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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Revised Procedures for Planning and Implementing
Off-site Response Actions

FROM: *J. Winston Porter*
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TO: Regional Administrators
Regions I-X

With this memo I am transmitting the revised procedures for planning and implementing off-site response actions (the "off-site policy"). These procedures should be observed when a response action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Section 7003 of the Resource Conservation and Recovery Act (RCRA) involves off-site treatment, storage or disposal of CERCLA waste.

This policy incorporates all of the mandates of CERCLA as amended by the Superfund Amendments and Reauthorization Act (SARA) and expands several of the more stringent requirements when applying them to wastes resulting from CERCLA decision documents signed, and RCRA section 7003 actions initiated, after the enactment of SARA. This revised policy also reinterprets the original off-site policy, issued in May 1985, as it applies to CERCLA wastes resulting from decision documents signed, and RCRA section 7003 actions initiated, before the enactment of SARA.

This revised policy is effective immediately upon issuance. It is considered to be an interim final policy as key elements of the policy will be incorporated in a proposed rule to be published in the Federal Register. As part of that rulemaking, the policy will be subject to public comment. Comments received during that period may cause additional revisions to the policy.

If you have comments regarding this revised policy, please contact Gene Lucero, Director, Office of Waste Programs Enforcement.

cc: Waste Management Division Directors
Regions I-X

REVISED PROCEDURES FOR IMPLEMENTING OFF-SITE RESPONSE ACTIONS

I. INTRODUCTION

The off-site policy describes procedures that should be observed when a response action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Section 7003 of RCRA involves off-site storage, treatment or disposal of CERCLA waste. The procedures also apply to actions taken jointly under CERCLA and another statute.

The purpose of the off-site policy is to avoid having CERCLA wastes contribute to present or future environmental problems by directing these wastes to facilities determined to be environmentally sound. It is EPA's responsibility to ensure that the criteria for governing off-site transfer of CERCLA waste result in decisions that are environmentally sensible and that reflect sound public policy. Therefore, in developing acceptability criteria, the Agency has applied environmental standards and other sound management practices to ensure that CERCLA waste will be appropriately managed.

EPA issued the original off-site policy in May 1985. See "Procedures for Planning and Implementing Off-Site Response Actions", memorandum from Jack W. McGraw to the Regional Administrators. That policy was published in the Federal Register on November 5, 1985. The 1986 amendments to CERCLA, the Superfund Amendments and Reauthorization Act (SARA), adopted EPA's policy for off-site transfer of CERCLA wastes, with some modifications. CERCLA §121(d)(3) requires that hazardous substances, pollutants or contaminants transferred off-site for treatment, storage or disposal during a CERCLA response action be transferred to a facility operating in compliance with §§3004 and 3005 of RCRA and other applicable laws or regulations. The statute also requires that receiving units at land disposal facilities have no releases of hazardous wastes or hazardous constituents. Any releases from other units at a land disposal facility must also be controlled by a RCRA or equivalent corrective action program. While the original policy required compliance with RCRA and other applicable laws, SARA goes beyond the original policy, primarily by prohibiting disposal at units at a land disposal facility with releases, rather than allowing the Agency to judge whether the releases constituted environmental conditions that affected the satisfactory operation of a facility.

The off-site policy has been revised in light of the mandates of SARA. This revised policy also extends the SARA concepts to certain situations not specifically covered by the statute. These requirements apply to CERCLA decision documents signed, and RCRA §7003 actions taken, after enactment of SARA. Specifically, this policy covers:

- o Extending SARA's "no release" requirement to all RCRA units receiving CERCLA waste, not just units at RCRA land disposal facilities;
- o Expanding SARA's release prohibition to include releases of CERCLA hazardous substances, in addition to releases of RCRA hazardous waste and hazardous constituents;
- o Addressing releases from other units at RCRA treatment and storage facilities; and
- o Addressing off-site transfer to non-RCRA facilities.

The revised policy also reinterprets the May 1985 policy as it now applies to CERCLA decision documents signed, and RCRA §7003 actions taken, prior to the enactment of SARA.

The revised off-site policy is effective immediately upon issuance. It is considered to be an interim policy as key elements of the policy will be incorporated in a proposed rule to be published in the Federal Register. As part of that rulemaking, the policy will be subject to public comment. Comments received during that period may cause additional revisions to the policy. The final rule will reflect the final policy under CERCLA §121(d)(3) and EPA will issue a revised implementation policy memorandum if necessary.

II. APPLICABILITY

There are a number of variables which will determine whether and how the off-site policy applies: waste type, authority, funding source, and whether the decision document or order supporting the clean-up was signed before or after the enactment of SARA (i.e., before or after October 17, 1986). In order to determine which elements of the policy apply to a specific CERCLA cleanup each factor must be considered.

The first factor to consider is the type of waste to be transferred. The revised policy applies to the off-site treatment, storage or disposal of all CERCLA waste. CERCLA wastes include RCRA hazardous wastes and other CERCLA hazardous substances, pollutants and contaminants. RCRA hazardous wastes are either listed or defined by characteristic in 40 CFR Part 261. CERCLA hazardous substances are defined in 40 CFR 300.6.

Because RCRA permits and interim status apply to specific wastes and specific storage, treatment or disposal processes, the Remedial Project Manager (RPM) or On-Scene Coordinator (OSC) must determine that the facility's permit or interim

status authorizes receipt of the wastes that would be transported to the facility and the type of process contemplated for the wastes. Therefore, it is important that facility selection be coordinated with RCRA personnel.

A CERCLA hazardous substance that is not a RCRA hazardous waste or hazardous constituent (i.e., non-RCRA waste) may be taken to a RCRA facility if it is not otherwise incompatible with the RCRA waste, even though receipt of that waste is not expressly authorized under interim status or in the permit. Non-RCRA wastes can also be managed at non-RCRA facilities. Criteria applicable to CERCLA wastes that can be disposed of at non-Subtitle C facilities are discussed later in this revised policy.

The second factor to consider in determining whether this revised policy applies is the statutory authority for the action. This revised off-site policy applies to any remedial or removal action involving the off-site transfer of any hazardous substance, pollutant, or contaminant under any CERCLA authority or under RCRA §7003. This policy also applies to response actions taken under §311 of the Clean Water Act, except for cleanups of petroleum products. The policy also covers cleanups at Federal facilities under §120 of SARA.

The third factor to assess is the source of funding. The revised policy applies to all Fund-financed response actions, whether EPA or the State is the lead agency. The policy does not apply to State-lead enforcement actions (even at NPL sites) if no CERCLA funds are involved. It does apply to State-lead enforcement actions where EPA provides any site-specific funding through a Cooperative Agreement or Multi-Site Cooperative Agreement, even though the State may be using its own enforcement authorities to compel the cleanup. Similarly, non-NPL sites are covered by this policy only where there is an expenditure of Fund money or where the cleanup is undertaken under CERCLA authority.

The final factor that affects how this revised policy applies is the date of the decision document. As noted earlier, there are two classes of actions subject to slightly different procedures governing off-site transfer: first, those actions resulting from pre-SARA decision documents or RCRA §7003 orders issued prior to October 17, 1986, are subject to the May 1985 policy as updated by this revised policy; and second, those actions resulting from post-SARA decision documents or RCRA §7003 orders issued after October 17, 1986, are subject to the requirements of SARA as interpreted and expanded by this revised policy. Although the procedures in this policy are similar for these two classes of actions, there are important differences (e.g., the requirements pertaining to

releases from other units at a facility) that will be highlighted throughout this document.

Compliance with the revised procedures is mandatory for removal and remedial actions. However, there is an emergency exemption for removals if the OSC determines that the exigencies of the situation require off-site treatment, storage or disposal without following the requirements. This exemption may be used when the OSC believes that the threat posed by the substances makes it imperative to remove the substances immediately and there is insufficient time to observe these procedures without endangering public health, welfare or the environment. In such cases, the OSC should consider temporary solutions (e.g., interim storage) to allow time to locate an acceptable facility. The OSC must provide a written explanation of his or her decision to use this emergency exemption to the Regional Administrator within 60 days of taking the action. In Regions in which authority to make removal decisions has not been fully delegated by the Regional Administrator to the OSC, the decisions discussed above must be made by the Regional official to whom removal authority has been delegated. This emergency exemption is also available to OSC's taking response actions under §111 of the Clean Water Act.

III. DEFINITIONS

A. Release

For the purposes of this policy, the term "release" is defined here as it is defined by §101(22) of CERCLA, which is repeated in 40 CFR 300.6 of the NCP, and the RCRA §3000(h) guidance ("Interpretation of Section 3000(h) of the Solid Waste Disposal Act", Memorandum from J. Winston Porter and Courtney M. Price to the Regional Administrators, RE AL, December 16, 1985). To summarize, a release is any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, dumping or disposing to the environment. This includes releases to surface water, ground water, land surface, soil and air.

A release also includes a substantial threat of a release. In determining whether a substantial threat of release exists, both the imminence of the threat and the potential magnitude of the release should be considered. Examples of situations where a substantial threat of a release may exist include a weakened or inadequately engineered dike wall at a surface impoundment, or a severely rusted treatment or storage tank.

De Minimis releases from receiving units are exempt; that is, they are not considered to be releases under the off-site

policy. De minimis releases are those that do not adversely affect public health or the environment, such as releases to the air from temporary opening and closing of bungs, releases between landfill liners of 1 gallon/acre/day or less, or stack emissions from incinerators not otherwise subject to Clean Air Act permits. Releases that need to be addressed by implementing a contingency plan would not normally be considered de minimis releases.

Federally-permitted releases, as defined by CERCLA §101(10) and 40 CFR 300.6, are also exempt. These include discharges or releases in compliance with applicable permits under RCRA, the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Marine Protection, Research and Sanctuaries Act, and Atomic Energy Act or analogous State authorities.

For purposes of this policy, an interim status unit in RCRA ground-water assessment monitoring (under 40 CFR 265.93) or a permitted unit in compliance monitoring (under 40 CFR 264.99) is not presumed to have a release. EPA will evaluate available information, including the data which led to a determination of the need for assessment or compliance monitoring, data gathered during assessment monitoring, and any other relevant data, including that gathered from applicable compliance inspections. A determination of unacceptability should be made when information will support the conclusion that there is a probable release to ground water from the receiving unit. Finding a release can happen at any time before, during or after an assessment or compliance monitoring program.

On the other hand, it is not necessary to have actual sampling data to determine that there is a release. An inspector may find other evidence that a release has occurred, such as a broken dike or feed line at a surface impoundment. Less obvious indications of a release might also be adequate to make the determination. For example, EPA could have sufficient information on the contents of a land disposal unit, the design and operating characteristics of the unit, or the hydrogeology of the area in which the unit is located to conclude that there is or has been a release to the environment.

B. Receiving Unit

The receiving unit is any unit that receives off-site CERCLA waste:

- (1) for treatment using BDAT, including any pre-treatment or storage units used prior to treatment;
- (2) for treatment to substantially reduce its mobility,

toxicity or persistence in the absence of a defined BDAT; or

- (3) for storage or ultimate disposal of waste not treated to the previous criteria.

Note that the acceptability criteria may vary from unit to unit, and that the receiving unit may vary from transfer to transfer.

C. Other Units

Other units are all other regulated units and solid waste management units (SWMU's) at a facility that are not receiving units.

D. Controlled Release

In order to be considered a controlled release, the release must be addressed by a RCRA corrective action program (incorporated in a permit or order) or a corrective action program approved and enforceable under another applicable Federal or delegated State authority.

E. Relevant Violations

Relevant violations include Class I violations as defined by the RCRA Enforcement Response Policy (December 21, 1984, and subsequent revisions) at or affecting a receiving unit. A Class I violation is a significant deviation from regulations, compliance order provisions or permit conditions designed to:

- o Ensure that hazardous waste is destined for and delivered to authorized facilities;
- o Prevent releases of hazardous waste or constituents to the environment;
- o Ensure early detection of such releases; or
- o Compel corrective action for releases.

Recordkeeping and reporting requirements (such as failure to submit the biennial report or failure to maintain a copy of the closure plan at the facility) are generally not considered to be Class I violations.

Violations affecting a receiving unit include all ground-water monitoring violations unless the receiving unit is outside the waste management area which the ground-water monitoring system was designed to monitor. Facility-wide Class I violations (such as failure to comply with financial

responsibility requirements, inadequate closure plan, inadequate waste analysis plan, inadequate inspection plan, etc.) that affect the receiving unit are also relevant violations.

Violations of State or other Federal laws should also be examined for relevance, considering the significance of the requirement that is being violated; the extent of deviation from the requirement; and the potential or actual threat to human health or the environment.

F. Relevant Release

A relevant release under this revised policy includes:

- o - Any release or significant threat of release of a hazardous substance (defined in 40 CFR 300.6) not previously excluded (i.e., de minimis releases or permitted releases) at all units of a RCRA Subtitle C land disposal facility and at receiving units of a RCRA Subtitle C treatment or storage facility; and
- o Environmentally significant releases of any hazardous substance not previously excluded at non-receiving units at RCRA Subtitle C treatment and storage facilities and at all units at other facilities.

G. Relevant Conditions

Relevant conditions include any environmental conditions (besides a relevant violation) at a facility that pose a significant threat to public health, welfare or the environment or that otherwise affect the satisfactory operation of the facility.

H. Responsible Agency

Determinations of acceptability to receive an off-site transfer of CERCLA waste will be made by EPA or by States authorized for corrective action under §3004(u) of RCRA. References in this document to the "responsible Agency" refer only to EPA Regions or to States with this authority.

I. Responsible Government Official

The responsible government official is that person authorized in the responsible Agency to make acceptability determinations under this revised policy.

IV. ACCEPTABILITY CRITERIA

A. Acceptability Criteria for Wastes Generated Under Pre-SARA Decision Documents

CERCLA wastes from actions resulting from pro-SARA decision documents and pre-SARA RCRA §7003 orders may go to a facility meeting the following criteria:

- o There are no relevant violations at or affecting the receiving unit; and
- o There are no relevant conditions at the facility (i.e., other environmental conditions that pose a significant threat to public health, welfare or the environment or otherwise affect the satisfactory operation of the facility).

In order to determine if there is a relevant violation, an appropriate compliance inspection must be conducted no more than six months before the expected date of receipt of CERCLA waste. This inspection, at a minimum, must address all regulated units. This inspection may be conducted by EPA, a State or an authorized representative. When a State conducts the inspection, it should determine the facility's compliance status. Where a violation or potential violation comes to EPA's attention (e.g., through a citizen complaint or a facility visit by permit staff), the Region or State is expected to investigate whether a violation occurred as soon as is reasonably possible.

The May 1985 policy does not refer specifically to releases. Rather, a corrective action plan is required for relevant conditions. Therefore, in some cases, a facility receiving CERCLA wastes from an action subject to a pre-SARA decision document may not need to institute a program to control releases. Releases will be evaluated by the responsible Agency to determine whether such releases constitute relevant conditions under this policy.

The activities related to determining acceptability, providing notice to facilities, regaining acceptability and implementation procedures are discussed in the "Implementation" section of this document, and apply to off-site transfers of waste generated under pre-SARA and post-SARA decision documents.

B. Acceptability Criteria for Wastes Generated Under Post-SARA Decision Documents

Under this revised policy, there are three basic criteria that are used to determine the acceptability of a facility to receive off-site transfers of CERCLA waste generated under a post-SARA decision document or post-SARA RCRA §7003 cleanup. The criteria are:

- o There must be no relevant violations at or affecting the receiving unit;
- o There must be no releases from receiving units and contamination from prior releases at receiving units must be addressed as appropriate; and
- o Releases at other units must be addressed as appropriate.

The last two criteria are applied somewhat differently, depending on the type of facility. These differences are described below.

1. Criteria Applicable to All RCRA Subtitle C Treatment, Storage and Disposal Facilities. The first criterion that applies to all Subtitle C facilities is that there can be no relevant violations at or affecting the receiving unit. As discussed earlier, this determination must be based on an inspection conducted no more than six months prior to receipt of CERCLA waste.

A second element that applies to all Subtitle C facilities is that there must be no releases at receiving units. Releases from receiving units, except for de minimis releases and State- and Federally-permitted releases, must be eliminated and any prior contamination from the release must be controlled by a corrective action permit or order under Subtitle C, as described in the next section.

The final criterion that applies to all Subtitle C facilities, is that the facility must have undergone a RCRA Facility Assessment (RFA) or equivalent facility-wide investigation. This investigation addresses EPA's affirmative duty under CERCLA §121(d)(3) to determine that there are no releases at the facility.

Releases of RCRA hazardous waste or hazardous constituents and CERCLA hazardous substances are all included under the policy. While the RFA need not focus on identifying releases of hazardous substances that are not RCRA hazardous wastes or hazardous constituents, to the extent such releases are discovered in an RFA or through other means, they will be

considered the same as a release of hazardous waste or hazardous constituents.

o Additional Criteria Applicable to RCRA Subtitle C Land Disposal Facilities. Land disposal facilities must meet additional requirements imposed by SARA and this policy. The term "land disposal facility" means any RCRA facility at which a land disposal unit is located, regardless of whether the land disposal unit is the receiving unit. Land disposal units include surface impoundments, landfills, land treatment units and waste piles.

As stated earlier, there must be no release at or from receiving units. In addition, releases from other units at a land disposal facility must be controlled under a corrective action program. The RFA will help determine whether there is a release. In addition, land disposal facilities must have received a comprehensive ground-water monitoring evaluation (CME) or an operation and maintenance (O&M) inspection within the last year.

Units at RCRA Subtitle C land disposal facilities receiving CERCLA waste that is also RCRA hazardous waste must meet the RCRA minimum technology requirements of RCRA §3004(c). Only where a facility has been granted a waiver can a land disposal unit not meeting the minimum technology requirements be considered acceptable for off-site disposal of CERCLA waste that is RCRA hazardous waste.

o Criteria Applicable to Subtitle C Treatment and Storage Facilities. The criterion for controlling releases from other units does not apply to all releases at treatment and storage facilities, as it does at land disposal facilities. Releases from other units at treatment and storage facilities must be evaluated for environmental significance and their effect on the satisfactory operation of the facility. If determined by the responsible Agency to be environmentally significant, releases must be controlled by a corrective action program under an applicable authority. Releases from other units at treatment and storage facilities determined not to be environmentally significant do not affect the acceptability of the facility for receipt of CERCLA waste.

2. Criteria Applicable to RCRA Permit-by-Rule Facilities. This revised policy is also applicable to facilities subject to the RCRA permit-by-rule provisions in 40 CFR 270.60. Those include ocean disposal barges or vessels, injection wells and publicly owned treatment works (POTWs). Permit-by-rule facilities receiving RCRA hazardous waste must have a RCRA permit or RCRA interim status. RCRA permit-by-rule facilities must also receive an inspection for compliance with applicable RCRA permit or interim status requirements. In addition, those

facilities (and other non-RCRA facilities) should be inspected by the appropriate inspectors for other applicable laws.

In general, except for POTWs (discussed below), these facilities will be subject to the same requirements as RCRA treatment and storage facilities. That is, there can be no releases of hazardous waste, hazardous constituents or hazardous substances from receiving units. There also can be no relevant violations at or affecting the receiving unit, as confirmed by an inspection conducted no more than six months prior to the receipt of CERCLA waste. Releases from other units determined by the responsible Agency to be environmentally significant must be controlled by an enforceable agreement under the applicable authority.

Criteria for discharge of wastewater from CERCLA sites to POTWs can be found in a memorandum titled, "Discharge of Wastewater from CERCLA Sites into POTWs," dated April 15, 1986. That memorandum requires an evaluation during the RI/FS process for the CERCLA site to consider such points as:

- o the quantity and quality of the CERCLA wastewater and its compatibility with the POTW;
- o the ability of the POTW to ensure compliance with applicable pretreatment standards;
- o the POTWs record of compliance with its NPDES permit; and
- o the potential for ground-water contamination from transport to or impoundment of CERCLA wastewater at the POTW.

Based on a consideration of these and other points listed in the memorandum, the POTW may be deemed appropriate or inappropriate for receipt of CERCLA waste.

3. Criteria Applicable to Non-Subtitle C Facilities. In some instances, it may be appropriate to use a non-Subtitle C facility for off-site transfer: for example, PCB disposal is regulated under the Toxic Substances Control Act (TSCA); nonhazardous waste disposal is regulated under Subtitle D of RCRA and applicable State laws; and disposal of radionuclides is regulated under the Atomic Energy Act. At such facilities, all releases are treated in the same manner as releases from other units at Subtitle C treatment and storage facilities. That is, the responsible Agency should make a determination as to whether the release is environmentally significant and, if so, the release should be controlled by a corrective action program under the applicable Federal or State authority.

Requirements for the disposal of PCBs are established in 40 CFR 761.60. Generally, these regulations require that whenever disposal of PCBs is undertaken, they must be incinerated, unless the concentrations are less than 50 ppm. If the concentrations are between 50 and 500 ppm, the rule provides for certain exceptions that provide alternatives to the incineration requirements. The principal alternative is disposal in a TSCA-permitted landfill for PCBs. If a TSCA landfill is the receiving unit for PCBs, then that facility is subject to the same criteria applicable if a RCRA land disposal unit is the receiving unit; i.e., no relevant violations, no releases at the receiving unit and controlled releases at other units. PCBs at levels less than 50 ppm may be transported to acceptable Subtitle D facilities as discussed previously.

V. IMPLEMENTATION

A. Determining Acceptability

Acceptability determinations under the off-site policy will be made by EPA or by States authorized for corrective action under §3004(u) of RCRA. Where States have such authority, the State may make acceptability determinations for facilities in the State in consultation with EPA. Regardless of a State's authorization status, the Region and States should establish, in the Superfund Memorandum of Agreement, mechanisms to ensure timely exchange of information, notification of facilities and coordination of activities related to the acceptability of facilities and potential selection of facilities for off-site transfer. The Regions and States also need to establish or enhance coordination mechanisms with their respective RCRA program staffs in order to ensure timely receipt of information on inspections, violations and releases. These agreements can be embodied in State authorization Memoranda of Agreement, State grant agreements, or State-EPA enforcement agreements.

The responsible government official in the Region or State in which a hazardous waste facility is located will determine whether the facility has relevant violations or releases which may preclude its use for off-site transfer of CERCLA wastes. Each Region and State should have a designated off-site coordinator responsible for ensuring effective communication between CERCLA response program staff and RCRA enforcement staff within the Regional Offices, with States, and with other Regions and States.

The off-site coordinator should maintain a file of all information on the compliance and release status of each commercial facility in the Region or State. This information should be updated based on the results of State- or

EPA-conducted compliance inspections or other information on these facilities.

CERCLA response program staff should identify potential off-site facilities early in the removal action or the remedial design process and check with the appropriate Regional and/or State off-site coordinator(s) regarding the acceptability status of the facilities. If one or more facilities is identified that has not received an inspection within the last six months, the Regional off-site coordinator(s) should arrange to have such inspection(s) conducted within a timeframe dictated by the project schedule. The CERCLA REM/FIT contractor may conduct the inspection under the direction of the Deputy Project Officer. If contractor personnel are used, the Region should ensure that such personnel are adequately trained to conduct the inspections.

Responsible Agencies should base their acceptability determinations on an evaluation of a facility's compliance status and, as appropriate, whether the facility has releases or other environmental conditions that affect the satisfactory operation of the facility. States not authorized for HSWA corrective action may assist EPA in making the acceptability determination by determining a facility's compliance status (based on a State inspection) and providing this information to EPA. Regions and States should use the following types of information to make acceptability determinations:

- o State- or EPA-conducted inspections. EPA will continue to assign high priority to conducting inspections at commercial land disposal, treatment and storage facilities. Facilities designated to receive CERCLA waste must be inspected within six months of the planned receipt of the waste. In addition, land disposal facilities must have received a comprehensive ground-water monitoring inspection (CME) or an operation and maintenance (O&M) inspection within the last year, in accordance with the timeframes specified in the RCRA Implementation Plan (RIP).
- o RCRA Facility Assessments (RFAs). To be eligible under this policy, a RCRA Subtitle C facility must have had an RFA or equivalent facility-wide investigation. The RFA or its equivalent must be designed to identify existing and potential releases of hazardous waste and hazardous constituents from solid waste management units at the facility.
- o Other data sources. Other documents such as the facility's permit application, permit, Ground Water Task Force report, ground-water monitoring data or

ground-water assessment report can contain information on violations, releases or other conditions. Relevant information from those documents should also be used to determine a facility's acceptability to receive waste under the off-site policy.

B. Notice Procedures

EPA expects that Regions and States will take timely and appropriate enforcement action on determining that a violation has occurred. Where a responsible Agency performs an inspection that identifies a relevant violation at a commercial facility likely to accept CERCLA wastes, within five working days of the violation determination, the responsible Agency must provide written notice to the facility of the violation and the effects of applying this policy. States not authorized for HSWA corrective action should inform EPA of the violation so that EPA can notify the facility of the effect of the violation under this policy. (See RCRA Enforcement Response Policy for a discussion of appropriate enforcement responses and timeframes for Class I violations.)

When the responsible Agency determines that a relevant release has occurred, or that relevant conditions exist, the responsible Agency must notify the facility in writing within five working days of that determination. The notice must also state the effect of the determination under this policy. A copy of any notice must also be provided to the non-issuing Region or State in which the facility is located. States not authorized for HSWA corrective action should provide EPA with information on releases so that EPA can determine whether a relevant release has occurred.

Private parties conducting a response action subject to this policy will need to obtain information on the acceptability of commercial facilities. The responsible Agency must respond with respect to both pre-SARA and post-SARA wastes. In addition, the responsible Agency should indicate whether the facility is currently undergoing a review of acceptability and the date the review is expected to be completed. No enforcement sensitive or predecisional information should be released.

A facility may submit a bid for receipt of CERCLA waste during a period of unacceptability. However, a facility must be acceptable in order to be awarded a contract for receipt of CERCLA waste.

Scope and Contents of the Notice. The responsible Agency must send the notice to the facility owner/operator by certified and first-class mail, return receipt requested. The

certified notice, if not acknowledged by the receipt return card, will be considered to have been received by the addressee if properly sent by first-class mail to the last address known to the responsible Agency. The notice should contain the following:

- o A finding that the facility may have conditions that render it unacceptable for receipt of off-site waste, based upon available information from an RFA, an inspection, or other data sources;
- o A description of the specific acts, omissions or conditions that form the basis of the findings;
- o Notice that the facility owner/operator has the opportunity to request an informal conference with the responsible government official to discuss the basis for the facility's unacceptability determination under this revised policy, provided that such a request is made within 10 calendar days from the date of the notice. The owner/operator may submit written comments within 30 calendar days from the date of the notice in lieu of holding the conference.
- o Notice that failure to request an informal meeting or submit written comments will result in no further consideration of the determination by the responsible Agency during the 60 calendar days after issuance of the notice. The responsible Agency will cease any transport of CERCLA waste to the facility on the 60th calendar day after issuance of the notice.
- o Notice that the owner/operator may request, within 10 calendar days of hearing from the responsible government official after the informal conference or the submittal of written comments, a reconsideration of the determination by the Regional Administrator or appropriate State official. The Regional Administrator or State official may agree to review the determination at his or her discretion; and
- o Notice that such a review by the Regional Administrator or appropriate State official, if agreed to, will be conducted within 60 calendar days of the initial notice, if possible, but that the review will not stay the determination.

The facility may continue to receive CERCLA waste for 60 calendar days after issuance of the initial notice. As indicated above, facility owners or operators may request an informal conference with the responsible government official

within 10 calendar days from the date of issuance of the notice, to discuss the basis for a violation or release determination and its relevance to the facility's acceptability to receive CERCLA wastes. Any such meeting should take place within 30 calendar days of the date the initial notice is issued. If unacceptability is based on a State inspection or enforcement action, a representative of the State should attend the meeting. If the State does not attend, EPA will notify the State of the outcome of the meeting. The owner/operator may submit written comments within 30 calendar days from the date of the notice in lieu of holding the conference. If the responsible Agency does not find that the information submitted at the informal conference or in comments is sufficient to support a finding of acceptability to receive CERCLA wastes, it should so inform the facility orally or in writing.

Within 10 calendar days of hearing from the responsible government official after the informal conference or the submittal of written comments, the facility owner or operator may request a reconsideration of the determination by the Regional Administrator or appropriate State official. The Regional Administrator or appropriate State official may use his or her discretion in deciding whether to conduct a review of the determination. Such a review, if granted, should be conducted within the 60 day period (originating with the notice) to the extent possible. The review will not stay the determination.

The RPM, OSC or equivalent site manager must stop transfer of waste to a facility on the 60th calendar day after issuance of a notice. The facility then remains unacceptable until such time as the responsible Agency notifies the owner or operator otherwise. The off-site coordinator and the OSC/RPM should maintain close coordination throughout the 60-day period.

In limited cases, the responsible Agency may use its discretion to extend the 60 day period if it requires more time to review a submission. The facility should be notified of any extension, and it remains acceptable during any extension.

The responsible Agency may also use its discretion to determine that a facility's unacceptability is immediately effective upon receipt of a notice to that effect. This may occur in situations such as, but not limited to, emergencies (e.g., fire or explosion) or egregious violations (e.g., criminal violations or chronic recalcitrance) or other situations that render the facility incapable of safely handling CERCLA waste.

Implementation of this notice provision does not relieve the Regions or States from taking appropriate enforcement action under RCRA or CERCLA.

C. Procedures for Facilities with Outstanding Unacceptability Determinations

Under the original May 1985 off-site policy, facilities determined to be unacceptable to receive CERCLA wastes were provided with written notice and were generally afforded informal opportunities to comment on the determination (the latter step was not required by the policy). Although the Agency believes that these steps represented adequate procedural safeguards for facilities seeking to receive CERCLA wastes, EPA has decided to provide an additional opportunity for review, in light of this revised policy, for facilities with unacceptability determinations already in place on the effective date of the revised policy.

Any such facility that wishes to meet with the responsible Agency to discuss the basis for a violation or release determination and its relevance to the facility's ability to receive CERCLA wastes, may request an informal conference with or submit written comments to the responsible Agency at any point up to the 60th day after the publication of the proposed rule on the off-site policy in the Federal Register. Such a meeting should take place within 30 calendar days of the request. If the responsible government Agency does not find the information presented to be sufficient to support a finding of acceptability to receive CERCLA wastes, then it should inform the facility orally or in writing that the unacceptability determination will continue to be in force. The facility may, within 10 calendar days of hearing from the responsible government official after the informal conference or submittal of written comments, petition the EPA Regional Administrator or appropriate State official for reconsideration. The Regional Administrator or State official may use his or her discretion in deciding whether to grant reconsideration.

These procedures for review of unacceptability determinations that were already in place on the effective date of this revised policy will not act to stay the effect of the underlying unacceptability determinations during the period of review.

D. Re-evaluating Unacceptability

An unacceptable facility can be reconsidered for management of CERCLA wastes whenever the responsible Agency finds that the facility meets the criteria described in the "Acceptability Criteria" section of this policy.

For the purposes of this policy, releases will be considered controlled upon issuance of an order or permit that

initiates and requires completion of one or more of the following: a facility-wide RCRA Facility Investigation (RFI); a Corrective Measures Study (CMS); or Corrective Measures Implementation (CMI). The facility must comply with the permit or order to remain acceptable to receive CERCLA waste. At the completion of any such phase of the corrective action process, the responsible Agency should again review the facility for acceptability under the off-site policy using the criteria listed in this document, and as necessary and appropriate, make new acceptability determinations, and issue additional orders or modify permit conditions to control identified releases. Releases that require a determination of environmental significance will be considered controlled upon issuance of an order or permit to conduct an RFI, CMS or CMI, or upon completion of an RFI which concludes that the release is not environmentally significant. Again, the facility must comply with the permit or order to remain acceptable to receive CERCLA waste.

If the facility is determined to be unacceptable as a result of relevant violations at or affecting the receiving unit, the State (if it made the initial determination) or EPA must determine that the receiving unit is in full physical compliance with all applicable requirements. Where a State not authorized for HSWA corrective action makes this determination, it should notify EPA immediately of the facility's return to compliance, so that the Agency can expeditiously inform the facility that it is once again acceptable to receive CERCLA wastes.

The responsible Agency will notify the facility of its return to acceptability by certified and first-class mail, return receipt requested.

E. Implementation Procedures

All remedial decision documents must discuss compliance with this policy for alternatives involving off-site management of CERCLA wastes. Decision documents for removal actions also should include such a discussion.

Provisions requiring compliance with this policy should be included in all contracts for response action, Cooperative Agreements with States undertaking Superfund response actions, and enforcement agreements. For ongoing projects, these provisions will be implemented as follows, taking into consideration the differences in applicable requirements for pre- and post-SARA decision documents:

- o **RI/FS:** The Regions shall immediately notify Agency contractors and States that alternatives for off-site

management of wastes must be evaluated against the provisions of this policy.

- o Remedial Design: The Regions shall immediately notify Agency contractors, the States, and the U.S. Army Corps of Engineers that all remedies that include off-site disposal of CERCLA waste must comply with the provisions of this policy.
- o Remedial Action: The Regions shall immediately assess the status of compliance, releases and other environmental conditions at facilities receiving CERCLA waste from ongoing projects. If a facility is found not to be acceptable, the responsible Agency should notify the facility of its unacceptability.
- o Enforcement: Cleanups by responsible parties under enforcement actions currently under negotiation and all future actions must comply with this policy. Existing agreements need not be amended. However, EPA reserves the right to apply these procedures to existing agreements, to the extent it is consistent with the release and reopener clauses in the settlement agreement.

If the response action is proceeding under a Federal lead, the Regions should work with the Corps of Engineers or EPA Contracts Officer to negotiate a contracts modification to an existing contract, if necessary. If the response action is proceeding under a State lead, the Regions should amend the Cooperative Agreement.