



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

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OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

**MEMORANDUM**

Directive 9360.0-12A

**SUBJECT:** Final Guidance on Implementation of the "Consistency" Exemption to the Statutory Limits on Removal Actions

**FROM:** Jonathan Z. Cannon /s/  
Acting Assistant Administrator

**TO:** Director, Waste Management Division  
Regions I, IV, V, VII, VIII  
Director, Hazardous Waste Management Division  
Regions III, VI  
Director, Emergency and Remedial Response Division  
Region II  
Director, Toxic and Waste Management Division  
Region IX  
Director, Hazardous Waste Division, Region X  
Superfund Branch Chiefs, Regions I-X  
Oil and Hazardous Materials Coordinators, Regions I-X

**Purpose:**

The purpose of this memorandum is to transmit final guidance on use of the exemption from the statutory limits on removals for actions that are otherwise appropriate and consistent with the remedial action to be taken.

**Background:**

On April 6, 1987, interim final guidance was issued on implementation of the revised statutory limits on removal actions which discussed procedures for using the new exemption contained in the Superfund Amendments and Reauthorization Act of 1986 (SARA). This exemption allows removals to exceed the statutory time and money limits of one year and \$2 million where necessary to achieve consistency with the remedial action to be taken. This guidance is final and supersedes the interim final version of April 1987.

Objective:

The final guidance elaborates on the approach adopted in the proposed National Contingency Plan. Except in limited circumstances, use of the exemption from the statutory limits will be restricted to sites on the National Priorities List. Justification for use of the exemption will require that the removal action be “consistent” with the remedial action as defined in the guidance, and fall into at least one of the four categories of activities that are listed as “appropriate.” Included with the guidance is a sample action memorandum demonstrating proper documentation of the justification.

Implementation:**1.0 Introduction**

Section 104(e) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) amends section 104(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to raise the statutory limits on removal actions and establish a new exemption from those limits. Under SARA, the limits on removals increase from \$1 million and six months to \$2 million and 12 months.

The new exemption may be used if “continued response action is otherwise appropriate and consistent with the remedial action to be taken.” It applies to any Fund-financed removal and thus encompasses State-lead as well as EPA-lead responses. Actions where the Agency has the lead, but is to be reimbursed by private parties or other Federal agencies, are still subject to the statutory limits and provisions for exemption.

Regional Administrators (RAs) are authorized to approve requests for exemption from the 12-month limit. The Assistant Administrator (AA), Office of Solid Waste and Emergency Response (OSWER) retains authority to approve requests for exemption from the \$2 million limit, but may delegate that authority to RAs on a case-by-case basis.

**2.0 Purpose of the Exemption**

The “consistency” exemption in CERCLA 104(c) supports the new provision in CERCLA 104(a) (2) requiring removal actions to “contribute to the efficient performance or any long-term remedial action” (see OSWER Directive 9360.0-13). Together, the new CERCLA 104(a) provision and the “consistency” exemption in 104(c) are intended to promote and enhance efficiency and continuity in the Superfund program as a whole.

The 104(a) provision does this by ensuring that the removal program attempts to anticipate remedial action that will be needed and avoids taking

response actions that will impede the remedial action or result in wasteful restarts. The “consistency” exemption promotes efficiency by allowing removals to exceed the statutory limits for time and cost when to do so will result in lower overall cleanup cost as well as enhanced protection of public health and the environment.

### **3.0 Application of the “Consistency” Exemption**

#### **3.1 Criteria for Eligible Activities**

As stated above, removal actions should take into account efficiency of the Superfund program as a whole. If there is no efficiency to be gained from continuing a removal action beyond the statutory limits, then the “consistency” exemption should not be used. In addition, in order to show that a proposed removal is “appropriate and consistent with the remedial action to be taken” it must be shown to meet the criteria for consistency in (a) and for appropriateness in (b) below:

- (a) Consistency: At a minimum, the removal does not foreclose the remedial action.

This criterion is necessary to ensure that planned or expected remedies are not precluded by the removal. The “remedial action to be taken” is the remedial action that, prior to the start of the removal action, was planned or could reasonably have been expected to be taken. Certainly, the actual performance of the activities that are part of a planned or expected remedial action are consistent with that action. It may turn out that after a removal done under a “consistency” exemption, the Agency will decide not to take any further response action.

- (b) Appropriateness: The activity is necessary for any one of the four following reasons:

**1. To avoid a foreseeable threat.**

This is an action that permanently abates a threat, as opposed to a temporary measure that, of necessity, will have to be repeated periodically, until the permanent remedy is performed.

**2. To prevent further migration of contaminants.**

This is an action taken to minimize the scope of the cleanup and the potential for harm to human health and the environment.

### **3. To use an alternative to land disposal.<sup>1</sup>**

This criterion recognizes that procurement of alternative technology is more time-consuming and expensive than that of land disposal. CERCLA expresses preference for alternative technologies over land disposal.

### **4. To comply with the Off-site Policy.**

This criterion recognizes that the standards required of facilities at which Superfund wastes may be disposed of may limit the number of available facilities. This in turn may cause delay in, or increase the cost of, disposing of site wastes.

#### **3.2 Extension of Statutory Limits**

For eligible activities, use of the “consistency” exemption to exceed the statutory limits of \$2 million and 12 months will be considered in the following manner:

(a) Cost: Only reasonable increases will be granted. Generally, this means not more than \$1 to \$2 million above the statutory limits.

(b) Time: Limits on duration will be decided, based on the particular circumstances at the site.

#### **3.3 Sites at Which Use of the Exemption is Appropriate**

This exemption will be used primarily at sites listed on the National Priorities List (NPL). However, there may be limited circumstances when use of this exemption will be appropriate for non-NPL sites. Those instances are expected to occur only rarely, and will be determined by the AA, OSWER, on a case-by-case basis. In addition to the above criteria, the AA will generally consider the following factors when making that determination:

(a) the magnitude of the contamination and the threat to human health and the environment;

(b) the status of negotiations with potentially responsible parties;

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<sup>1</sup> Procedures for analysis, justification, and documentation for emergency and time-critical actions can be found in the “Administrative Guidance for Removal Program Use of Alternatives to Land Disposal, “August 1988, OSWER Directive 9380.2-1; for non-time-critical actions use the EE/CA Guidance memo from Tim Fields, March 30,1988.

(c) the opportunity for widespread technology transfer; and

(d) whether the site is likely to be proposed for the NPL.

#### **4.0 Approval Procedures**

##### **4.1 Documentation**

The action memo requesting approval of the “consistency” exemption should document that the proposed activities meet the requirements under section 3.0, above.

##### **4.2 Concurrences**

In addition to any concurrences ordinarily obtained, where the site in question is proposed for or listed on the NPL, the appropriate official in the Region’s remedial program must concur.

##### **4.3 Approval**

Regional Administrators (RAs) are authorized to approve requests for exemption from the 12-month limit for both NPL and non-NPL sites. The Assistant Administrator (AA), Office of Solid Waste and Emergency Response (OSWER) retains authority to approve all requests for exemption from the \$2 million limit, but may delegate that authority to RAs on a case-by-case basis.

cc: Henry Longest  
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