Corrective Action in RCRA Permits: An Emerging Rival to Superfund as the Hot Area for Environmental Lawyers and Consultants

by Richard G. Stoll

Editors' Summary: The passage of CERCLA in 1980 has supported a growing number of environmental professionals. The Act's vague language, expensive cleanup requirements, and strict liability scheme require an army of environmental lawyers, engineers, and scientists. In the next few years, the RCRA corrective action program may begin to rival the CERCLA program. The corrective action program covers many facilities and often requires expensive studies and cleanup. EPA recently issued proposed regulations implementing the RCRA corrective action program, which EPA will apply until a final rule is issued. This Article describes the RCRA corrective action program, including EPA's proposed regulations, and compares it with the CERCLA remedial program.

It has become common knowledge in U.S. business and legal circles that the Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA, or Superfund)[1] has revolutionized the field of environmental law. CERCLA's harsh liability scheme and high-priced cleanup requirements are now pervasive in U.S. society and are dramatically bloating the ranks of environmental lawyers and consultants.

Slowly, but surely, the Resource Conservation and Recovery Act (RCRA)[2] corrective action program may become a worthy rival for such dubious honors. Although Congress authorized the program in 1984, the Environmental Protection Agency (EPA) took six years to formulate its proposal for the basic implementing regulations. Now that EPA has issued its proposal,[3] practitioners are beginning to see corrective action at work.

EPA has estimated that 5,700 facilities throughout the United States are subject to this program[4]—a number that greatly exceeds the size of the current CERCLA national priorities list (NPL), and any reasonably projected NPL growth for the next decade or two. Since EPA has just begun to scratch the surface of the RCRA corrective action program, it is safe to assume that the program will be around for many years to come. Also, based on the relatively few corrective action permits EPA has issued thus far, it is safe to assume that extensive and expensive studies and remediations will often be required.

This Article draws some key comparisons and contrasts between the CERCLA remedial program and the RCRA corrective action program. It begins with some basic jurisdictional and programmatic differences between RCRA and CERCLA. It then describes the corrective action program as it has grown from its "infancy" to its "maturity," and analyzes EPA's most recent corrective action rulemaking. The Article also points out interesting issues for private cost recovery in the corrective action context.

Jurisdictional Background

RCRA

One major focus of RCRA is its regulatory compliance program for ongoing hazardous waste management activities. The corrective action program, on the other hand, focuses on cleanup of conditions created in the past. Before discussing the corrective action program under RCRA, it is helpful to describe generally the RCRA regulatory structure.

First, RCRA jurisdiction attaches only to *wastes*. Unlike some environmental laws, including CERCLA, there is no RCRA jurisdiction over products.[5]

All waste materials may be broadly split into hazardous and nonhazardous wastes. As described below, whether a waste is hazardous or nonhazardous makes a dramatic difference under the RCRA regulatory compliance program. The hazardous/nonhazardous distinction is not as significant, however, under the corrective action program.

One important term is "hazardous constituent." EPA has a long list of chemical compounds called hazardous constituents. EPA uses this list in determining whether to classify a waste as hazardous.[6]

It is important to recognize that a particular waste may contain hazardous constituents and still not be classified as a hazardous waste. In deciding what is a RCRA hazardous waste, EPA generally looks for some threshold hazard level (albeit sometimes awfully low). Thus, many wastes that are legally nonhazardous may nevertheless contain hazardous constituents.[7] As discussed below, a material that contains

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1. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA 001-075.
2. 42 U.S.C. §§6901-6992, ELR STAT. RCRA 001-050.
3. 55 Fed. Reg. 30798 (1990) (to be codified at 40 C.F.R. pts. 264, 265, 270, 271) (proposed July 27, 1990) [hereinafter July 27 Rulemaking].
4. *Id.* at 30861.
5. RCRA §1004(27), 42 U.S.C. §6903(27), ELR STAT. RCRA 005; RCRA §3001, 42 U.S.C. §6921, ELR STAT. RCRA 010; 40 C.F.R. pt. 260, app. I (1990).
6. 40 C.F.R. pt. 261, app. VIII (1990).
7. *See* 40 C.F.R. §261.11 (1990).

a hazardous constituent may be addressed under the corrective action program even if that material is not classified as a hazardous waste.

Finally, all wastes (both hazardous and nonhazardous) fall under the general legal rubric of "solid wastes." The adjective "solid" is misleading: RCRA defines solid to include liquids, semisolids, sludges, and even contained gaseous materials.[8]

CERCLA

Under CERCLA, a "hazardous substance" is any substance EPA has designated for special consideration under the Clean Air Act (CAA),[9] the Federal Water Pollution Control Act (FWPCA),[10] or the Toxic Substances Control Act (TSCA),[11] *and* any "hazardous waste" under RCRA.[12] Moreover, EPA must designate as hazardous additional substances that "may" present substantial danger to health and the environment.[13] EPA maintains and updates a list of all such "hazardous substances" in 40 C.F.R. part 302. There are hundreds of substances on this list. Congress has excluded only two basic types of substances from the definition of CERCLA hazardous substances: petroleum and natural gas (and synthetic gas usable for fuel).[14]

Comparing how substances trigger jurisdiction under CERCLA with the RCRA hazardous waste program shows that CERCLA's reach is much broader. First, to trigger RCRA jurisdiction a substance must be a waste. Under CERCLA, whether a substance is a waste, a product, or something else is irrelevant.

Second, the concept of "hazardousness" is much broader under CERCLA. For instance, the RCRA hazardous constituents are a mere subset of the CERCLA hazardous substances.[15] Moreover, under RCRA a waste must either be "listed" or meet one of the hazardous "characteristics" to trigger jurisdiction.[16] In either case, the RCRA determination is based on concentrations of hazardous constituents in some numerical threshold amount. Under CERCLA, however, EPA says that a substance containing any amount of a listed hazardous substance triggers jurisdiction. EPA's position has generally been upheld by the courts.[17]

8. RCRA §1004(27), 42 U.S.C. §6903(27), ELR STAT. RCRA 005; 40 C.F.R. §261.2 (1990).
9. CERCLA §101(14), 42 U.S.C. §9601(14), ELR STAT. CERCLA 007; *see also* CAA §112, 42 U.S.C. §7412, ELR STAT. CAA 28.
10. CERCLA §101(14), 42 U.S.C. §9601(14), ELR STAT. CERCLA 007; *see also* FWPCA §307(a), 33 U.S.C. §1317(a), ELR STAT. FWPCA 037.
11. CERCLA §101(14), 42 U.S.C. §9601(14), ELR STAT. CERCLA 007; *see also* TSCA §7, 15 U.S.C. §2606, ELR STAT. TSCA 017.
12. CERCLA §101(14), 42 U.S.C. §9601(14), ELR STAT. CERCLA 007; *see also* RCRA §3001, 42 U.S.C. §6921, ELR STAT. RCRA 010.
13. CERCLA §101(14), 42 U.S.C. §9601(14), ELR STAT. CERCLA 007; CERCLA §102(a), 42 U.S.C. §9602(a), ELR STAT. CERCLA 010.
14. CERCLA §101(14), 42 U.S.C. §9601(14), ELR STAT. CERCLA 007.
15. *Compare* 40 C.F.R. pt. 261, app. VIII (1990) (list of RCRA hazardous constituents) *with* 40 C.F.R. pt. 302 (list of CERCLA hazardous substances).
16. 40 C.F.R. §§261.10-.33 (1990).
17. *See* United States v. Western Processing, 734 F. Supp. 930, 936, 20 ELR 20990 (W.D. Wash. 1990); United States v. Nicolet, Inc., 712 F. Supp. 1205, 1207, 20 ELR 20864 (E.D. Pa. 1989); United States v. Conservation Chemical Co., 619 F. Supp. 162, 238, 16 ELR 20193 (W.D. Mo. 1985). *But cf.* Amoco Oil Co. v. Borden, 889 F.2d 664, 669-71, 20 ELR 20281 (5th Cir. 1989) (if nongovernmental plaintiff incurred response costs because of release of hazardous substance, liability attaches only if release was of amount sufficient to violate any state or federal standard).

RCRA Hazardous Waste Management System

Activities Covered

The RCRA regulatory compliance program for ongoing hazardous waste management activities has been in place since 1980.[18] Different types of requirements apply depending on whether a party falls into one of three broad categories with respect to hazardous waste management: (1) generator, (2) transporter, and/or (3) treater, storer, or disposer (TSD). Some facilities fit one of these categories; others fit two or all three.[19]

Generators must comply with recordkeeping and paperwork requirements and must assure that the wastes they generate are ultimately treated or disposed of in accordance with applicable RCRA requirements.[20] Transporters also must comply with recordkeeping and paperwork requirements and assure that their vehicles are of specified structural integrity.[21]

The requirements for TSD facilities are much more onerous and comprehensive than the requirements for the parties that generate only or transport only.[22] First, the TSD substantive regulatory requirements go far beyond the reach of generator and transporter requirements in terms of scope, complexity, and cost. Second (and this is a key lead-in to the corrective action program), a TSD facility must obtain a RCRA permit.[23]

RCRA Permits

Obtaining a RCRA permit is often difficult and time-consuming. In addition, because of requirements for notice and public hearings, it is often a lightning rod for public opposition. More significantly, any facility that needs a RCRA permit is now subject to the corrective action program.[24] This also applies to facilities that had already obtained RCRA permits before the corrective action program took effect, because all RCRA permits must be periodically reviewed and renewed.[25]

Moreover, one cannot simply walk away from a permit. To "close" a TSD facility, there are arduous regulatory requirements. EPA will insist that each TSD unit be "clean closed" before the facility can be released from its permit.[26] To clean close, the permittee may have to perform such extensive and expensive cleanup around the unit that there

18. 40 C.F.R. pts. 260-265 (1990).
19. *See generally id.* pt. 260, app. I.
20. *Id.* at pt. 262.
21. *Id.* at pt. 263.
22. *Id.* at pts. 264-265.
23. 40 C.F.R. pt. 270 (1990).
24. 40 C.F.R. §264.101 (1990).
25. 40 C.F.R. §270.50 (1990).
26. *See, e.g.*, 52 Fed. Reg. 8706 (Mar. 19, 1987).

is virtually no detectable hazardous constituents left in the surrounding soil and groundwater.[27]

If the permittee cannot achieve such a clean closure, then—in a catch-22 fashion—EPA will deem the contaminated remainder to be hazardous waste landfill and require the facility to obtain a *postclosure* permit.[28] Since a permit will thus be required (even if it is not truly being voluntarily "sought"), corrective action is triggered for the facility.

Blurring of Hazardous Vs. Nonhazardous Waste Distinction With the Corrective Action Program

Traditionally there has been a distinct difference between how hazardous and nonhazardous wastes have been regulated under RCRA. All of the foregoing regulatory compliance requirements have applied only to generators, transporters, and TSDs for *hazardous* wastes. For solid wastes that are nonhazardous, RCRA has taken a kind and gentle approach.[29] In fact, there have merely been "guidelines" for states, and there have been no federally enforceable requirements at all.[30] As discussed later, however, one major effect of the corrective action program is to require TSD facilities to address hazardous constituents from *nonhazardous* wastes.

RCRA Corrective Action

In Its Infancy

The corrective action program has evolved in two basic steps: the "infant" and "mature" corrective action program phases. As the names imply, the mature is much more robust and complex than the infant.

Under the infant corrective action program,[31] only the hazardous waste *land disposal* units that a company chose to include in the RCRA hazardous waste regulatory compliance regime for TSDs *and* those land disposal units that received hazardous wastes after July 26, 1982, will be affected.[32] The principal requirements are to assure that any groundwater contamination from hazardous constituents spreading from the land disposal unit is remediated so that "groundwater protection standards," defined as concentration levels for various hazardous constituents, are not exceeded.[33]

To summarize, under the infant program:

> (1) Corrective action is not triggered by all TSDs, but only by the narrower subset of TSDs with land-based units for hazardous waste disposal, and even the narrower subset of such units that received hazardous waste after July 26, 1982.
>
> (2) If triggered, corrective action addresses only releases from those regulated land-based units.
>
> (3) Groundwater is the only environmental medium covered.

In Its Maturity

The mature corrective action is much broader and more comprehensive than the infant program. As described below, it originated with the 1984 RCRA amendments.[34] Because of the overwhelming complexities and extreme controversies involved, however, it took EPA almost six years to issue proposed regulations. EPA issued its proposal on July 27, 1990 (the July 27 Rulemaking).[35]

EPA has announced it will be performing additional economic impact studies before it finalizes the corrective action regulations. EPA personnel expect that it will be at least two years before EPA issues its final corrective action rules. It is important to stress, however, that the new corrective action program will be implemented in the meantime. EPA personnel have made it clear that their regional and state officials are to follow the guidance of the July 27 Rulemaking in addressing corrective action activities at RCRA facilities.

The mature corrective action program comes close to subjecting every RCRA TSD facility to the same degree of examination and the same types of potential cleanup activities (and costs) as a Superfund site. Here are the key elements of the mature corrective action program.

First, all TSDs seeking a permit must go through the corrective action process.[36] (In the infant corrective action program, only a subset of TSDs with *land-based* hazardous waste units were affected.) Thus, even if a facility will do nothing more than *store* hazardous waste, it is now subject to the corrective action program.

Second, if corrective action is triggered, the facility is required to assess, and clean up where necessary, hazardous constituents (1) from all "solid waste management units" (SWMUs), (2) within the entire boundary of the facility, (3) regardless of when the SWMU was created.[37] The following points should make vivid the breadth of this requirement:

- Under the infant corrective action program, waste units that stopped receiving hazardous waste before July 26, 1982, were not subject to corrective action. In contrast, under the mature corrective action program, the time that waste was deposited is irrelevant. Like CERCLA, the mature corrective action program is retroactive.[38] Wastes that were deposited decades ago must still be addressed.
- Under the infant corrective action program, hazardous constituents could be addressed only if they came

27. *Id.*

28. *See, e.g.*, 52 Fed. Reg. 45794-96 (Dec. 1, 1987).

29. *See* RCRA Subtitle D, 42 U.S.C. §§6941-6949a, ELR STAT. RCRA 027-031.

30. 40 C.F.R. pt. 257 (1990).

31. 40 C.F.R. §§264.90-.101 (generally referred to as "Subpart F").

32. *Id.* at §264.90(a)(2).

33. *Id.* at §264.92.

34. RCRA §3004(u),(v), 42 U.S.C. §6924(u),(v), ELR STAT. RCRA 016. RCRA also authorizes EPA to issue corrective action orders at facilities that have interim status and are still awaiting a RCRA permit. *See* RCRA §3008(h), 42 U.S.C. §6928(h), ELR STAT. RCRA 021.

35. July 27 Rulemaking, *supra* note 3.

36. RCRA §3004(u), 42 U.S.C. §6924(u), ELR STAT. RCRA 016.

37. *Id.*

38. Courts have consistently upheld the retroactivity of CERCLA. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 734, 17 ELR 20603 (8th Cir. 1986).

from hazardous waste units. Under the mature corrective action program, hazardous constituent releases must also be addressed if they come from units with any solid wastes, regardless of whether the waste is legally classified as hazardous. (Hence, the term "solid waste management unit.")

- Under the infant corrective action program, only groundwater was addressed. The mature corrective action program requires that all environmental media be assessed when addressing SWMUs. Thus, the focus turns not only to groundwater, but also to contaminated soil, air, surface water, and sediments.[39]

The requirement to address all SWMUs within the facility is quite dramatic. EPA defines "facility" for this purpose (and the courts have upheld EPA) to include all contiguous property under the owner/operator's control.[40]

Thus, assume there are two parcels, *A* in Maine and *B* in California. Both parcels *A* and *B* have 10,000 acres of contiguous land, 4 hazardous waste landfills that were closed in the 1970s, 16 hazardous waste surface impoundments that were closed in the 1970s, 10 waste pits where plant trash has been dumped (none of it legally deemed a hazardous waste), and probably dozens of additional areas in which nonhazardous and hazardous waste was routinely spilled or dumped over the last 50 years.

In addition, at parcel *B* (but not parcel *A*) there is one fenced concrete-pad area measuring 80' x 120'. This area is permitted under RCRA for storage of hazardous waste in drums. Given these facts, the two virtually identical 10,000-acre parcels will be treated as follows: Parcel *A* will not be covered by the corrective action program and Parcel *B* will be fully covered.

Jurisdictional Comparisons Between RCRA Correction Action and CERCLA Remediation

Conditions Needed to Trigger Jurisdiction

To *trigger* the mature corrective action program under RCRA, all four of the following conditions must be present: a facility must have (1) since November 19, 1980,[41] (2) stored, treated, and/or disposed of (3) a material that fits the definitions of both solid and hazardous waste and (4) failed to obtain a certified RCRA "closure" for such storage/treatment/disposal by January 26, 1983.[42]

Thus, facilities that stopped managing such wastes before November 19, 1980, are exempt. Further, facilities that stopped managing such wastes after 1980, *and* obtained a certified closure of TSD status before January 26, 1983, and which never again have treated, stored, or disposed of hazardous wastes are exempt. Moreover, facilities that merely generated hazardous wastes (without becoming TSD facilities or seeking a permit for TSD facilities) are exempt. Note that none of these factors would exempt a facility from CERCLA.

The regulations provide a "90-day accumulation" exemption for generators.[43] This exemption provides that wastes stored or treated in certain types of tanks or containers and that are moved off site within 90 days from the date of generation will not trigger TSD status. Thus, generating facilities whose storage or treatment of hazardous waste has always been within this 90-day exemption (and who have not engaged in other storage/treatment/disposal activities) will not trigger corrective action.

Again, under CERCLA, the foregoing limitations are irrelevant. As long as a hazardous substance (or a "pollutant or contaminant") is involved, CERCLA response jurisdiction is triggered. The only exceptions would be at a site where the sole substance of concern was petroleum or natural gas,[44] or where the only release of concern met the narrow definition of "federally permitted release."[45] Most importantly, to trigger CERCLA, a waste need not be involved, treatment/storage/disposal need not be involved, and the date a substance was deposited is irrelevant.

Once Jurisdiction Is Triggered

If corrective action is triggered for a facility, jurisdictional distinctions persist but are not quite as significant. To show how these distinctions begin to lose significance, the following points about the corrective action program are explained.

☐ *Facility Concept.* As noted earlier, all it takes is one little TSD area on a great big facility to taint the entire facility with corrective action. EPA takes a broad view of what may be included within a single "facility." Since a TSD is not needed to trigger CERCLA, the facility definition will not restrain CERCLA jurisdiction.

For corrective action purposes, EPA says that it will generally consider all "contiguous property" under control of the same owner or operator as one facility.[46] For instance, even if two parcels are defined as separate sections or plots on a tax map or plot plan, if they are under the control of the same party, EPA will consider them a single facility under RCRA. This means that the "taint" effect of one little TSD area can have even more dramatic effects.

39. *See* 50 Fed. Reg. 28713 (July 15, 1985).

40. *Id.* at 28712.

41. A facility that ceased all hazardous waste management activities before November 19, 1980, is not covered by the RCRA Subtitle C program for hazardous waste. 45 Fed. Reg. 33066 (May 19, 1980).

42. 40 C.F.R. §270.1(c) (1990); *see* 52 Fed. Reg. 45795 (Dec. 1, 1987). A facility owner who failed to obtain a certified closure by this date may still be able to avoid corrective action by achieving a clean closure. *See supra* text accompanying notes 25-28.

43. 40 C.F.R. §262.34 (1990).

44. CERCLA §101(14), 42 U.S.C. §9601(14), ELR STAT. CERCLA 007.

45. Under CERCLA §107(j), 42 U.S.C. §9607(j), ELR STAT. CERCLA 027, there is no liability for a federally permitted release. This term is defined in CERCLA §101(10), 42 U.S.C. §9601(10), ELR STAT. CERCLA 007, to include releases that are in full compliance with a permit or other standard issued under several federal environmental laws, such as the CAA, 42 U.S.C. §§7401-7671a, ELR STAT. CAA 1-186; the FWPCA, 33 U.S.C. §§1251-1387, ELR STAT. FWPCA 001-068; and the Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA 001-024. As a practical matter, it provides little relief.

There are several other special types of releases excluded from CERCLA jurisdiction that should be noted: (1) releases solely within a workplace, (2) engine exhaust emissions, (3) certain nuclear releases subject to Nuclear Regulatory Commission jurisdiction, (4) the normal application of fertilizer, (5) certain releases of naturally occurring substances, (6) products in building structures (i.e., asbestos), and (7) releases caused by drinking water system deterioration. CERCLA §101(22), 42 U.S.C. §9601(22), ELR STAT. CERCLA 008; CERCLA §104(a)(3), 42 U.S.C. §9604(a)(3), ELR STAT. CERCLA 012.

46. July 27 Rulemaking, *supra* note 3, at 30808.

In the July 27 Rulemaking, EPA has announced the following additional corrective action interpretations:

> (1) Two parcels under the same ownership that are completely separated by land owned by others will not be a single facility.
>
> (2) Property that is separated only by a public right-of-way (e.g., as a road or power transmission right-of-way) will be a single facility.
>
> (3) Assume that on a 100-acre parcel, the owner leases a specific five-acre segment to a company that operates a TSD facility on the segment. There is absolutely no hazardous waste management activity on the remaining 95 acres. Nevertheless, the entire 100 acres is subject to corrective action.
>
> (4) Following the example immediately above, assume the owner also owns 20 acres adjacent to the 100-acre parcel, but no part of the 20-acre parcel is contiguous to the five-acre leased parcel. Nevertheless, the entire 120 acres is subject to corrective action.
>
> (5) Assume a big parent company owns two separate subsidiaries. Subsidiary *A* owns parcel *A* and Subsidiary *B* owns the adjacent parcel *B*. Subsidiary *A* operates a TSD facility on parcel *A* and Subsidiary *B* does not manage hazardous waste at all. Both parcels are a single facility for purposes of corrective action.

☐ *SWMU Concept.* In the regulatory section of the July 27 Rulemaking, EPA defines SWMU as: "Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released."

In the preamble to the July 27 Rulemaking, EPA further explains this definition. First, EPA explains that the term includes the types of units "typically" identified with the RCRA regulatory program. Thus, landfills, surface impoundments, land treatment units, waste piles, tanks, containers, container storage areas, incinerators, injection wells, wastewater treatment units, waste recycling units, and other physical, chemical, or biological treatment units in which solid wastes (but not products) have been managed will be considered SWMUs.

In addition to such "typical" RCRA TSD units, the proposed definition includes any area of a facility at which solid wastes (but not products) have been released in a "routine and systematic" manner. The preamble provides several examples of what EPA considers a "routine and systematic" release. The first example is loading or unloading areas. The preamble explains that it is appropriate to cover these areas, since activities in such areas often result in a steady, though small, amount of spillage or drippage that over time can result in highly contaminated soils.

Similarly, outdoor areas used for solvent washing are identified as likely SWMUs because drippage onto the soil occurs that could lead to serious contamination. EPA's third example is a "kickback drippage" area, where pressure-treated wood is stored in a manner that allows preservative fluids routinely to drip onto the soil.

EPA also has identified certain types of releases that it does *not* consider an SWMU under the "routine and systematic" criterion. A one-time spill of hazardous waste (e.g., from a vehicle traveling across the facility) is not considered an SWMU. Similarly, leakage from a chemical product storage tank would generally not be an SWMU. In the preamble, EPA characterizes such leakage as "passive," and thus generally not a routine and systematic release resulting from a systematic human activity. Similarly, releases from production processes and resulting contamination generally will not be considered an SWMU.

The proposed regulatory definition of an SWMU (quoted above) is not necessarily consistent with the preamble. While the definition says that areas in which solid wastes *have been* routinely and systematically released *are* SWMUs, it does not explicitly state the converse proposition—that areas in which solid wastes *have not been* routinely and systematically released *are not* SWMUs.

The preamble seems quite clear, however, that EPA intends affirmatively to exclude such areas. EPA headquarters personnel have agreed with this reading of the preamble and have agreed that the regulatory language was not drafted as precisely as it should have been. (Note, however, that the "routine and systematic" issue relates only to areas at a facility that do not fit within the "typical" waste unit category. For example, a landfill or surface impoundment is an SWMU regardless of whether "routine and systematic" releases existed.)

The July 27 Rulemaking also identifies an industrial process collection sewer as an SWMU. Such sewers are typically designed and operated as a system of piping into which wastes are introduced, which in turn discharge into a wastewater treatment system. EPA explains that it is appropriate to require corrective action for these units, because such sewers routinely handle large volumes of wastes, are an integral part of many facilities' overall waste management system, and often experience significant leakage. For the same reasons, EPA has also included ditches (open or closed) that are used to convey solid wastes as SWMUs.

The July 27 Rulemaking provides several other useful points of guidance for identifying SWMUs. First, any unit that fits the SWMU descriptions discussed above will be covered even if the waste is otherwise exempt from coverage under RCRA as a hazardous waste unit. For example, certain recycling units or tanks qualifying as a "wastewater treatment unit" are exempt from the requirement to obtain a RCRA Subtitle C permit. Nonetheless, EPA says these units are SWMUs subject to corrective action.

EPA's preamble also discusses spill issues. EPA explains that only spills from an otherwise discernible unit (e.g., a landfill) constitute a "release" from an SWMU. A spill that cannot be linked to an SWMU is not covered. For example, a spill from a truck driving through the facility is not an SWMU and does not constitute a release from an SWMU.

Finally, EPA has explained that the date the waste was put in the SWMU is irrelevant. Waste placed in the SWMU at any time in the past is covered, regardless of whether the current owner held the property at the time of placement, and regardless of whether the placement occurred before RCRA was enacted.

Below is a chart that identifies SWMUs and non-SWMUs based on the guidance in EPA *Federal Register* notices.

SWMUs	*Non-SWMUs*
Typical Subtitle C units (e.g., landfills, tanks, incinerators, waste piles, etc.)	One-time spills
Areas where solid wastes (but not products) have been routinely and systematically released (e.g., loading/unloading areas, solvent washing areas, kickback drippage)	Routine leakage from chemical product storage tanks
Industrial process collection sewers	Releases from production processes
Ditches carrying solid waste	

Thus, even though the SWMU concept is broad, there are limitations. These limitations do not apply in CERCLA responses, however; all of the items identified as "non-SWMUs" above are fully subject to CERCLA response authority.

The Ultimate Stretch: AOCs

Even the above meager limitations on the SWMU concept are apparently unacceptable to some EPA regions. They avoid these limitations by requiring permittees to address areas of concern (AOCs) as if they were SWMUs.

EPA's regions cite the so-called omnibus sentence in RCRA[47] as authority for this avoidance scheme. This sentence provides the following: "Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment."

For instance, a region might want to include in a corrective action permit an area that is categorized as a non-SWMU in the above reference chart. As explained below, where the region has actually found a hazard that needs to be addressed to protect health and the environment, inclusion of such an area in the corrective action permit under the omnibus sentence may not be particularly troubling.

Some regions appear to be extending the omnibus sentence to (or beyond) its limits. For instance, at a particular facility a region might suspect, for whatever reason, that (1) there were 11 areas where solid wastes *may* have been deposited, even though there is no evidence that such deposits exist; and (2) a certain type of solid waste *may* have been deposited at various locations throughout the facility, even though there is no evidence to indicate any such deposits exist. In crafting its corrective action permit, the region—citing the omnibus sentence—might label the 11 areas as AOCs. It might also call the *entire facility* an AOC for this waste. The permit would then require the permittee to undertake full-blown studies and analyses for not only the SWMUs, but also for the numerous AOCs.

This approach appears to be at odds with the statute and the regulations. RCRA §3004(u) requires a corrective action program in each post-1984 permit, and that program is to be limited to SWMUs. EPA's July 27 Rulemaking also limits the corrective action program to SWMUs. Yet under the omnibus stretch approach, not only could SWMUs be studied to death, but so could every nook and cranny of a facility.

It is particularly instructive to note that of the tens of thousands of words in the July 27 Rulemaking, only one short paragraph mentions the omnibus authority.[48] Rather, the preamble and the regulations make clear that EPA's focus is limited to SWMUs.

Section 264.500 of the July 27 Rulemaking is the governing "purpose and applicability" provision. It provides that all of Subpart S (i.e., the corrective action subpart of the Code of Federal Regulations) is designed to cover releases *from SWMUs*.[49] It requires that owners/operators "institute investigations and/or corrective action, as necessary to protect human health and the environment," but only for releases *from SWMUs*.[50]

The duty to perform a remedial investigation is limited to SWMUs.[51] The duty to perform a corrective measure study is limited to SWMUs.[52] The scope of the corrective measure study is limited to SWMUs.[53] The duty to report newly discovered releases relates only to SWMUs.[54] There is in fact not a word in the regulatory portion of the July 27 Rulemaking about addressing non-SWMUs.

In fact, EPA expressly stated that it intended to exclude certain releases from the corrective action process. EPA said that it "recognizes that these interpretations have the effect of precluding section 3004(u) from addressing some environmental problems at RCRA facilities."[55]

Granted, EPA noted in the preamble that it intended to exercise "as necessary" authorities such as the RCRA omnibus provision, other RCRA authorities, and CERCLA, and/or that states could exercise state authority to correct non-SWMU problems.[56] When EPA alluded to the omnibus authority in the July 27 Rulemaking, however, it did not say that all areas of unsubstantiated suspicion should be treated routinely through the corrective action process or that all such areas should be assessed, characterized, investigated, and studied exactly as if they were SWMUs.

If this approach prevails, there would be no purpose for Congress to have limited corrective action authority to SWMUs. Moreover, there would be no purpose for EPA to have carefully defined the extent of SWMU jurisdiction in its July 27 Rulemaking and to have carefully limited all the assessment, investigation, study, and other requirements to SWMUs.

The so-called omnibus authority should be exercised only where EPA becomes aware that a non-SWMU presents an environmental problem. This approach would be consistent with the language of the omnibus sentence in RCRA, since

47. RCRA §3005(c)(3), 42 U.S.C. §6925(c)(3), ELR STAT. RCRA 017.

48. July 27 Rulemaking, *supra* note 3, at 30809.

49. *Id.* at 30874 (proposed §264.500(a)).

50. *Id.* (proposed §264.500(b)).

51. *Id.* (proposed §264.510).

52. *Id.* at 30875 (proposed §264.520(a) and (b)).

53. *Id.* at 30876 (proposed §264.522(a)(2)).

54. *Id.* at 30882 (proposed §270.30(l)(12)).

55. July 27 Rulemaking, *supra* note 3, at 30809.

56. *Id.*

it would require the Administrator to determine that a measure is necessary to protect health and the environment before imposing a permit condition. And as discussed below, it would also be consistent with the RCRA legislative history and with recent EPA statements in a final rulemaking under RCRA.

The legislative history for the omnibus sentence in RCRA provides as follows:

> This provision also gives the Administrator, or the State if it has been authorized to issue permits, the authority to add permit terms and conditions beyond those mandated in regulations, if, in the judgment of the Administrator (or the State, if the State is issuing the permit), such terms and conditions are *necessary* to protect human health and the environment. *This amendment gives the Agency the authority to address special cases and unique circumstances. The provision is designed to deal with factors or situations different from those addressed in the regulations.* It can also be used to address areas already covered by the regulations in order to incorporate new or better technologies or other new requirements in permits, where EPA intends to add such technologies or requirements to the regulations but has not yet issued a final regulatory amendment. The permitting authority is not required to impose every condition suggested by commentators on proposed permits. [57]

Certainly there is nothing "special" or "unique" about an area for which there is no evidence of a problem, but for which EPA feels that further study would be a neat idea. And certainly EPA knew when it drafted the SWMU definition that virtually all TSD facilities would have areas of theoretical "concern" that did not qualify as an SWMU. Such a facility would not present a "situation different" from those addressed in the regulations.

The above-quoted provision also says the omnibus sentence is designed to allow EPA to include requirements from pending regulations into a permit. This does not support an AOC-blanketing approach, for EPA has no pending regulations that would elevate AOCs to the status of SWMUs in the corrective action regime.

Even more interesting is a point EPA stressed in a recent final rulemaking:

> EPA notes that permit writers choosing to invoke the omnibus permit authority of §270.32(b)(2) to add conditions to a RCRA permit must *show* that such conditions are necessary to ensure protection of human health and the environment and *must provide support* for the conditions to interested parties and accept and respond to comment. In addition, permit writers must *justify* in the administrative record supporting the permit any decisions based on omnibus authority. [58]

EPA apparently feels quite strongly about this point—so strongly, in fact, that it included this paragraph *verbatim seven times* in the same preamble. [59] Presumably, when EPA says exactly the same thing seven times in a document, the Agency means it.

This very recent and very repeated statement calls into severe question the regional practice of routinely blanketing a corrective action permit with AOCs. A region would be hard pressed to "show" that subjecting areas with unsubstantiated suspicions to full-blown corrective action procedures is "necessary" to protect health and the environment.

Liability Scheme and Administrative and Judicial Review

Direct Liability to the Government

Under RCRA, only the owner/operator of a facility is liable to the government for implementing corrective action measures. The corrective action program for any facility will be intertwined with the facility's RCRA permit (operating or postclosure), and enforceable requirements will be included as conditions and/or schedules of compliance in the permit. [60]

As a RCRA permit is being issued, the permittee (and possibly intervenors) have fairly well-prescribed rights to a hearing and rights of appeal through the administrative process. [61] A dissatisfied permittee (or intervenor) has by statute a direct right of judicial review in the appropriate U.S. court of appeals once a permit is issued or denied. [62] The mere filing of a petition for review in the U.S. court of appeals does not automatically stay the enforceability of the permit. A permittee has the burden of making the traditional showings (e.g., irreparable harm, likelihood of success, etc.) to secure a judicial stay.

If a permittee violates a permit condition, EPA can issue an administrative compliance order and/or initiate an enforcement action in federal district court. Civil penalties of up to $25,000 per day of violation can be assessed. In addition, for "knowing" violations, EPA can bring a criminal action with possible penalties of up to $50,000 per day of violation and five years imprisonment for the first offence. For subsequent convictions, the dollars and years may be doubled. [63]

CERCLA stands in sharp contrast to much of the above. While the current owner/operator of the facility is liable, so are past owner/operators (at the time of any disposal), transporters, and so-called generators—all on a joint and several basis. [64] The statute makes no attempt to give guidance on how liability is to be allocated among and within these groups. The legislative history gives little guidance, and the case law has not yet developed with any definiteness. Overall, there is a trend in the case law that is supported in the legislative history. It saddles a heavy share on owners/operators that performed the dumping, that affirmatively allowed dumping to take place, and/or that benefited economically from the dumping. [65]

Unlike RCRA, CERCLA has no permits to govern the terms of a cleanup. The CERCLA specifics may be included

57. S. REP. No. 284, 98th Cong., 1st Sess. 31 (1983) (emphasis added).

58. 56 Fed. Reg. 7134, 7145 n.8 (Feb. 21, 1991) (emphasis added).

59. *Id.* at 7145 n.8; 7147 n.15; 7166 nn.48-49; 7173 n.56; 7179 n.68; and 7189 n.81.

60. 40 C.F.R. pt. 270 (1990).

61. 40 C.F.R. pt. 124 (1990).

62. RCRA §7006(b)(1), 42 U.S.C. §6976(b)(1), ELR STAT. RCRA 037.

63. RCRA §3008, 42 U.S.C. §6928, ELR STAT. RCRA 020.

64. CERCLA §107(a), 42 U.S.C. §9607(a), ELR STAT. CERCLA 024.

65. *Compare* Amoco Oil Co. v. Dingwell, 690 F. Supp. 78 (D. Me. 1988) (65-percent share for owner/operator responsible for treatment and storage of waste) *with* Jersey City Redev. Auth. v. PPG Indus., 18 ELR 20364 (D.N.J. Sept. 3, 1987) (0-percent share for landowner that had no responsibility for the dumping).

in a negotiated judicial consent decree or an administrative consent order, in which case the document will usually include (on a site-by-site basis) a schedule of stipulated penalties for noncompliance.

In addition, EPA may issue an order under CERCLA §106 to compel cleanup actions. Any person who violates such an order is liable for penalties of up to $25,000 per day per violation.[66] Moreover, unlike RCRA, a CERCLA §106 order violator may be held liable for damages equaling *three times* the response costs covered by the order.[67] There is generally no criminal liability associated with the CERCLA response program, however.

Unlike RCRA, there is no real administrative due process accompanying the issuance of CERCLA §106 orders or the process for negotiating judicial decrees or administrative consent orders. Similarly, there are no administrative appeal processes. CERCLA consent decrees usually have a "resolution of disputes" clause that basically says: "Party *A* (EPA) and everybody else will argue in good faith. Then whatever Party *A* says, goes."

Also unlike RCRA, there is no right to obtain direct judicial review of an EPA CERCLA decision—even a §106order—upon issuance. The statute provides that such issues can be litigated only at such later date (if ever) that *EPA chooses* to bring an enforcement or cost recovery action in court.[68]

Private Party Actions

Another important liability issue is whether a party tagged by the government for remedial funds can seek recovery from other potentially liable parties. CERCLA contains two provisions that are frequently used (and have spawned much litigation) by tagged parties in efforts to pass cleanup costs off to others: (1) §107(a) private cost recovery; and (2) §113(f)(1) contribution.[69]

Under CERCLA §107(a), any person who incurs costs in responding to hazardous substances in a manner that is "consistent with the national contingency plan" (NCP) has a right of action in federal district court against any parties liable to the government under CERCLA (owners/operators, transporters, generators). The defenses for these private actions are the same very limited few that apply when the government is a plaintiff (e.g., act of God, act of war).[70]

Under CERCLA §113(f)(1), any person alleged to be liable for response costs may seek contribution in federal district court from any other person who is or may be liable under CERCLA §107(a) "during or following" any civil action under CERCLA §106 or §107. The distinctions, similarities, and overlaps between CERCLA §§107(a) and 113(f)(1) provisions have spawned many articles and confusing case law that need not be dissected here. Basically, if a tagged party is performing a remediation pursuant to a CERCLA consent decree, the party could probably proceed under either §107(a), §113(f)(1), or both. Where the government never initiates a judicial action against the tagged party and/or where a tagged party is not performing a remediation pursuant to CERCLA, §113(f)(1) will less likely apply. Section 107(a) may still apply, however.

While the multi-party nature of CERCLA sites is well known, a RCRA owner/operator may also have viable parties in mind from whom to seek recovery in a corrective action cleanup. At many RCRA sites, SWMUs could have been created years ago by prior owners and operators. Moreover, at some RCRA facilities, it may be possible to trace certain SWMUs back to generators and transporters.

In the RCRA corrective action mode, however, an owner/operator's efforts to secure recovery from others may run into complications. For one thing, RCRA has no provision stating that an owner/operator performing corrective action has a right to seek recovery from others. Can a RCRA owner/operator avail himself of the CERCLA §107(a) right of action? It appears from the case law thus far that the answer is yes.

Over the last several years, defendants have argued frequently that plaintiffs must have performed a CERCLA remediation at a CERCLA NPL site in order to bring a CERCLA §107(a) action. The overwhelming weight of the case law has gone against these theories.[71]

Rather, taking the fairly simple provisions of CERCLA §107(a) at their word, courts have generally required that there be "response" (which can be almost anything) to a "hazardous substance" (which again can be almost anything—and is certainly much more encompassing than "hazardous waste"), *and* that such response be consistent with the NCP. And the courts have at least twice ruled that a RCRA owner/operator may seek private cost recovery under CERCLA §107(a).[72]

Consistency With the NCP

"Consistency with the NCP" is frequently the most pivotal issue in CERCLA private cost recovery actions, and this requirement may cause additional complications for the RCRA owner/operator. The NCP is the procedural and substantive bible for all CERCLA response actions.[73] It includes such detailed procedural requirements for preliminarily assessing sites, conducting full-blown investigations, studying alternatives, public participation, and state involvement.

66. CERCLA §106(b), 42 U.S.C. §9606(b), ELR STAT. CERCLA 024.

67. CERCLA §107(c)(3), 42 U.S.C. §9607(c)(3), ELR STAT. CERCLA 025.

68. CERCLA §113(h), 42 U.S.C. §9613(h), ELR STAT. CERCLA 040.

69. Whatever rights a "tagged" party has against others, in the context of either a CERCLA remedy or a RCRA corrective action, are limited to *cost recovery*. A party tagged by the government may not turn around and sue others to compel them to perform the remedial work. *See, e.g.*, Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 18 ELR 20470 (9th Cir. 1988).

70. CERCLA §107(b), 42 U.S.C. §9607(b), ELR STAT. CERCLA 025.

71. *See, e.g.*, Wickland Oil Terminals v. ASARCO, 792 F.2d 887, 16 ELR 20754 (9th Cir. 1986); Walls v. Waste Resources Corp., 761 F.2d 311, 15 ELR 20438 (6th Cir. 1985); Artesian Water Co. v. New Castle County, 605 F. Supp. 1348, 15 ELR 20577 (D. Del. 1987); Emhart Indus. v. Duracell Int'l, Inc., 665 F. Supp. 549, 17 ELR 21243 (M.D. Tenn. 1987); Sunnen Prods. Co. v. Chemtech Indus., 658 F. Supp. 276, 17 ELR 20884 (E.D. Mo. 1987); Bulk Distrib. Centers, Inc. v. Monsanto, 589 F. Supp. 1437, 15 ELR 20151 (S.D. Fla. 1984); Jones v. Inmont Corp., 584 F. Supp. 1425, 14 ELR 20485 (S.D. Ohio 1984); Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 15 ELR 20173 (N.D. Cal. 1984).

72. Chemical Waste Management, Inc. v. Armstrong World Indus., 669 F. Supp. 1285, 18 ELR 21091 (E.D. Pa. 1987); Mardan Corp. v. CGC Music, Ltd., 600 F. Supp. 1049, 15 ELR 20370 (D. Ariz. 1984), *aff'd*, 840 F.2d 1454 (9th Cir. 1986).

73. 40 C.F.R. pt. 300 (1990).

The NCP also includes detailed substantive guidance for selecting the remedy that will be performed. It sets forth nine criteria that the regional decisionmaker must consider on a case-by-case basis, generally requires that "applicable and relevant or appropriate" (ARAR) requirements from other environmental laws be met (e.g., to determine acceptable concentration limits in soil or groundwater), and contains quite detailed guidance on how to determine ARARs.[74]

In the case law that has developed over the last few years, there has been great disagreement on the degree to which a private party's activities must be consistent with the NCP in order to recover its costs. Some courts have tended to demand evidence that the plaintiff followed to the letter each and every procedural and substantive NCP requirement. Others have taken a generous approach that looks only for "substantial compliance."

EPA has recently included in its final NCP regulations provisions intended to end the confusion and to define the requirements a private party must meet to satisfy the NCP consistency requirement. The new final regulations essentially make a substantive-procedural split. Generally, a party need only achieve "substantial compliance" with numerous procedural requirements. Substantively, the party must perform a remedy that qualifies as a "CERCLA-quality cleanup" (CQC).[75]

As to procedural requirements, the regulations specify provisions that may be considered "potentially" applicable to private response actions. The regulations further provide that "immaterial or insubstantial deviations" from such procedures will not make a private cleanup inconsistent with the NCP.[76]

EPA's preamble provides guidance on the CQC concept, although the regulatory language does not.[77] EPA says that to achieve CQC status, a cleanup must satisfy the following basic tests (all drawn from CERCLA §121(b)(1)):

> 1. The cleanup must be protective of human health and the environment, utilize permanent solutions and alternative treatment technologies to the maximum extent practicable, and be cost effective;
> 2. The cleanup must attain ARARs from other environmental laws; and
> 3. Meaningful public participation must be provided in the process.

EPA says that while "substantial compliance" will suffice for the procedural requirements of the NCP, the CQC requirements "must be met."[78] The final NCP also makes clear that cleanups performed in compliance with an EPA order or consent decree will automatically be considered consistent with the NCP.

Thus, for a RCRA owner/operator, the recent EPA NCP amendments appear to lay a reasonably clear roadmap to follow in seeking cost recovery from others. As discussed below, however, there is an interesting twist: does the July 27 Rulemaking suggest so much procedural and/or substantive flexibility that a party performing a RCRA corrective action could compromise its chances of qualifying for NCP consistency (and therefore obtaining cost recovery)?

74. *See* 40 C.F.R. §300.430(e) (1990).

75. *See* 40 C.F.R. pt. 300, subpt. H (1990).

76. *Id.*

77. 55 Fed. Reg. 8666, 8792-94 (Mar. 8, 1990).

78. *Id.*

Rules and Procedures for Assessing Sites and Selecting Remedies

Assessments and Studies

The July 27 Rulemaking specifies a process for assessing RCRA sites, investigating contamination, studying remedial alternatives, and selecting and implementing remedies that appears at first to match the CERCLA remedial process. Upon closer examination of the July 27 Rulemaking, however, significant differences appear.

EPA will perform a RCRA Facility Assessment (RFA), which is analogous to a CERCLA Preliminary Assessment/Site Investigation (PA/SI).[79] The main goal of the RFA, which includes both a paperwork review and site visit (perhaps with limited sampling), is to identify SWMUs and determine whether it is likely that there are releases of hazardous constituents from any of them.[80]

When any potentially significant releases are identified in an RFA, the owner/operator must perform a "Remedial Investigation" (RI), which is analogous to the CERCLA RI.[81] The RI will be a thorough study of sampling and analysis designed to characterize the nature and extent of contamination associated with each release.[82]

If EPA finds based on the RI that a cleanup is likely, it will require the owner/operator to perform a corrective measure study (CMS). This is analogous to a CERCLA feasibility study (FS).[83] The CMS will examine remedial alternatives and assess their costs and effectiveness.[84]

Remedy

Based on the information presented in the CMS, EPA will select the corrective action remedy. The corrective action proposal goes into some detail about the criteria for remedy selection, and they are in part analogous to the CERCLA remedial selection criteria.

It is interesting to compare the nine CERCLA selection criteria with the five corrective action criteria.[85] The nine CERCLA criteria are listed below, with comparisons to the "corrective action five" noted in brackets:

1. Overall protection of human health and the

79. *Id.* at 8837 (to be codified at 40 C.F.R. §300.305). In the PA/SI phase of the CERCLA remedial process, EPA's on-scene coordinator must conduct a preliminary assessment using existing information, supplemented where necessary by an on-site inspection, to (1) evaluate the magnitude and severity of the release, (2) assess the feasibility of removal, (3) identify potentially responsible parties, and (4) ensure that authority exists for undertaking additional response actions. *Id.*

80. July 27 Rulemaking, *supra* note 3, at 30810.

81. 55 Fed. Reg. at 8708 (Mar. 8, 1990). The purpose of the RI is to collect necessary data to characterize the site adequately for the purpose of remedy selection.

82. *Id.*

83. *Id.* at 8712. "[T]he primary objective of the FS is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the waste management options can be presented to a decision-maker and an appropriate remedy selected."

84. July 27 Rulemaking, *supra* note 3, at 30813.

85. The five corrective action criteria are listed at 55 Fed. Reg. 30798, 30813 (July 27, 1990); the nine CERCLA criteria are listed at 55 Fed. Reg. 8666, 8712 (Mar. 8, 1990).

environment. [Not one of the corrective action five.]

2. Compliance with ARARs.[86] [Not one of the corrective action five.]

3. Long-term effectiveness and permanence. [Corrective action analog: "Long-term reliability and effectiveness." "Permanence" deleted in corrective action.]

4. Reduction of toxicity, mobility, or volume through treatment. [Corrective action analog: "Reduction of toxicity, mobility, or volume." "Through treatment" deleted in corrective action.]

5. Short-term effectiveness. [Same in corrective action five.]

6. Implementability. [Same in corrective action five.]

7. Cost. [Same in corrective action five.]

8. State acceptance. [Not one of the corrective action five.]

9. Community acceptance. [Not one of the corrective action five.]

Accordingly, compliance with ARARs is not a specific requirement of corrective action. Although EPA was obviously cribbing from the CERCLA NCP when it wrote the corrective action proposal, it chose not to adopt such words as "permanence" and "treatment." It also chose not to require state and community acceptances.

At first it seems this exercise in tight textual semanticism is silly and that any distinctions might well have been inadvertent. The July 27 Rulemaking is strewn with evidence that such is not the case. Rather, numerous statements in the July 27 Rulemaking point toward a corrective action program that is intended to be both more procedurally flexible than CERCLA's (particularly in the areas of sampling and analysis, and in the nature and extent of studies) and more substantively flexible than CERCLA's (in both selection and implementation of the remedy).

Along these lines, a few July 27 Rulemaking points worth noting:

- Stresses overall flexibility. States that generally, corrective action will be less complex and expensive than CERCLA remedies. Must allow "significant latitude" on case-by-case basis.[87]
- Corrective action studies can be much more "streamlined" than CERCLA studies. Corrective action need not involve development of many remedial alternatives; a "single alternative" may "frequently" suffice.[88]
- SWMUs do not need as rigorous analysis as RCRA-regulated units. Subtitle F (for currently regulated hazardous waste units) is preventive, while Subtitle S (the new corrective action for SWMUs subtitle) is responsive.[89]
- Most RCRA facilities' environmental problems are "much less extensive" than CERCLA facilities. Favors "streamlining" of corrective measure studies and again suggests "one-alternative" approach.[90]
- Focus only on "plausible" remedies.[91]
- A groundwater remedy schedule based on "natural attenuation" might be most appropriate remedy at some sites.[92]
- Contaminated soil could be cleaned up to lesser levels depending on whether continued "industrial use" is reasonably assured.[93]
- Most RCRA facilities "pose significantly lower environmental and human health risks than Superfund sites."[94]

Moreover, EPA has developed a "conditional" remedy approach in the July 27 Rulemaking. EPA explains this concept in terms of allowing contamination to stay within the facility boundary—even at existing levels—for extended periods of time. EPA's theory seems to be that so long as there is no significant off-site threat and a "viable" owner/operator can be counted on to assure the stability of the present situation, it is not necessary to expedite on-site cleanup.[95] In fact, the proposed regulation does not even specify a maximum time period for this approach. One may fairly infer that so long as a viable owner/operator remains bound by a permit to assure site stability and ultimately to be responsible for remediation upon site closure, the status quo could be preserved forever.

Much of the corrective action flexibility is not found in the NCP under CERCLA. While it is unclear whether the corrective action flexibility will survive in the final corrective action package, it should be stressed that EPA intends for the current proposal to reflect current policy and it will be at least two years before EPA issues the final corrective action rules.

Not all of the July 27 Rulemaking, however, is entirely consistent in this "kind and gentle" approach. In fact, another section of the preamble seems to indicate that a corrective action cleanup and a CERCLA remediation would be virtually identical.[96] Nevertheless, there are certainly enough "kind and gentle" messages in the July 27 Rulemaking that would clearly authorize such an approach whenever the owner/operator can convince the permitting agency it is worth it.

NCP Consistency Issues

If the full flexibility seemingly allowed by the July 27

86. One of the most important (and potentially costly) CERCLA requirements is that cleanups achieve ARARs. CERCLA §121(d), 42 U.S.C. §9621(d), ELR STAT. CERCLA 052. Very generally, this means that standards from other environmental laws (such as the FWPCA and the SDWA) may be imputed into the CERCLA regime even where Congress never intended such standards for that purpose.

87. July 27 Rulemaking, *supra* note 3, at 30802.

88. *Id.* at 30803, 30805. A single alternative would clearly never succeed in the CERCLA remedial context. *See* 55 Fed. Reg. 8666, 8712 (Mar. 8, 1990).

89. July 27 Rulemaking, *supra* note 3, at 30806.

90. *Id.* at 30821.

91. *Id.*

92. *Id.* at 30825.

93. *Id.* at 30826.

94. *Id.* at 30833.

95. *Id.* at 30833-34.

96. *Id.* at 30852-53.

Rulemaking is actually employed at a facility, interesting questions might arise as to whether the cleanup will be considered "consistent with the NCP" for private cost recovery purposes. The criteria for consistency are summarized above.

For one thing, ARAR compliance is a necessary precondition to NCP consistency, and the July 27 Rulemaking does not require ARAR compliance. For another thing, it seems hardly likely that the "conditional remedy" approach authorized in the corrective action preamble would comply with the NCP consistency requirement to use permanent solutions and alternative treatment technologies to the maximum extent practicable.

Even on the procedural side (where only "substantial compliance" is required for consistency), problems may be presented. For instance, one may question whether a one-alternative study—so frequently touted throughout the July 27 Rulemaking—could be viewed as merely an "immaterial or insubstantial deviation" from the robust multi-alternative CERCLA studies required by the NCP. It would indeed be a strained reading of the NCP section governing FS preparation [97] to conclude that the drafters contemplated that one alternative could suffice.

This situation may present a RCRA facility owner/operator with an interesting dilemma. On the one hand, the owner/operator might want to shoot for the studies with the least hassle and the remedy with the least costs. Even though this might be accomplished under the July 27 Rulemaking, the cleanup might not be deemed consistent with the NCP and the owner/operator might reduce its chances of recovering against others under CERCLA §107(a). On the other hand, to assure such consistency, the owner/operator risks driving the study and remedy costs much higher.

It appears each owner/operator might have to make a case-by-case assessment of the pros and cons. Perhaps at many sites there will be no other viable responsible parties so NCP consistency will not be important. At other sites, it may appear so clear that some other party or parties will share substantial portions of the liability that the extra trouble of NCP consistency will be worth it. Where several parties are clearly going to have to share corrective action liability, nothing would prevent them from agreeing to a funding scheme upfront and agreeing to waive any NCP consistency arguments so they could all jointly benefit from a less costly remedy.

97. 40 C.F.R. §300.430(e) (1990).

Overlaps Between CERCLA and RCRA Jurisdiction at a Single Facility

A particular facility may often be subject to both CERCLA remedial and RCRA corrective action jurisdictions. EPA has expressed a general policy preference for "deferring" the listing of a facility on the CERCLA NPL where there is a viable owner/operator and CERCLA has been triggered. [98] No statutory provision would prohibit EPA from placing such a RCRA facility on the NPL, however, and EPA has done so several times.

At such a site, EPA has claimed broad authority to mix and match as it sees fit. In the recent corrective action preamble, EPA stated:

> In situations where CERCLA section 104 or section 106 remedial activities have been initiated, and where a RCRA permit is to be issued to the facility, the Agency may choose to continue these remedial actions under CERCLA authority. In such cases, the CERCLA cleanup would be referenced in the RCRA permit, and the Agency would take steps to ensure that further cleanup under RCRA section 3004(u) would not be required at the affected portion of the facility. At the same time, RCRA may be used to address other cleanup needs at the facility that are not addressed by the CERCLA action underway. Alternatively, the cleanup may be shifted to RCRA and the selected remedy incorporated into the permit through a permit modification. [99]

The bottom line to the above is not surprising. EPA claims authority to go either way whenever EPA deems it appropriate to do so.

98. July 27 Rulemaking, *supra* note 3, at 30853.

99. *Id.*