



CERCLA Compliance With Other Laws Manual

CERCLA Compliance with State Requirements

Office of Emergency and Remedial Response
Office of Program Management OS-240

Quick Reference Fact Sheet

The 1986 Superfund Amendments and Reauthorization Act (SARA) adopts and expands a provision in the 1985 National Contingency Plan (NCP) that remedial actions must at least attain applicable or relevant and appropriate requirements (ARARs). Section 121(d) of CERCLA, as amended by SARA, requires attainment of Federal ARARs and of State ARARs in State environmental or facility siting laws when the State requirements are promulgated, more stringent than Federal laws, and identified by the State in a timely manner.

To implement the ARARs provision, EPA has developed guidance, CERCLA Compliance With Other Laws Manual: Parts I and II (Publications 9234.1-01 and 9234.1-02). EPA is preparing a series of short fact sheets that summarize these guidance documents. This fact sheet provides a guide to Chapter 6 of Part II, which addresses CERCLA compliance with State requirements. The material covered here is based on SARA and on policies in the proposed revisions to the NCP. The final NCP may adopt policies different from those covered here and should, when promulgated, be considered the authoritative source.

I. INTRODUCTION TO STATE ARARs

Prior to SARA, the NCP classified all State requirements as criteria that EPA should consider when selecting a remedy. The amendments elevated to the level of potential ARARs any "promulgated" State requirements that are "more stringent" than Federal requirements (see **Highlight 1** for specific criteria).

Highlight 1: CRITERIA FOR A STATE REQUIREMENT TO QUALIFY AS AN ARAR

In order to qualify as a State ARAR, a State requirement should be:

- A State law;
- An environmental or facility siting law;
- Promulgated;
- More stringent than the Federal requirement;
- Identified in a timely manner; and
- Consistently applied.

State requirements, like Federal requirements, must also be substantive in nature to qualify as ARARs. Administrative or procedural State requirements are not ARARs. Elements of State ARARs are discussed below.

Generally, laws and regulations adopted at the State level, as distinguished from the regional, county, or local level, are considered to be State ARARs. Local laws in themselves are not ARARs. However, requirements that are developed by a local or regional body and are both adopted and legally enforceable by the State may be potential State ARARs. Potential State ARARs may also be found where local or regional boards have established standards that become part of a legally enforceable State "plan."

II. STATE ENVIRONMENTAL OR FACILITY SITING LAWS AS ARARs

Several common types of State statutes that may provide State ARARs are described below. Guidance on compliance with these requirements is provided.

A. State Siting Requirements (Location Standards)

State siting requirements may restrict the location of existing and expanding or new hazardous waste treatment, storage, and disposal (TSD) facilities (**Highlight 2** provides the triggers for State siting).

requirements). Siting restrictions have generally been left to the States to implement. However, the Resource Conservation and Recovery Act (RCRA) contains limited siting provisions that restrict locations in fault zones, 100-year floodplains, salt dome and salt bed formations, and underground caves. As of 1987, 33 States had promulgated siting requirements that were more stringent than Federal requirements.¹

Highlight 2: TRIGGERS FOR STATE SITING REQUIREMENTS

State siting requirements may be triggered as potential ARARs when:

- An existing hazardous waste site is in a restricted location, and a corresponding action is required (such as a removal, remediation, design, or modified care);
- A new hazardous waste unit is to be created in a restricted location; or
- A non-land-based unit is brought on-site.

The application of a State siting law to a Superfund action also depends upon the State's definition of a "new" or "existing" site. Because Superfund sites generally represent pre-existing (and unplanned) situations, State restrictions for new or operating facilities may not apply to Superfund sites.

State siting requirements are commonly found in State laws that address environmentally sensitive areas such as wetlands, endangered species habitats, gamelands, parks, preserves, and underground mining/subsidence areas. States also protect ground water and surface water through a variety of location standards such as: (1) prohibitions of facilities in certain locations; (2) quantitative setback distances from water supplies or other water bodies; (3) quantitative thickness or hydraulic conductivity in soil barriers; and (4) designation of acceptable soil or rock type for facility siting. Finally, buffer zones may also contain location standards ranging from specific setback distances to general statements that preclude interference with population areas.

B. Discharge of Toxic Pollutants to Surface Waters

The Clean Water Act (CWA) requires States to identify water bodies that may be adversely affected by toxic pollutants and to develop criteria to protect these areas. State toxic pollutant regulations are generally pre-

¹ Temple, Barker, and Sloane, Inc., Review of State Hazardous Waste Facility Criteria, Revised Draft Final Report. U.S. EPA, Washington, DC, 1987.

ented in the form of narrative goals rather than numeric criteria. For example, State narrative requirements may be expressed in terms predicated upon specific toxicity testing procedures or in terms of whole effluent toxicity limits. All substantive aspects of these narrative requirements may be ARARs for CERCLA discharges. In addition, general prohibitions on toxic pollutant discharges of known carcinogens may be State ARARs for on-site CERCLA discharges. All such State requirements should be examined for any exemptions of Federal activities.

C. Antidegradation Requirements for Surface Water

The CWA requires all States to adopt statutes or regulations that prevent the degradation of high-quality waters. In addition, States may have promulgated other antidegradation requirements for surface waters (see **Highlight 3** for typical State antidegradation requirements).

Highlight 3: TYPICAL STATE ANTIDEGRADATION REQUIREMENTS

Typical State antidegradation requirements will mandate the:

- Maintenance of existing in-stream designated beneficial uses;
- Maintenance of high-quality waters unless the State decides to allow limited degradation where economically or socially justifiable;
- Maintenance of the quality of Outstanding National Resource Waters (ONRW); and
- Use of best available technology for treatment of new or increased pollution into high-quality waters.

If a CERCLA remedial action involves a point-source discharge of treated effluent to high-quality surface waters, these various State antidegradation requirements may be ARARs for the discharge.

D. Antidegradation Requirements for Ground Water

Like antidegradation requirements for surface water, antidegradation requirements for ground water are generally prospective in nature and are designed to prevent further degradation of water quality. If a State has developed antidegradation requirements for ground water, CERCLA remedial actions involving injection of partially treated water into a pristine aquifer may be affected. These State requirements would not, however, require cleanup to the aquifer's original quality prior to contamination. However, there may be a State cleanup

law that specifically requires cleanup to background, which would constitute an ARAR for the remediation.

III. "PROMULGATED" LAWS AS ARARs

A State requirement must be promulgated to qualify as an ARAR. A State requirement is promulgated if it is: (1) legally enforceable; and (2) of general applicability (see **Highlight 4**).

Highlight 4: PROMULGATED STATE LAWS

- **Legal Enforceability:** State requirements may be legally enforceable in several ways. State statutes or regulations may either: (1) have their own specific enforcement provisions written into them; or (2) be enforced through the State's general legal authority.
- **General Applicability:** State requirements must apply to a broader universe than Superfund sites. For example, a State requirement having general applicability ("of general applicability") would apply to all hazardous waste sites in the State that meet the jurisdictional prerequisites of the requirement, not just to CERCLA sites.

Promulgated requirements are found in State statutes and regulations that have been adopted by authorized State agencies. Statute numbers, enactment dates, and effective dates may indicate whether the requirements have been promulgated. Such promulgated requirements may be either numerical or narrative in form.

A. Criteria That Are "To Be Considered" (TBCs)

Although they are not ARARs, State advisories, guidance and policies, etc., may help EPA define and develop protective remedies and interpret State laws. These State policies and guidance, known as "to be considered" (TBCs), are not potential ARARs because they are neither promulgated nor enforceable. It may be necessary to consult TBCs to interpret ARARs or to determine preliminary remediation goals when ARARs do not exist for particular contaminants. States should identify or communicate to EPA TBCs that they consider to be pertinent to the remedy.

B. Narrative Standards

Occasionally, a State may submit as an ARAR a narrative State statute. While narrative State statutes may be ARARs, unpromulgated methodologies that are designed to implement narrative statutes are not. EPA has discretion to determine whether numbers obtained from unpromulgated methodology should be met, or whether they constitute TBCs. It is important to note, however, that numbers derived from State narrative statutes may be

ARARs if the narrative statute is an ARAR, and has implementing regulations that are also ARARs.

IV. "MORE STRINGENT" LAWS AS ARARs

CERCLA requires remedies to comply with State requirements that are more stringent than Federal requirements (see **Highlight 5** for a definition of "more stringent").

Highlight 5: CRITERIA FOR "MORE STRINGENT"

- State requirements are more stringent than Federal requirements if the State program has Federal authorization and the State requirements are "at least" as stringent.
- State programs that do not have a Federal counterpart are generally more stringent because they add new requirements.
- Stringency comparisons may be necessary if a State program is not Federally authorized but has a Federal counterpart.

It is important to note that EPA believes that if a State is authorized to implement a program in lieu of a Federal agency, State laws arising out of that program constitute the ARARs instead of the Federal authorizing legislation. A stringency comparison is unnecessary because State regulations under Federally authorized programs are considered to be Federal requirements.

V. IDENTIFYING AND COMMUNICATING STATE ARARs IN A TIMELY MANNER

CERCLA requires States to identify ARARs in a timely manner. As a result, EPA and a State may enter into a Superfund Memorandum of Agreement (SMOA) which, among other things, establishes a schedule for communicating ARARs. In the absence of a SMOA, States must identify ARARs within certain timeframes (identified below) in order for that identification to be considered "timely". EPA is not legally required to consider potential State ARARs that are not identified within these timeframes. The responsibilities of a State to communicate ARARs will vary depending upon its role at the site (see **Highlight 6** for State roles and responsibilities).

A. Critical Points for Identifying State ARARs

There are particular points in the preremedial and remedial processes during which the lead and support agencies must communicate with each other. SMOAs may identify timeframes for communicating potential ARARs. **Highlight 7** presents the critical points in the

Highlight 6: STATE ROLES AND RESPONSIBILITIES

As the support agency, the State is responsible for:

- Receiving and reviewing information about proposed Federal ARARs and TBCs, as early as site characterization;
- Coordinating State input on ARARs from all State agencies;
- Identifying State ARARs during the RI/FS;
- Justifying proposed State ARARs; and
- Reviewing ARARs identified in the proposed plan and ROD.

As the lead agency, the State is responsible for:

- Requesting EPA's identification of Federal ARARs;
- Identifying State ARARs during the RI/FS;
- Identifying ARARs and waivers in the proposed plan; and
- Documenting compliance with ARARs in the draft ROD.

pre-remedial and remedial processes if no SMOA exists, or if the SMOA fails to address such timeframes. It is important to note that regardless of their role, EPA and the States each have an unvarying responsibility. States are always responsible for identifying State ARARs and communicating them to EPA in a timely manner. EPA is always responsible for making the final determination on ARARs as part of remedy selection, regardless of who conducts the RI/FS (i.e., EPA, the State, or PRP), or who recommends the remedy (i.e., EPA or the State), except for State-lead non-Fund-financed sites.

B. EPA Responsibilities for Communicating Waivers

If EPA intends to waive any State-identified ARARs in its proposed plan, or does not agree with the State that a certain State standard is an ARAR, it must formally notify the State either: (1) when the Agency submits the RI/FS for State review; or (2) when the Agency responds to the State's submission of the RI/FS. In addition, EPA must respond to State comments on waivers from, or disagreements about, State ARARs after making the RI/FS and proposed plan available for public comment.

Highlight 7: CRITICAL POINTS FOR IDENTIFYING ARARS

Scoping of the RI/FS

- Lead and support agencies initiate discussion of potential ARARs and TBCs, focusing on chemical- and location-specific requirements.

Site Characterization

- Lead agency sends Preliminary Site Characterization Summary to support agencies to facilitate ARARs identification.
- Lead agency requests potential chemical- and location-specific ARARs and TBCs from support agency.
- Support agency has 30 days from receipt of request to respond.

Development of Alternatives

- Lead agency begins preliminary consideration of action-specific ARARs.

Screening of Alternatives

- Lead agency begins identification of action-specific ARARs.
- Lead Agency notifies the support agency of alternatives that passed initial screening.

Detailed Analysis of Alternatives

- Before Comparative Analysis begins, lead agency requests action-specific and any additional ARARs and TBCs from support agency.
- Support agency has 30 days from receipt of request to respond.

Selection of Preferred Alternative

- Lead agency states in Proposed Plan whether each alternative will comply with all identified ARARs and/or identifies proposed waivers and their justification.
- Lead agency provides Proposed Plan and RI/FS report to support agency for review.

Record of Decision (ROD)

- Lead agency summarizes ARAR compliance in ROD and provides draft ROD to support agencies for review.

Remedial Design/Remedial Action

- Lead agency:
 - provides a copy of the RD to support agencies for review;
 - identifies additional ARARs based upon design specifications/changes;
 - verifies protectiveness of remedy if significant new ARARs are promulgated; and
 - reviews ARARs if RA significantly different than the ROD.

C. State Responsibilities for Documenting State ARARs

To demonstrate that the State requirement is an ARAR, States are required by the NCP to provide citations to the statute or regulation number. In addition, States should provide the requirement's effective date and description of scope, where appropriate. Furthermore, States should provide evidence that the requirement is more stringent than the Federal requirement. Finally, States should also describe in writing the relationship between the State requirement and the site or action, to show that the State requirement is applicable or relevant and appropriate to that particular site or action.

VI. STATE STANDARD WAIVERS

A. Statutory Waivers

Of the six ARAR waivers set forth in CERCLA, one applies exclusively to State ARARs: inconsistent application of the State standard by the State. This waiver may be invoked when evidence exists that a State standard has not been or will not be consistently applied to both non-NPL and NPL sites within the State. The waiver may be used, for example, for a State standard that was promulgated but never applied, or for a standard that has been variably applied or enforced. A State standard is presumed to have been consistently applied unless there is evidence to the contrary.

B. State Waivers

In addition to the waivers provided by CERCLA, many State regulations have their own waivers or exceptions to their requirements. When a State requirement has a waiver that is applicable, the State requirement does

not have to be met. EPA makes the final determination as part of the selection of remedy.

State waivers are common components of State siting requirements. Usually only temporary or emergency situations qualify for waivers of State siting requirements. Remedial actions at Superfund sites may qualify for State waivers depending upon their design and the particular waiver requirements. To determine if a remedial action qualifies for a State waiver, the State waiver provision should be examined for its duration, circumstances that justify its use, and any renewal provisions.

C. State-Wide Bans

Under CERCLA section 121(d), a State-wide ban prohibiting land disposal of hazardous substances is not an ARAR unless the following three criteria are met:

- The State requirement is of general applicability and was adopted by formal means;
- The State requirement was adopted on the basis of hydrologic, geologic, or other relevant considerations and was not adopted for the purpose of precluding on-site remedial actions or other land disposal for reasons unrelated to protection of human health and the environment; and
- The State arranges for, and assures payment of the incremental costs of, utilizing a facility for hazardous waste disposal.