



Department of Energy
Washington, DC 20585
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RCRA Docket Information Center
U.S. Environmental Protection Agency
Office of Solid Waste
Ariel Rios Building (5305G)
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0002

Docket Number F-2002-CC2A-FFFFF

Dear Sir or Madam:

Re: *Guidance on Completion of Corrective Action Activities at RCRA Facilities, February 27, 2002 Draft*

On February 27, 2002, the Environmental Protection Agency (EPA) released for public comment a draft guidance memorandum, *Completion of Corrective Action Activities at RCRA Facilities* (67 FR 9174 February 27, 2002). The Department of Energy (DOE) appreciates the opportunity to comment on this draft guidance document.

The DOE commends EPA for continuing to provide guidance on policies regarding corrective action, and supporting flexible, alternative approaches to implementation.

In DOE's comments¹ on the earlier corrective action draft completion guidance (66 FR 50195 October 2, 2001), the Department noted the technical criteria that must be met to render corrective action at a facility complete were not addressed. The current version of the draft guidance clearly provides much of the recommended technical standards. However, there are two areas that the DOE asks EPA to explicitly address: (1) The relationship to CERCLA closure when both RCRA corrective action and CERCLA exist at a facility; and (2) the use of alternative mechanisms for implementing "post-closure" care requirements.

The enclosed DOE comments are organized into two sections: General Comments (DOE's overarching reactions to the content of the guidance), and Specific Comments on the Guidance.

¹ *Recognizing Completion of Corrective Action Activities at RCRA Facilities; October 2, 2001, Draft: EH-413 Letter to the Environmental Protection Agency; November 1, 2001*

If you have any questions or need further clarification of our comments, please contact Jerry Coalgate of my staff at 202-586-6075 or jerry.coalgate@eh.doe.gov.

Sincerely,

Thomas T. Traceski
Director, RCRA/CERCLA Division
Office of Environmental Policy and Guidance

Enclosure



**UNITED STATES
DEPARTMENT OF ENERGY**

**Comments on “Completion of Corrective Action Activities at RCRA
Facilities” Guidance (67 FR 9174, February 27, 2002)
Docket # F-2002-CC2A-FFFFF**

April 29, 2002

**United States
Department of Energy
Comments on
Completion of Corrective Action Activities at RCRA Facilities
(67 FR 9174, February 27, 2002)**

General Comments

1. The Department appreciates EPA's ongoing efforts to provide guidance on how to implement RCRA corrective action activities. The EPA's recently issued draft guidance, "Completion of Corrective Action Activities at RCRA Facilities" (67 FR 9174, February 27, 2002), is particularly important to DOE because the Department is currently focusing significant efforts on implementing accelerated cleanup and cost reduction initiatives, and a clear understanding of EPA's policies on when Resource Conservation and Recovery Act (RCRA) corrective action is complete is essential to achieving the Department's goals.
2. The DOE would like to express support for the two primary concepts that EPA advocates in this draft guidance:
 - a) The recognition of two types of completion determinations - 1) Corrective Action Complete and 2) Corrective Action Complete with Controls. The discussion of the technical criteria to justify each of these completion determinations provides much needed clarification as to what conditions need to be met in order to render corrective action at a facility "complete." (67 FR 9176)
 - b) Acknowledging that a completion determination can be implemented for less than an entire facility (e.g., portion) and providing specific guidance on when and how this can occur. (67 FR 9177)

In both cases, the DOE believes these areas of flexibility are necessary because the States and EPA are requiring corrective action at sites that are very different from each other. These differences are particularly apparent at Federal Facilities. Some federal facilities will be remediated to an unrestricted land use, while many will (or have) selected remedies that allow residual contamination to remain on-site above levels that would allow for unlimited use and unrestricted exposure. In some cases, federal facilities will transfer portions of land to other entities, some will have ongoing missions, while others close entirely.

Finally, regardless of the particular situation noted above, federal facilities are often subject to other laws and regulations with respect to environmental remediation (i.e., cleanup) such as the the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in addition to RCRA.

3. The draft guidance does not address some unique issues with regard to completion of remediation work at federal facilities. Many federal facilities are subject to both RCRA Corrective Action and CERCLA remediation under Superfund. With respect to facilities subject to remediation under both statutes, DOE would like to note the following:

The draft guidance does not acknowledge or identify options for facilities that are subject to both RCRA Corrective Action and CERCLA. Many facilities, especially federal facilities, fall into this category. The RCRA permit for some of these facilities specifies that RCRA Corrective Action may be conducted under the CERCLA Superfund process and that any CERCLA investigation and remediation will be deemed to be equivalent to RCRA Corrective Action. Sites remediated under CERCLA may meet the “acceptable risk” criterion specified in the draft guidance. Some sites where contamination is left in place may be subject to “controls” as discussed in the draft guidance. Under the CERCLA program these controls could take the form of physical, administrative, or institutional controls; a condition equivalent to “Complete with Controls” as discussed in the draft guidance. These sites are also subject to review every five years, as specified under CERCLA. This review verifies that existing remediation levels and controls remain protective of human health and the environment. When CERCLA remediation is complete the site is removed from the National Priorities List. This action is initiated through an announcement in the Federal Register and is subject to public review and comment; a process similar to that proposed in the draft guidance.

The DOE notes that EPA has previously acknowledged the concept of “parity” between decisions made under RCRA corrective action and those of CERCLA. The EPA has applied the principle of parity to RCRA and CERCLA so that the cleanup requirements of both programs are satisfied by either authority. Otherwise, for DOE sites with existing cleanup agreements covering both RCRA and CERCLA requirements and environmental regulator roles and responsibilities, inconsistencies between requirements for closing out RCRA activities and CERCLA procedures for deleting sites from the National Priority List would be a substantial problem.

The concept of “parity” between the two regulatory programs, within the context of “corrective action completion” is not discussed in the draft document. Because this discussion is omitted, DOE presumes that the concept of parity would apply.

In other words, a Corrective Action Complete Determination would be functionally equivalent to a CERCLA closure that is not subject to the five-year review process

(i.e., following implementation of a remedy, results achieved allow for unlimited use and unrestricted exposure) and a Corrective Action Complete with Controls Determination would be equivalent to a CERCLA closure that is subject to the five-year review (i.e., following implementation of a remedy, contaminants remain on-site above levels that allow for unlimited use and unrestricted exposure). The DOE advocates that the EPA include a discussion of how sites that fall under dual regulation can demonstrate completion of RCRA Corrective Action through the CERCLA process in a future version of this guidance.

Specific Comments on Guidance

1. **Page 9176 (Column 2), Corrective Action Complete with Controls Determination Footnote 12** *“EPA seeks to use terminology that is precise, clear in meaning and, to the extent possible, consistent with Superfund. EPA welcomes commenters’ suggestions on terminology that may be more accurate and/or less cumbersome than “Corrective Action Complete with Controls” to describe this determination.”*

The DOE believes that “Corrective Action Complete with Controls” is an adequate term to describe this type of determination. It may be helpful, however, to more directly equate both the Corrective Action Complete with Controls and the Corrective Action Complete determinations with the concepts of Restricted Resource Use and Unrestricted Resource Use, respectively.

It is clear from the technical criteria provided for making a Corrective Action Complete with Controls determination that protection of human health and the environment is achieved by imposing a remedy that allows some contamination to remain in place, but requires engineering and/or institutional controls at the facility to limit exposure and subsequent release of contamination that remains following cleanup. The end state for the land or groundwater in this case is commonly referred to “restricted” in other programs, such as CERCLA (see Comprehensive Five-Year Review Guidance). Likewise, the technical criteria for making a Corrective Action Complete determination indicate that protection is achieved through treatment or removal of waste and all contaminated media to levels that return the facility to “unrestricted” use, where no further activity or controls are necessary (again, consistent with other programs - e.g., CERCLA). The use of these concepts could provide additional clarification on the meaning of each type of completion determination. Moreover, if this is not what the Office of Solid Waste means, it will be very important to make this point clear so that any differences between the programs is well understood.

2. **Page 9176 (Column 3), Corrective Action Complete with Controls Determination Footnotes 13** *“The Agency solicits comment on mechanisms, other than permits and orders, in particular, those that are enforceable by EPA and the authorized States, that might be used to implement institutional controls following a Corrective Action Complete with Controls determination. The Agency further solicits comment on whether and under what circumstances such mechanisms (and any other mechanisms that might be used to implement other types of controls, such as operation and maintenance, in the absence of a permit or order) generally would provide enough certainty, with respect to continued compliance with required controls, to justify elimination of the permit or order.”*

In response to EPA’s request for comment on mechanisms, other than permits and

orders, that might be used to implement controls at a facility following cleanup (e.g., O&M, monitoring, institutional controls), DOE recommends that EPA endorse the use of alternative mechanisms, when appropriate, and encourage states to implement cost-effective mechanisms to enforce controls that remain in place after corrective action is complete. The DOE has identified three specific types of alternative mechanisms it could foresee being useful. The choice of mechanism, of course, would be dependent upon site-specific circumstances.

1. Issuance of a post-closure plan in lieu of a post-closure permit that would be enforceable under a Federal Facility Agreement. DOE notes that the final rule issued on October 22, 1998 (Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities: Post-Closure Permit Requirement and Closure Process, 63 FR 56710) authorizes the use of alternatives to post-closure permits, including Federal and State orders and closure and post-closure plans (63 FR 56715, 2nd -3rd columns).
 2. At facilities that are regulated under both RCRA and CERCLA, integrate the RCRA post-closure requirements into a CERCLA mechanism. Integration of RCRA and CERCLA post-closure requirements presents a streamlining opportunity, whereby all regulatory obligations are enforced but only under a single mechanism. For example, integrated O&M Plans could be prepared that would cover both RCRA and CERCLA units/areas, and a five-year review could occur to ensure that all elements of a protective remedy remained in place.
 3. If ownership of the facility or portion of the facility were to be transferred from one government agency to another government agency (e.g., federal to a State or local government entity), a binding legal instrument between the two government agencies could serve as the mechanism for implementing controls. A legal instrument could contain specific requirements for long-term care, monitoring and reporting, and review of the remedy to ensure it remained protective.
3. **Page 9178 (Column 1), Corrective Action Complete Determinations for Entire Facility** *“EPA recognizes that referring to this decision as a ‘permit denial’ may be confusing to the public and problematic to the facility when the facility is in compliance, is not seeking a permit, and does not have an active permit ‘application’.”*

The DOE agrees that referring to/handling corrective action completion decisions as “permit denials” could mislead stakeholders and their perception of an entity’s good faith efforts to comply with environmental mandates. Rather than advising regulators to follow the standard permit denial process, or choose some alternative terminology

and authorized equivalent procedure, the DOE recommends that EPA simply establish a process free of any negative aspects. The DOE advocates use of the alternative procedures and terminology proposed by EPA in this draft guidance (67 FR 9178):

1. Issuing a notice informing the facility and the public that the facility has met its corrective action obligations, rather than issuing a final permit decision (denial), and
2. Referring to this decision as a “no permit necessary determination”, rather than a permit denial.

4. Page 9178 (Column 3), Corrective Action Complete Determinations for Less Than the Entire Facility

This section only addresses the procedures for acknowledging “Corrective Action Complete” determinations for portions of a facility. There is no discussion here (or in any other section of the draft guidance) about the procedures for acknowledging “Corrective Action Complete with Controls” determinations for portions of a facility; therefore, DOE presumes that the procedures for “Corrective Action Complete with Controls” determinations for a portion of a facility are the same as those for an entire facility. These include:

1. Modification of the permit at permitted facilities;
2. Issuance of a notice to acknowledge completion of corrective action with an opportunity for public comment; and
3. Options, in addition to a permit or order, to maintain O&M and monitoring actions, and/or compliance with and implementation of any institutional controls.

References

Atomic Energy Act, 42 U.S.C. Sect. 2011 - Sect. 2259, Date Unknown.

Comprehensive Five-Year Review Guidance, EPA 540-R-01-007, June 2001.

Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities, EPA Memo, September 24, 1996.

Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities; Advance Notice of Proposed Rulemaking, 61 FR 19432, May 1, 1996.

Corrective Action for Solid Waste Management Units, 40 CFR 264.101, July 15, 1985.
EPA Notice of Policy Statement on Deleting Sites from the Superfund List and Deferring Them for RCRA Action, 60 FR 14641, March 20, 1995.

Executive Order 12580 - Superfund Implementation, 52 FR 2923, January 23, 1987.

Hazardous Waste Management, RCRA Subtitle C, 1984.

Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 52 FR 8704, March 19, 1987.

Notice of Partial Deletion of the Cimarron Mining Superfund Site, 65 FR 52947, August 31, 2001.

RCRA Corrective Action Workshop on Results-Based Project Management,
<http://www.epa.gov/epaoswer/hazwaste/ca/workshop.htm>, July 2000.

RCRA Post-Closure Sites, EPA Memo, July 2, 1992.

RCRA Public Participation Manual, EPA 530-R-96-007, September 1996.

Risk-Based Clean Closure, EPA Memo, March 16, 1998.

Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-Closure Permit Requirement; Closure Process; State Corrective Action Enforcement, 59 FR 55778, November 8, 1994.

State or Regional Solid Waste Plans, RCRA Subtitle D, 1984.

