

2. NPL Deletion/Deferral Policy and RCRA Subtitle C Corrective Action

EPA has the authority under both CERCLA and RCRA to address the cleanup of contaminated sites. Under what circumstances will EPA address a contaminated site through one of the RCRA Subtitle C corrective action authorities rather than list the site on the CERCLA National Priorities List (NPL)? If a site is already on the NPL, what are the criteria for deleting the site and deferring it to RCRA?

To conserve Superfund resources and avoid duplication of effort, EPA has maintained a policy of not to undertake CERCLA responses at certain sites that can or will be adequately addressed by RCRA. Consequently, instead of listing sites on the NPL, the Agency often defers sites that otherwise meet the NPL criteria to RCRA Subtitle C corrective action. Under current policy, EPA may defer sites to RCRA at any point in the NPL process, including after placement on the NPL. EPA has had a policy of deferring certain sites from listing since the first NPL final rule on September 8, 1983 (48 FR 40658).

Prior to the enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), the RCRA Subtitle C corrective action authorities only applied to certain releases from surface impoundments, waste piles, land treatment areas, and landfills that received hazardous wastes after July 27, 1982. HSWA expanded the RCRA Subtitle C corrective action authorities, giving EPA the authority to address the on- and off-site cleanup of releases from active and inactive permitted and interim status hazardous waste treatment, storage, and disposal facilities (TSDFs). In order to implement this broader authority, in 1986, the Agency developed a policy for the listing or deferral from listing of potential NPL sites (51 FR 21057; June 10, 1986). According to the 1986 deferral policy, EPA will generally defer the listing of potential NPL sites when other authorities exist that are capable of accomplishing the needed corrective action.

The Agency will not automatically defer all sites eligible for cleanup under RCRA. For example, EPA will not defer federal facilities from the NPL, because federal facilities are not eligible for Fund-financed remedial action, and deferring them would not conserve Fund monies (54 FR 10520; March 13, 1989). In addition, the Agency will continue to include RCRA sites not subject to Subtitle C corrective action authorities, such as generator and transporter sites, on the NPL. EPA is also reluctant to defer sites owned by persons who are unwilling or unable to pay for corrective action and related activities because these owners are unlikely to take corrective action as required by RCRA. For this reason, the 1986 deferral policy clarifies that the Agency will not defer sites meeting the criteria for listing on the NPL that fall into one of the following

categories:

- RCRA facilities owned by bankrupt persons;
- RCRA facilities that have lost authorization to operate under the RCRA Loss of Interim Status (LOIS) provision and are owned by persons who have indicated an unwillingness to undertake corrective action; and
- Facilities that have not lost authorization to operate, but that are owned by people who have, as determined on a case-by-case basis, a clear history of unwillingness to undertake corrective action.

On June 24, 1988 (53 FR 23979), EPA clarified the deferral policy and added the following four categories of RCRA facilities to those types of sites which it will not defer from inclusion on the NPL:

- Non- or late-filers - treatment, storage, or disposal facilities that managed hazardous waste after November 19, 1980, but did not file Part A RCRA permit applications by that date and have little or no history of compliance with RCRA;
- Converters - facilities that previously treated or stored hazardous waste, but have since converted to activities that do not require interim status and have therefore formally withdrawn their Part A applications;
- Protective filers - facilities that filed RCRA Part A permit applications as a precautionary measure for treatment, storage, or disposal operations that do not require interim status and are not subject to RCRA Subtitle C corrective action authorities; and
- Pre-HSWA permittees - sites holding permits issued before the enactment of the Hazardous and Solid Waste Amendments (HSWA).

These types of sites are either not subject to RCRA Subtitle C corrective action authorities or are not high priorities under RCRA and would not be promptly addressed by the RCRA corrective action program. The Agency has therefore decided to place these sites on the NPL if they meet the listing criteria so that, if necessary, the Superfund authorities are fully available.

On March 20, 1995 (60 FR 14641), EPA issued a new deferral policy for sites after their placement on the NPL. Previously, once EPA made the decision to place a site on the NPL (rather than defer the site to another cleanup authority), the Agency would only delete the site from the NPL when no further response at that site was appropriate (55 FR 8845; March 8, 1990). This policy meant EPA would not delete sites from the NPL to defer them to RCRA during the response process, even if the Agency determined that a RCRA response was appropriate. Under the 1995 deletion/deferral policy, the Agency may, during the response process, delete sites from the NPL based on deferral to the RCRA Subtitle C corrective action program. To be eligible for deletion from the NPL based on deferral to RCRA, NPL sites must meet the following criteria:

- The site must be eligible for deferral from inclusion on the NPL under EPA's current deferral policy (as discussed above);
- EPA must be currently addressing the site through a RCRA corrective action authority under an existing enforceable order or permit containing corrective action provisions;
- Response under RCRA must be progressing adequately; and
- Deletion must not disrupt any ongoing CERCLA response actions.

Before a site may be deleted from the NPL under the deferral/deletion policy, it must also meet other applicable deletion requirements under CERCLA regulations. In particular, a site may only be deleted from the NPL after the state in which the release was located has concurred with the proposed deletion (40 CFR 300.425(e)(2)). Thus, sites must also be evaluated by the appropriate state authority before EPA can delete the sites from the NPL for deferral to RCRA.