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R J KALL EH-231  
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CERCLA Information Brief

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## The Off-Site Rule

**BACKGROUND:** Under Section 121(d)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, wastes generated as a result of CERCLA remediation activities and transferred off-site must be managed at a facility operating in compliance with federal laws. EPA issued its Off-Site Policy (OSWER Directive No. 9834.11), which gave guidance on complying with this particular requirement. Specifically, EPA requires off-site waste management facilities to fulfill EPA's definition of acceptability and has established detailed procedures for issuing and reviewing unacceptability determinations.

EPA proposed amending the National Contingency Plan (NCP) (40 CFR part 300) to include the requirements contained in the Off-Site Policy (53 FR 48218). EPA received numerous comments, which were analyzed and used to finalize the Off-Site Rule. On September 22, 1993, EPA published the Off-Site Rule (58 FR 49200), which became effective on October 22, 1993. The primary purpose of the Off-Site Rule is to clarify and codify CERCLA's requirement to prevent wastes generated from remediation activities conducted under CERCLA from contributing to present or future environmental problems at off-site waste management facilities that receive them. Thus, the Off-Site Rule requires that CERCLA wastes only be sent to off-site facilities that meet EPA's acceptability criteria.

The final Off-Site Rule makes two major changes to the proposed Off-Site Rule: (1) only EPA, not an authorized State, can make determinations of the acceptability of off-site facilities that manage CERCLA wastes, and (2) the Off-Site Rule eliminates the distinction between CERCLA wastes governed under pre-SARA and post-SARA agreements. The purpose of this Information Brief is to highlight and clarify EPA's final Off-Site Rule and its implications on DOE remedial actions under CERCLA.

**STATUTES:** CERCLA Section 121(d)(3) as amended by SARA; Resource Conservation and Recovery Act (RCRA) as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA).

**REGULATIONS:** 40 CFR Part 300; 58 FR 49200, September 22, 1993, Procedures for Planning and Implementing Off-Site Response Actions.

- REFERENCES:**
1. "The Off-Site Policy: Interim Final Question and Answer Series," EPA memorandum, Office of Waste Programs Enforcement, RCRA Enforcement Division, April 1992.
  2. "ROCs Role in Implementing the Federal Hazardous Waste Generator Notification Policy," EPA memorandum, July 8, 1991.
  3. "Federal Hazardous Waste Generator Notification Policy," EPA memorandum, April 26, 1991.
  4. *Enforcement Response Policy*, EPA, OSWER Directive #9900.01A, October 1, 1993.
  5. "Off-Site Policy Implementation Issues," EPA memorandum, August 29, 1993.
  6. "Policy on Off-site Treatment, Storage, and Disposal of Non-radioactive Hazardous Waste," DOE/EH-231 memorandum, June 24, 1986.

## When does the Off-Site Rule apply to CERCLA wastes generated from remedial actions at DOE facilities?

The Off-Site Rule applies to wastes generated from CERCLA-authorized cleanups that are sent off-site for management. CERCLA-authorized cleanups include those taken under lead-agency authority, Consent Orders, Consent Agreements, and Consent Decrees. EPA requires that remedial actions at Federal facilities taken under Sections 104, 106, or 120 of CERCLA comply with the Off-Site Rule (58 *FR* 49200). Thus, DOE must comply with the Off-Site Rule for all cleanups taken using DOE's lead agency authority under CERCLA, whether or not the site is on the National Priorities List (NPL). EPA does not require compliance with the Off-Site Rule in the following instances:

- spills of a reportable quantity per CERCLA Section 103, when the response (i.e., cleanup) is not conducted pursuant to CERCLA or meets the exemption for a CERCLA "emergency" removal action;
- cleanup of a site using state authority and state funds only (regardless of the site's listing on the NPL); and
- voluntary cleanup involving government oversight, including State governments, unless conducted pursuant to CERCLA, including CERCLA orders or decrees.

## What is considered "off-site" under the Off-Site Rule?

What constitutes off-site derives from the definition of *on-site*. *On-site* means "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action" (40 CFR 300.5). Thus, moving waste from one part of a facility to another part of the same facility could require compliance with the Off-Site Rule if the receiving unit is not in the "areal extent of contamination and areas in the very near proximity."

## What are the acceptability criteria for a facility under the Off-Site Rule?

The Off-Site Rule divides possible CERCLA waste management facilities into three categories with different acceptability requirements for each. These are (1) RCRA Subtitle C facilities that have a land disposal unit, (2) RCRA Subtitle C facilities that do not have a land disposal unit, and (3) all other facilities that manage CERCLA remediation-de-

rived wastes (e.g., management units permitted under the Toxic Substances Control Act). All three categories of facilities must comply with RCRA or other applicable federal and state laws. In addition, specific acceptability criteria apply to each type of facility. RCRA permitted Subtitle C facilities that have a land disposal unit are deemed acceptable if:

- The receiving unit—the unit that directly receives the CERCLA waste—has no releases of any hazardous waste, constituent or substance.
- The receiving unit meets minimum technology requirements under RCRA Section 3004(O).
- The releases from all of the non-receiving units are addressed and in compliance with a legally binding agreement (e.g., a corrective action agreement) before CERCLA wastes are placed in the receiving unit.

RCRA-permitted Subtitle C facilities that do not have a land disposal unit must also have no releases from the receiving unit. However, only the *environmentally significant* releases from non-receiving units must be addressed in a corrective action. Environmentally significant releases are those that pose a threat to human health or the environment.

All other non-RCRA facilities must control the environmentally significant releases from both the receiving and non-receiving units.

## What qualifies as a release?

A *release* is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)...." (40 CFR 300.5). A release under the Off-Site Rule does not include:

- *De minimis*, or substantially less than a release that poses a threat to human health or the environment. An example of a *de minimis* release is the release to the air from the temporary opening and closing of a drum's bung.
- Federally-permitted releases as defined in the National Contingency Plan (NCP), Section 300.5 and CERCLA Section 101(10).
- Releases to the air that do not exceed standards to be established in RCRA Section 3004(n), or do not present a threat to human health or the environment.

### **Does the Off-Site Rule affect wastes that are moved around on a DOE facility?**

Whether the Off-Site Rule affects such actions depends on whether the portion of the facility that will receive the waste meets CERCLA's definition of *on-site*. Refer to the "what is considered off-site..." question above for the definition of on-site.

### **Does the Off-Site Rule apply when DOE wastes are shipped to another DOE facility, rather than a commercial facility?**

The Off-Site Rule applies to all situations where DOE is authorized under CERCLA to remediate a site and the CERCLA wastes generated are transferred off-site. If CERCLA wastes are shipped to another DOE facility for management, that facility must still meet EPA's acceptability criteria for receiving CERCLA wastes.

### **Does the Off-Site Rule apply to emergency removal actions?**

If a release occurs on-site and it poses an immediate and significant threat to human health or the environment, an On-Scene Coordinator (OSC) may determine that the transfer of CERCLA wastes off-site under an emergency removal action exemption to the rule requirements is necessary. Each DOE facility has a OSC who coordinates response efforts at the scene of a release [40 CFR 300.120(b)]. The OSC must provide a written explanation of the use of this emergency removal action exemption to the appropriate EPA Regional Administrator within 60 days of taking the action. Time-critical and non-time critical removal actions remain subject to the Off-Site Rule.

### **How does the Off-Site Rule affect the management of laboratory samples?**

Under the Off-Site Rule, the transfer of the following laboratory samples do not have to meet the full requirements of the rule:

- CERCLA waste samples that are being characterized;
- RCRA hazardous waste samples that meet the exemption under 40 CFR 261.4(e) and are being analyzed for a treatability study; and
- non-RCRA waste samples that are below the quantity threshold established in 40 CFR 261.4(e)(2) that are being analyzed for a treatability study [40 CFR 300.440(a)(5)].

In the final rule, EPA has two disposal options for laboratory samples and sample residues. First, labo-

raries can dispose of the CERCLA waste sample and sample residue without having the EPA determine if the disposal facility is acceptable. Second, laboratories can return the CERCLA waste sample to the remediation site if the OSC or the DOE Environmental Restoration Program Manager (ERPM) agrees to assume responsibility for the management of the sample.

### **Does the Off-Site Rule apply to CERCLA wastes subject to the Land Disposal Restrictions (LDR) under RCRA?**

Yes. Regardless of whether the CERCLA waste meets the LDR standards, the management facility it is transferred to off-site must meet EPA acceptability criteria.

### **Can CERCLA wastes be managed with wastes generated from ongoing operations?**

Yes, provided that the waste management unit meets EPA's acceptability criteria so that it may receive the CERCLA wastes. If wastes are generated under CERCLA actions and authorities, the Off-Site Rule applies.

### **Does the Off-Site Rule apply if wastes are managed at the CERCLA remedial site from which they originated?**

If wastes are managed within the "areal extent of contamination," they are not managed off-site, and the Off-Site Rule does not apply.

### **Can DOE use an intermediate off-site disposal facility in the CERCLA remediation process?**

The Off-Site Rule allows the use of intermediate facilities. The intermediate facilities used to manage the CERCLA waste, as well as the ultimate management facility, must meet EPA's acceptability criteria if they are located off-site. Subsequent transfers of CERCLA waste to other off-site facilities must also comply with the Off-Site Rule. In the remedial action decision document the final disposition and intermediate facilities should be identified.

### **When should a facility begin considering the Off-Site Rule?**

The Off-Site Rule must be considered when the management of waste off-site is part of a potential remedy. Such consideration normally occurs in the Remedial Investigation/Feasibility Study (RI/FS). Failure to consider the Off-Site Rule early in the decision-making process could result in selection of

off-site receiving units that have not been reviewed for acceptability or have been reviewed and found to be unacceptable. In either case, delay in the cleanup could result.

**Who decides if a receiving unit is acceptable? How do I get that information?**

A State can make initial findings regarding releases at a facility, but EPA must evaluate the facility to determine if it is acceptable for receiving CERCLA wastes. If the EPA Regional Office concludes that there are relevant violations at a facility managing CERCLA waste, it will issue an initial determination of unacceptability. The unacceptable facility has 60 days to prove the facility meets the acceptability criteria, or it will lose the ability to accept CERCLA waste. During the 60-day review period the state, owner/operator of the facility, and the EPA will meet, if necessary, to discuss:

- the basis for the finding of a violation or a release,
- the relevance of the violation/release under the Off-Site Rule, and
- the steps that are necessary for the facility to return to compliance and control the releases within the 60-day review period, or whether sufficient steps have already been taken [40 CFR 300.440 (d)(4)].

If EPA finds enough information has been provided to show that the facility is acceptable, it will notify the state and the owner/operators. If, however, the facility is still deemed unacceptable, no CERCLA wastes may be transferred to the facility's waste management units.

The Regional Off-Site Contact (ROC) is the source of information on the acceptability of facilities within the region. Because this determination is based upon compliance status, acceptability can change. Therefore, the ROC (*see table below*) should be contacted before shipping to verify the facility's current acceptability.

**Can a DOE facility ship waste to another DOE facility for which no determination of acceptability has been made?**

If the waste was generated from a CERCLA response action, the off-site receiving facility must be evaluated by the EPA Regional Office and determined to be acceptable before shipping waste to it, regardless of whether it is a DOE facility or not.

Regional Off-Site Contacts (ROCs)		
Region	Primary Contact	Backup Contact
I	Lynn Hanifan (617) 573-9662	Austine Frawley (617) 573-1754
II	Greg Zaccardi (212) 264-9504	Joel Golumbek (212) 264-2638
III	Sarah Caspar (215) 597-1857	Naomi Henry (215) 597-8338
IV	Edmund Burks (404) 347-7603	John Dickinson (404) 347-7603
V	Gertrud Matuschkovitz (312) 353-7921	Uylaine McMahon (312) 886-4445
VI	Ron Shannon (214) 655-2282	Joe Dougherty (214) 655-2281
VII	Gerald McKinney (913) 551-7816	David Doyle (913) 551-7667
VIII	Terry Brown (303) 293-1823	George Dancik (303) 293-1506
IX	Diane Bodine (415) 744-2130	Gloria Brownley (415) 744-2114
X	Ron Lillich (206) 553-6646	Kevin Schanilec (206) 553-1061

**What if an off-site receiving unit is no longer qualified to receive wastes by the time the waste is actually shipped?**

The Off-Site Rule needs to be factored into the contracts for managing CERCLA wastes and into the administration of such contracts. The contract should include a requirement that the units receiving CERCLA waste be acceptable under the Off-Site Rule at the time the CERCLA wastes are transferred.

**Questions of policy or questions requiring policy decisions will not be dealt with in EH-231 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning material covered in this Information Brief to Beverly Whitehead, RCRA/CERCLA Division, EH-231, 202-586-6073.**

