

**COMPLIANCE WITH THE OFF-SITE
RULE DURING REMOVAL ACTIONS**

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I. Introduction

A. Statutory Authority--Section 121(d)(3) of CERCLA

In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of [RCRA] (or, where applicable, in compliance with [TSCA] or other Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following are met:

- (A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.**
- (B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under Subtitle C of [RCRA]**

The President shall notify the owner and operator of such facility of determinations under this paragraph.

A. Old Policy and New Rule

- 1. "Procedures for Implementing Off-Site Response Actions of November 13, 1987 (OSWER Directive No. 9834.11) ("Off-Site Policy")**
- 2. "Procedures for Planning and Implementing Off-Site Response Actions" 40 C.F.R. § 300.440 (58 Fed. Reg. 49200) ("Off-Site Rule")**
- 3. The Off-Site Rule superseded the Off-Site Policy on October 22, 1993.**

II. Applicability

- A. The Off-Site Rule applies to any remedial or removal action involving the off-site transfer of any hazardous substance, pollutant or contaminant ("CERCLA waste") that is conducted by EPA, PRPs, or other federal agency. The rule applies to fund-lead cleanups and cleanups conducted pursuant to any CERCLA authority, including § 120 of CERCLA (federal facilities, and § 311 of the Clean Water Act [except for cleanups of petroleum exempt from CERCLA]). The Off-Site Rule also applies to those actions taken jointly under CERCLA and another authority. The Off-Site Rule is not an ARAR**

and cannot, therefore, be waived. There are, however, exceptions to the rule's applicability.

- B. **The Off-Site Rule applies to all CERCLA cleanup actions resulting from Action Memoranda, RODs, or enforcement orders and decrees ever issued under CERCLA (The old policy drew a distinction between pre-SARA and post-SARA documents.**
- C. **CERCLA wastes cannot be sent to a facility unless EPA finds the facility acceptable in accordance with the rule. A facility which has previously been found to be acceptable under the Off-Site Rule (or the old Off-Site Policy) remains acceptable until EPA notifies the facility otherwise.**
- D. **Exceptions**
 - 1. **In emergency removals, emergency actions taken during remedial actions, or response actions taken under § 311 of the CWA where the release poses an immediate and significant threat to human health and the environment, the OSC may determine that it is necessary to transfer CERCLA waste off-site without following the Off-Site rule.**

(Examples--occurrence or substantial threat of occurrence of fire or explosion).

- a) PRPs cannot use this exclusion unless they obtain the OSC's approval.**
 - b) In determining whether to send CERCLA waste to an unacceptable facility, the OSC should weigh, to the extent practicable:**
 - i) the exigencies of the situation;**
 - ii) the availability of alternative receiving facilities; and**
 - iii) the reason for the primary facility's unacceptability, its relation to public health threats, and the likelihood of a return to compliance.**
 - c. In dire emergencies the OSC may direct CERCLA wastes to be removed off-site before a receiving facility can be reviewed for acceptability.**
- 2. Samples sent to and from analytical laboratories--The transfer of CERCLA waste sent to a lab for analysis is not subject to the Off-Site Rule. In addition, the transfer from**

the labs of those samples for disposal is also exempt under the following circumstances:

- a. The samples may be transferred to a facility that can legally accept such waste; or**
- b. The lab may send the sample back to the Superfund site only if the OSC or RPM agrees to assume responsibility for the proper management of the samples and gives permission for the samples to be returned to the site.**

- 3. Treatability Study CERCLA wastes are also exempt if RCRA hazardous wastes and Non-hazardous wastes meet the requirements for an exemption from RCRA under 40 C.F.R. § 261.4(e) (That section sets forth quantity limitations, packaging, and transportation requirements for treatability study wastes).**

III. Criteria for Making Unacceptability Determinations Under the Off-Site Rule

- A. The Off-Site Rule requires that any facility used for the off-site management of CERCLA wastes have no relevant violations at or affecting the receiving unit receiving CERCLA wastes.**

1. Relevant violations at or affecting the unit receiving CERCLA waste--include serious deviations from regulations, permits, or orders that are designed to prevent the release of hazardous wastes; ensure early detection of such releases; ensure that CERCLA waste ends up at an authorized facility; or compel corrective action. Criminal violations resulting in indictments are also relevant violations. (The Off-Site Policy had given EPA discretion regarding criminal violations.) Violations of minimum technology requirements for landfills under § 3004(o) or RCRA are also relevant.
 2. Facility-wide violations affecting the receiving unit may also be relevant. (e.g., failure to maintain facility-wide waste analytical information or to provide LDR notifications for wastes sent to landfills)
 3. Criminal violations resulting from an indictment are relevant violations. (The Off-Site Rule had given EPA discretion in determining which criminal violations are relevant.)
- B. The Off-Site Rule prohibits the transfer of CERCLA wastes to a facility with the releases of hazardous substances. A release, as defined in 40 C.F.R. § 300.5, includes a threat of release. The

following releases will cause a facility to become unacceptable under the Off-Site Rule:

- 1. Receiving units at RCRA Subtitle C facilities (treatment, storage, disposal) which are releasing hazardous substances, hazardous wastes, or hazardous constituents into the air, water, or soil.**
- 2. Non-receiving units at RCRA Subtitle C land disposal facilities which have releases, unless such releases have been controlled by an enforceable agreement for corrective action. A land disposal facility is any RCRA facility at which a land disposal unit is located, regardless of whether a land disposal unit is the receiving unit.**
- 3. Other units at RCRA Subtitle C treatment and storage facilities which have releases posing a significant threat to public health or the environment, unless such releases are controlled by an enforceable agreement for corrective action.**
- 4. Units at all other facilities when those facilities have an environmentally significant releases, unless such releases are controlled are controlled by an enforceable agreement for corrective action. (e.g., Aptus PCB**

Incinerator in Kansas--Region VII)

5. The following releases are exempt from the Off-Site Rule:
 - a. **De Minimis releases--Those releases that are substantially less than releases posing a threat to human health and the environment. (The Off-Site Policy had defined de minimis releases as those that did not adversely affect public health or the environment.) Releases will only be considered de minimis in exceptional cases. Examples:**
 - i) emissions of non-toxic and non-regulated substances from units not otherwise regulated through Federal or State permits;
 - ii) air releases resulting from the temporary opening and closing of bungs;
 - iii) accumulation of liquid between landfill liners that is controlled by leachate collection systems.
- b. Air releases not otherwise permitted that result from hazardous waste management

units will only be considered releases under the Off-Site Rule if they exceed the limits in regulations promulgated under Section 3004((n) of RCRA. Air emissions not covered by those regulation only constitute releases under the Off-Site Rule if they pose a threat to human health or the environment.

- c. Federally-permitted releases (e.g., NPDES discharges) that do not constitute a threat to human health or the environment are not considered releases under the Off-Site Rule.

IV. Regaining Acceptability

- A. **Compliance with Relevant Violations--A facility must be in full physical compliance with all applicable Federal and State laws. In short, it must have resolved all relevant violations. Although in most cases physical compliance does not require the payment of penalties, compliance for violations that cannot be undone can only be achieved after outstanding penalties have been paid.**
- B. **Controlling Releases--The facility must demonstrate to EPA that:**

- 1. All release from receiving units at RCRA Subtitle C facilities have been eliminated and contamination from prior releases is controlled by a corrective action program approved under RCRA;**
- 2. All releases from other units at RCRA Subtitle C land disposal facilities are controlled by a corrective action program approved under RCRA;**
- 3. All releases from other units at RCRA Subtitle C storage and treatment facilities do not pose a significant threat to human health or the environment, or are controlled by a corrective action program approved under RCRA;**
- 4. Facilities with releases regulated under other Federal or State laws may regain acceptability if EPA deems the releases not to pose a threat to human health or the environment, or if the facility enters into an enforceable agreement under those laws to conduct corrective action.**

V. Unacceptability Notification Procedures

A. Notification and Timelines

- 1. The Region (RCRA Office Director) notifies the facility in writing that the facility is unacceptable. With certain exceptions, if the facility had been previously acceptable, it can accept CERCLA waste for an additional 60 days. If a facility has never been evaluated for acceptability, it must immediately refuse to accept CERCLA waste. Note that the EPA regional office makes all Off-Site Rule determinations. The Off-Site Policy had provided authorized States with the authority.**

- 2. Within 10 calendar days after issuance of the unacceptability letter, the facility may request an informal conference with the region's Off-Site Rule staff--Naomi Henry/Sarah Caspar and Mike Hendershot/Ben Fields.**

- 3. The region then must schedule a conference within 30 days after the date of the unacceptability notice, if possible. In addition to or instead of requesting an informal conference, the facility may submit written comments. If the facility neither requests a**

conference nor submits written material, it becomes unacceptable 60 days after notification. It remains unacceptable until EPA notifies it otherwise.

4. EPA must respond to the written material or the substance of the informal conference.
5. Within 10 days of hearing EPA's responses to the conference or the written, the facility may request a reconsideration of the unacceptability determination from the Regional Administrator. The RA must respond to the request. (Reconsideration by the RA was only optional under the Off-Site Policy).
6. A request for a redetermination by the RA does not automatically extend the 60-day period; the RA may, however, extend that time if additional time is required to review the facility's submissions.
7. Immediate Unacceptability--The region may decide that a facility is immediately unacceptable (or effective in less than 60 days) in extraordinary situations such as emergency situations or egregious violations. Possibility--Clean Harbors in Baltimore.

VI. Off-Site Rule Regional Staff

- A. Each region has an Off-Site Contact (ROC) and an ORC lawyer. A list of the ROCs and their backups is provided in this package.**

- B. In order for the Off-Site Rule to work nationwide, before waste is sent to an off-site facility in another region, it is critical that OSCs and RPMs conducting a response action consult the ROC in the region where the receiving facility is located.**

- C. Appearances of Conflicts of Interest--Ben Fields serves as backup counsel to the ROC whenever my representation of the region in an enforcement matter appears to conflict with my representation of the ROC. This has already happened in the Exide/Brown's Battery matter.**