deferred sites should not be required. Not having this requirement would allow CERCLA funds and resources to be redirected to sites at which no other authority expects to take a response action. Six commenters opposed any deferral policy that would not require health assessments.

**Response.** ATSDR health assessments will not be required at deferred sites because such sites will not be proposed or final on the NPL. However, upon petitioning ATSDR, a health assessment or consultation may be conducted at any site. Additionally, under the Superfund Accelerated Cleanup Model (SACM), EPA supports earlier use of ATSDR health assessments or consultations to accelerate responses. As a result, the Agency expects that health assessments and consultations will be conducted more frequently at non-NPL sites, including deferred sites.

## XIII. Terminating Deferral Status

Under the proposed policy, EPA reserved the right to terminate the deferred status of a site and take the necessary procedural steps to list the site on the NPL when the Agency determined the termination was necessary. Most of the 19 commenters on this issue supported EPA's right to terminate the deferral status of a site. However, these respondents commented on how to determine whether a deferral should be terminated. Comments included the following suggestions: terminate only with State concurrence; terminate only at the national level to promote national consistency; and terminate when negotiations with PRPs break down. One commenter suggested that terminated sites should be placed on the NPL automatically, while another urged that NPL listing should only occur if the site scores high enough on the HRS system. Two commenters also argued that EPA should establish definite procedures for terminating a site's deferred status and propose these procedures in the Federal Register and/or include them in the NCP.

A few commenters expressed concern about EPA terminating deferrals, noting that termination would result in duplicative use of resources. These commenters believed that PRPs would be extremely reluctant to enter into negotiations if they knew that the site would be deferred to an inadequate authority, only later to be returned to the CERCLA program.

**Response.** Under the deferral guidance, the Agency continues to preserve its right to terminate the deferral status of a site at any time and proceed with necessary response action and consideration for listing on the NPL. Because Regional Offices will be responsible for entering into agreements with States and for conducting oversight, they will have the discretion to determine whether the deferral status of a site should be terminated.

If a Regional Office determines, at any time, that the response at a deferred site is not CERCLA-protective, is unreasonably delayed or inappropriate, does not adequately address community concerns, or if the State is otherwise unable to compel or conduct a response action, the Regional Office may terminate the deferral status of the site. While the Regional Office must provide 30 days' notice and consult with the State before terminating a deferral, State concurrence with the termination is not required. States also may choose to terminate the deferred status of a site for any reason after 30 days' notice to the Regional Office.

Upon terminating a site's deferral status, the guidance instructs a Regional Office to consider immediately taking any necessary response actions and initiate consideration of the site for NPL listing. The site will not be automatically eligible for

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NPL listing, but the Agency believes that these actions will assure the public that EPA will continue to respond at sites where response actions have begun and will encourage PRPs to forge successful agreements with States.