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principal mechanism EPA uses to place sites on the NPL. Revisions to the HRS are being undertaken as a separate rulemaking action, and when finalized after opportunity for public comment, will be incorporated into the NCP as revised.

C. Proposal to Recategorize Sites on the NPL

The current NCP provides that releases may be deleted or recategorized on the NPL. At the time of promulgation of the 1985 NCP revisions, the deletion criteria and procedures had undergone several comment periods (see 49 FR 40322, October 15, 1984; 50 FR 5862, February 12, 1985; and 50 FR 47912, November 20, 1985) and EPA was in the process of deciding whether sites would be deleted from or recategorized on the NPL. The final NPL rulemaking on June 10, 1986 (51 FR 21066–67) reflected EPA's intention to delete sites rather than recategorize them on the NPL. However, EPA is now considering an approach that would recategorize sites on the NPL while still providing for deletion from the NPL when appropriate under current deletion criteria.

The purpose of this proposal would be to improve the way EPA communicates to the public the status of remediation progress at NPL sites. Currently, EPA identifies a response category and cleanup status code for each site on the NPL at which action has been initiated (51 FR 21075, June 10, 1986). Sites may be deleted from the NPL "where no further response is appropriate," such as where response actions have been completed either by the PRPs or through Fund-financed response, or where no remedial measures have been deemed necessary. EPA is concerned that the response category (identifies who has the lead) and the cleanup status codes (I=implementation activity underway, one or more operable units; O=one or more operable units completed, others may be underway; and C=implementation activity completed for all operable units) do not fully reflect the remedial response activities at a site. In many cases, due to the nature of hazardous waste contamination, a significant period of time may be required between installation of an appropriate and fully functional remedy and the completion of the remedial action. For example, a remedy designed to restore groundwater quality to acceptable levels may consist of long-term (e.g., 20 years) "pump and treat" operations. That such long-term activity is underway is not well communicated by the current status codes.

Therefore, in order to provide more useful information on the status of remedial activities conducted at NPL sites, EPA is considering a proposal to establish a new category on the NPL. This category would be the Construction Completion category, consisting of sites where construction activities have been completed, i.e., sites where long-term response actions (LTRA) are in progress or sites awaiting deletion. An LTRA represents a site where all remedial actions have been implemented but where continued operation of the remedy is required for an indefinite period before the levels of protection specified in the Record of Decision (ROD) are achieved. A site awaiting deletion is where an approved Close Out Report indicates that no further remedial activity is required or appropriate at that site.

When a remedy has been implemented and is operating properly, a Close Out Report (interim or final) would summarize the technical basis for determining that construction activities are complete at a site. For sites awaiting deletion, the Close Out Report would document that the remedy has achieved protectiveness levels specified in the ROD, and that remedial action is complete. For LTRAs, the Close Out Report would describe the nature of the continuing action. Sites initially denoted as LTRAs would eventually become sites awaiting deletion (on the basis of final or amended Close Out Reports). Those sites for which CERCLA requires five-year reviews of the remedy (see § 300.430(f)) would be clearly identified upon attaining classification in the Construction Completion category. Moreover, EPA does not believe that the need to conduct a five-year review means that a site must be listed as an LTRA; such sites may also, where appropriate, become deletion candidates.

After a Close Out Report has documented that a site can be placed in the Construction Completion category, EPA may begin the deletion process, where appropriate. However, in cases where a significant delay will exist between placing a site in the Construction Completion category and the date of the next NPL deletion notice, EPA may initiate the deletion process without placing the site in that category.

EPA requests comment on this proposal, specifically on the merits of creating a Construction Completion category.

D. Deferral Policies

EPA has in the past deferred the listing of sites on the National Priorities List (NPL) when other authorities were found to exist that were capable of accomplishing needed corrective action. To date, this deferral policy has been limited to two specifically enumerated Federal laws. EPA is considering broadening the deferral approach, such that listing of sites on the NPL would be deferred in cases where a Federal authority and its implementing program are found to have corrective action authority. EPA further requests comment on whether to extend this policy as well to States that have implementing programs with corrective action authorities to address CERCLA releases. EPA also requests comment on extending this policy to sites where the potentially responsible parties (PRPs) enter into Federal enforcement agreements for site remediation under CERCLA.

This section of the preamble is intended to clarify EPA's approach to determining which of those sites meeting the eligibility criteria of the NCP will be listed on the NPL. This section will describe the reasons EPA has implemented a deferred listing approach for certain authorities, the regulatory and statutory background of NPL listing policies, and issues raised by today's draft policy to consider the expansion of the deferred listing approach. EPA intends to keep the current deferral policies in effect, and not implement a general deferred listing policy, until comments are considered on today's draft policy.

There are two primary reasons why EPA is considering expanding its use of NPL deferrals to appropriate Federal and State authorities. First, EPA believes that this approach will assist EPA in meeting CERCLA objectives; by deferring to other authorities, a maximum number of potentially dangerous hazardous waste sites can be addressed, and EPA can direct its CERCLA efforts (and Fund monies, if necessary) to those sites where remedial action cannot be achieved by other means. Second, EPA believes where other authorities are in place to achieve corrective action, it may be appropriate to defer to those authorities.

1. *Purpose of the NPL.* EPA's approach to listing sites on the NPL is based on its interpretation of the purpose of the NPL. A conference report on CERCLA explains that the NPL was intended to:

> [S]erve primarily informational purposes identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial actions. S. Rep. No. 96–848, 96th Cong., 2d Sess. 60 (1980).

In the past, EPA viewed the NPL as a list compiled for the purpose of informing the public of the most serious hazardous waste sites in the nation,

regardless of which law applies. Subsequently, it was viewed as a list for informing the public of hazardous waste sites that appear to warrant remedial action under CERCLA. In addition, it may be appropriate to view the non-Federal section of the NPL merely as a list for informing the public of hazardous waste sites that appear to warrant CERCLA funding for remedial action through CERCLA funding alone. EPA believes that one of the latter two approaches would be preferable to the broad approach of listing all potential problem sites. This will allow EPA to make the NPL a more useful management tool for EPA and also to provide more meaningful information to the public and the States. EPA's decision on which way to view the NPL will be largely determined by its decision on the deferral policies discussed below. As explained in the following discussion, EPA believes that the latter two alternative views of the NPL are consistent with CERCLA and its legislative history.

EPA's interpretation of the NPL as a list that should not include all sites that could potentially be addressed by CERCLA is consistent with the terms of the statute itself. CERCLA section 105(a)(8)(B) calls upon the President to list "national priorities among the known releases or threatened releases throughout the United States," not to list all releases. Therefore, although EPA believes it has the authority to list any site where there has been a release or threatened release of a hazardous substance, pollutant, or contaminant, EPA believes that it is not obligated to do so.

Further, the statute requires EPA, in determining whether a site is to be listed on the NPL, to consider factors enumerated in CERCLA sections 105(a)(8) (A) and (B). The factors include the relative risks posed by the site, State preparedness to assume State costs and responsibilities, and "other appropriate factors." The statutory directive to "take into account to the extent possible" the enumerated factors provides EPA with broad discretion to weigh factors as appropriate. Moreover, the fact that Congress did not specify what factors are "appropriate" supports the breadth of EPA's discretion. Since the proposal of the first NPL (47 FR 58476, December 30, 1982), EPA has considered "other appropriate factors" to include the availability of other Federal authorities to address the problems at a site. PRP enforcement agreements, as well as the willingness of a State to undertake a site remediation, may also constitute other appropriate factors.

This interpretation is also consistent with Congressional intent. In the House Appropriations Committee Report for Fiscal Year 1988, the conferees expressed some concern over whether Superfund is operating to produce maximum environmental benefit for the investment: "The Committee wants to reemphasize the overriding principle of the legislation that Superfund should be reserved for the most serious sites not otherwise being addressed." H. Rept. 189, 100th Cong., 1st sess. 27–28 (1987).

The view of the NPL as a list of sites where CERCLA action is required is also consistent with the legislative history surrounding the reauthorization of RCRA. In adding new authorities to RCRA (sections 3004(u) and 3008(h)) in 1984, for example, Congress recognized that the burden of responding to the nation's waste sites should not fall entirely on Superfund. In its report on the Hazardous and Solid Waste Amendments of 1984, the House Committee on Energy and Commerce stated the following:

> Unless all hazardous constituent releases from solid waste management units at permitted facilities are addressed and cleaned up the Committee is deeply concerned that many more sites will be added to the future burdens of the Superfund program with little prospect for control or cleanup. The responsibility to control such releases lies with the facility owner and operator and should not be shifted to the Superfund program, particularly when a final [RCRA] permit has been requested by the facility. H. Rept. 198, 98th Cong., 1st Sess. 61 (1983).

EPA believes that the use of the NPL to identify sites that appear to warrant remedial (or Fund-financed) action under CERCLA, as compared to action under RCRA or another authority, is consistent with Congressional intent.

Finally, EPA believes that a more limited use of the NPL gives greater effect to the informational and management functions of the list. To include on the NPL every site that has a hazardous substance problem may give the public the misleading impression that every such site is awaiting CERCLA review or attention. In fact, some sites may be addressed by an ongoing corrective action program under another statute such as RCRA. Listing only those sites that appear to warrant remedial action or funding under CERCLA will also serve to make the NPL a more useful management tool for EPA, e.g., in setting priorities for reviewing and addressing sites.

A determination that a site "appears to warrant" remedial action or funding under CERCLA would not reflect a judgment that remedial action should be taken or funds spent at a site. As has always been the case, the decision to list a site on the NPL is not sufficiently refined to make final determinations as to which sites pose threats qualifying for remedial action under CERCLA (see 48 FR 40658, September 8, 1983). Rather, the findings are meant to pinpoint problem sites that deserve more comprehensive analysis under CERCLA. The approach being discussed today would simply add a judgment that no other authority is currently available to address the problem, and thus the site should be listed on the NPL for further evaluation.

2. *Current deferral policies.* EPA's current deferral policy has been limited to sites that can be addressed by the corrective action authorities of RCRA Subtitle C or that are subject to regulation by the Nuclear Regulatory Commission. EPA is now considering, and seeks comment on, the possibility of deferring more generally to Federal authorities. This would be consistent with the view of the NPL as a list of sites where response action is appropriate under CERCLA.

Currently, RCRA Subtitle C facilities are listed on the NPL only if necessary corrective actions under RCRA are unlikely to be performed (51 FR 21054, June 10, 1986), or if certain criteria for listing are met (53 FR 23978, June 24, 1988). Three categories of RCRA facilities have been identified where it is unlikely that RCRA corrective action will be performed: (i) Facilities owned by persons who are bankrupt, (ii) facilities that have lost RCRA interim status and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action; and (iii) facilities, analyzed on a case-by-case basis, whose owners or operators have shown an unwillingness to undertake corrective action. On August 9, 1988 (53 FR 30002–09), EPA announced the additional criteria that would be used in determining if a RCRA facility was unwilling to adequately carry out corrective action activities, and requested comment on criteria to be used in determining if the owner/operator is unable to pay for corrective action. On June 24, 1988 (53 FR 23978), EPA identified four other categories of RCRA facilities that may be listed on the NPL, i.e., non- or late-filers, protective filers, sites with pre-HSWA permits, and converters. RCRA Subtitle C facilities that meet any of the above categories are appropriate for listing provided the site meets the HRS scoring or other eligibility requirements.

EPA's present policy for Nuclear Regulatory Commission-licensed sites

(48 FR 40658, September 8, 1983) is not to list releases of source, by-product, or special nuclear material from any Nuclear Regulatory Commission-licensed facility on the grounds that the Nuclear Regulatory Commission has full authority to require cleanup of releases from such facilities, but to list such releases from State-licensed facilities.

EPA under CERCLA does not oversee remedial activities at deferred sites under either the RCRA or Nuclear Regulatory Commission deferred listing policy. EPA generally does not believe it is appropriate under CERCLA to oversee the work of other Federal agencies, or of other authorities under EPA's jurisdiction once a site has been deferred. (Of course, EPA would oversee the remedial activities at a site deferred from listing based on a CERCLA enforcement order.) Although a policy of deferring to other Federal authorities may result in variations in procedures and extent of remedial action, it may be appropriate to assume that the Federal authority will adequately address the remedial action. The Federal laws that have been passed have undergone national notice and comment, and are generally consistent in their application from State to State. In the case of sites deferred for action under RCRA Subtitle C, the corrective action provisions are substantially equivalent to those required under CERCLA, and thus EPA believes it is not necessary to require compliance with CERCLA corrective action standards as a condition of deferral. In the case of the Nuclear Regulatory Commission sites, the Commission has full authority and expertise to require corrective action of the unique waste types subject to its jurisdiction. EPA did not deem it appropriate to require compliance with CERCLA standards.

Later in this section, there is discussion of the possibility of also deferring sites, with the State's concurrence, subject to CERCLA section 106 enforcement agreements. This would be deferral under CERCLA authorities, and not deferral to another Federal authority. This approach would be consistent with the view of the NPL as a list of sites that appear to warrant CERCLA funding for remedial action.

3. *Expanding the deferral policy to other Federal authorities.* EPA is today considering extending the deferral option to other Federal programs as follows:

i. *RCRA Subtitle D.* Under the deferred listing approach, RCRA Subtitle D landfills would continue to be listed on the NPL because corrective action authorities are not currently available for such facilities. However, EPA proposed regulations that will require corrective action at new and existing Subtitle D municipal waste landfills (53 FR 33313, August 30, 1988). These regulations are expected to be implemented by the States when they adopt permit programs to implement the regulations. Only after the Subtitle D regulations are effective would new and existing municipal landfills generally be deferred to the States that have adopted State permit programs that incorporate the revised Federal Subtitle D regulations. Because closed municipal landfills will not be regulated by Subtitle D, they will continue to be listed on the NPL if eligible.

ii. *RCRA Subtitle I.* Under the deferred listing approach, EPA would defer listing sites that can be addressed by Subtitle I corrective action authorities when those authorities take effect. Section 9003(h) of RCRA gives EPA authority to respond to petroleum releases from underground storage tank (UST) systems or to require their owners and operators to do so. It also establishes a trust fund to finance some of these activities. On September 23, 1988, EPA issued final standards for the regulation of hazardous materials in USTs under RCRA Subtitle I. Subpart F of those regulations requires corrective action for "confirmed releases" from USTs containing either hazardous substances listed under CERCLA or petroleum (53 FR 37082).

However, where USTs are but one of numerous leaking units (landfills, surface impoundments, above ground tanks, etc.), EPA will determine whether to defer to a mix of authorities or list sites on the NPL.

iii. *Mining wastes.* Under the deferred listing approach, in cases where States address sites using State-share monies from the Abandoned Mine Land Reclamation (AMLR) Fund under the response authorities of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), the sites would be deferred from listing.

Although the AMLR Fund was designed primarily to address reclamation and restoration of land and water resources adversely affected by past coal mining, SMCRA sections 409 (a) and (c) provide that States can use funds to address noncoal sites if either all coal sites have been addressed, or the Governor of the State declares that the noncoal project is necessary for the protection of public health or safety. It is important to note that generally the decision to use AMLR funds at a particular site resides with the State concerned, except in one narrow circumstance. EPA will continue to add noncoal mining sites to the NPL should States choose not to take action to respond to the site under SMCRA. States may also choose to use State-share AMLR funds for portions of CERCLA remedial action activities. Sites at which only portions of the remedial action take place with AMLR funds would continue to be listed .

One exception to this policy is the situation where a State has funded all of its known coal and noncoal mining projects, and is proposing to use its remaining AMLR funds for impact assistance (e.g., construction of roads, recreation facilities, etc.). EPA would not list a mining site that is: (a) Discovered in a State where it was previously thought that all mining projects had been completed and impact assistance had been granted, (b) the site is eligible for AMLR funding, (c) sufficient AMLR funds remain to fund the entire response action, and (d) the State intends to use those funds for impact assistance. Currently, no sites meet this description.

iv. *Pesticide sites.* To date, EPA has not finalized its policy regarding the listing of pesticide application sites; thus, pesticide application sites will not be generally listed on the NPL at this time (49 FR 40320, October 15, 1984). EPA believes that the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) may be the most appropriate statute for controlling the source of contamination resulting from the registered use of pesticides since it provides the authority to cancel or limit a pesticide's use or to require label changes when the risks associated with use outweigh the benefits. Therefore, FIFRA will be the primary statute used to address pesticide problems. However, EPA will continue to list sites resulting from leaks, spills, and improper disposal of pesticides. In addition, CERCLA removal activities, such as providing alternate water supplies, may be initiated if it is determined that the release or threat of release constitutes a public health or environmental emergency and no other party has the authority or capability to respond in a timely manner.

v. *Other Federal authorities.* It is possible that by amendment, a Federal regulatory authority not mentioned above will be authorized to require corrective action at sites currently addressed under CERCLA. If so, the affected sites would also be addressed under the general deferred listing approach.

vi. *Oversight of Federal authorities.* As noted earlier, EPA believes it may be appropriate to assume that a Federal authority will adequately address a site,

and thus has to date deferred to RCRA Subtitle C and Nuclear Regulatory Commission authorities without oversight. However, the additional Federal authorities being considered today for deferral do not necessarily present the same level of assurance of remediation that meet the environmental protection standards of CERCLA. Thus, for response actions under these additional Federal authorities, it may be appropriate to require some oversight by CERCLA officials or a requirement that CERCLA cleanup standards be applied. A decision by EPA to defer to another Federal authority for the corrective action of a site does not constitute an approval by EPA of the method or extent of the response to be undertaken by that other authority.

EPA requests comment on the appropriateness of deferring generally to Federal authorities, and on whether such authorities should be required to meet some or all CERCLA standards in addressing deferred NPL sites.

4. *Expanding the deferral policy to State authorities.* EPA believes it is appropriate at this time to consider broadening the scope of the deferral policies to include State authorities in addition to Federal authorities in recognition of other possible avenues of response action.

EPA has already instituted a policy of deferring non-Federal RCRA sites to States that are authorized to carry out the Subtitle C corrective action authorities of RCRA (51 FR 21054, June 10, 1986). However, EPA currently does not defer to other State authorities even if they have authority to achieve some corrective action at contaminated sites. The present framework of the NPL process has not precluded States from taking independent enforcement authorities during CERCLA remedial activities, and a State can request the enforcement lead at sites on the NPL. (Under any of the proposed approaches for State deferral, a State would retain the option of having a State-lead enforcement site listed. Subpart F of today's proposal discusses EPA's criteria for designating a State as the lead agency. The Subpart F criteria are intended solely for State-lead actions under CERCLA.)

EPA has, in the past, listed sites being addressed under State authorities so that it could ensure that similar sites were remediated to similar levels, and in a manner consistent with the NCP. Further, public participation, ATSDR health assessments, and oversight by EPA is assured for all NPL sites. In addition, affected communities are eligible to apply for Technical Assistance Grants (TAGs) at sites on the NPL (53 FR 9471, March 24, 1988), and mixed funding settlements for remedial action are possible.

EPA is now considering deferring to State authorities more generally. EPA recognizes that many more sites need to be addressed than present CERCLA resources can accomodate; by deferring some problem sites to the States, EPA believes more overall response actions can be accomplished more quickly, and EPA can direct its resources to sites that otherwise would not be addressed. As with any deferral, no CERCLA funds would be available to the State for the site being deferred, although EPA may exercise its enforcement or response authorities at that site. Moreover, the State may be required to obtain on-site permits, as permit exemptions are only available for CERCLA actions.

EPA notes that even if a State has authorities applicable to Federal facilities, the remediation of such sites will not be deferred, and Federal facilities will continue to be listed on the NPL, consistent with CERCLA section 120(d)(2).

EPA believes it may be appropriate to defer listing sites on the NPL to allow the States to fully utilize corrective action authorities under their own programs when they have programs in place for obtaining some corrective action at contaminated sites. This approach is consistent with the view of the NPL as a list of sites where response action is appropriate under CERCLA, and the site is not being otherwise addressed.

A deferral would not be a delegation of any CERCLA authority, and it is not intended to ensure equivalence to CERCLA. By deferring to a State authority, EPA is not approving the remediation to be undertaken by that State authority. In considering this deferral policy, EPA recognizes that corrective actions under State authorities may not follow the procedures and requirements of the NCP, and in some cases, this may result in differences, e.g., some States may have more stringent corrective action standards than EPA while other States may have less stringent corrective action standards. Requiring State authorities to conform strictly to NCP requirements might result in fewer States choosing to undertake a site remediation that could be deferred. EPA requests comment on the level of remediation that should be required for sites deferred to States.

It is important to note in instances where State authorities intend to recover their costs from responsible parties under CERCLA section 107 for sites subsequently listed on the NPL, response actions at these sites may not be "inconsistent with" the NCP.

Although EPA does not intend to apply all of the procedures and requirements of the NCP to deferred sites, EPA strongly believes that the general public participation procedures of the NCP are a necessary part of any State deferral policy. The NCP has specific requirements to inform the community of releases and planned actions at a site, and to provide the public an opportunity to comment on removal and remedial plans. However, EPA recognizes that specific requirements to involve a community in remediation decisions may or may not exist under State authorities. Therefore, EPA believes if sufficient public participation requirements do not already exist under the State authority, the State should be required, as a condition of deferral, to develop a site-specific public participation plan to inform the community of remediation progress and involve the community in the remedy selection.

EPA is requesting comment in general on the issue of deferring to State authorities, and requests comment on two options for implementing deferral to States: (i) Deferral based upon a State petition to EPA requesting deferral; and (ii) deferral based upon a State's certification of its commitment and ability to address the site according to certain CERCLA standards. EPA intends to keep the current limited State deferral policy, i.e., deferral to authorized State RCRA authorities, in effect while public comments are reviewed. If a more expanded State deferral policy is implemented, EPA would apply it prospectively to sites as they are proposed for listing (see discussion of final sites below).

i. *Option 1—Deferral based upon a State petition.* Under this option, EPA would defer sites from listing on the NPL in cases where the State petitioned EPA for deferral. Specifically, once EPA believes that a site scores above the HRS cutoff, or otherwise meets eligibility requirements for listing sites on the NPL, EPA would consider deferring the site if the State petitions EPA certifying that:

a. The State has provided reasonable notice to the public of its intent to petition for deferral of a site, and its plans and general schedule for corrective action under State laws;

b. The State will provide for public participation in the remedy selection process; and

c. If requested by the public, the State would hold a public meeting at which it