

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C 20460

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**SUBJECT:** Use of the Corrective Action Advance Notice of Proposed Rulemaking as Guidance

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**TO:** RCRA/CERCLA Senior Policy Managers Regions I - X

On May 1, 1996 we published an advance notice of proposed rulemaking ("ANPR") for corrective action for releases from solid waste management units at hazardous waste management facilities (61 FR 19432). The ANPR has several purposes: it introduces our strategy for improving the corrective action program (the Subpart S Initiative), requests information to assist in identifying and developing program improvements, provides a status report on the corrective action program and guidance on program implementation, and highlights areas of flexibility within the program and program improvements currently underway. This memorandum emphasizes our expectation that the ANPR will be used as guidance.

### **Background**

In the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act (RCRA), Congress directed EPA to require corrective action for all releases of hazardous waste or constituents from solid waste management units at facilities seeking RCRA permits (i.e., hazardous waste treatment, storage or disposal facilities) regardless of the time at which waste was placed in the units. When corrective action cannot be completed prior to permit issuance, the statute directs EPA to specify corrective action schedules of compliance and financial assurance, as necessary to protect human health and the environment, in all permits issued under RCRA § 3005. In addition, EPA is directed to require that corrective action, as necessary to protect human health and the environment, be taken beyond facility boundaries unless facility owners/operators demonstrate to the Agency's satisfaction that, despite their best efforts, they were unable to obtain the necessary permission to undertake off-site corrective action. See RCRA §§ 3004(u) and (v), 42 U.S.C. 6924(u) and (v). At the same time, Congress enacted the RCRA permit omnibus provision directing that, "each permit issued under [RCRA Section 3005] shall contain such terms and conditions as the Administrator determines necessary to protect human health and the environment." See, RCRA § 3005(c)(3), 42 U.S.C. 6925(c)(3). EPA is also authorized to

require corrective action at interim status facilities by issuing orders under RCRA § 3008(h), 42 U.S.C. 6928(h).

In July 1985, EPA codified corrective action requirements at 40 CFR 264.90(a)(2), 264.101, 270.60(b), and 270.60(c). These regulations essentially reiterated the statutory language of RCRA Section 3004(u). In December 1987, EPA promulgated additional corrective action regulations to address the requirements of RCRA Section 3004(v). Because the regulatory language governing the corrective action program is minimal, program implementation has largely been addressed in guidance. Over the years, EPA has published a number of major corrective action guidance documents and, in 1990, proposed detailed corrective action regulations. See, 55 FR 30798, July 27, 1990. As discussed in the ANPR, many of these documents, including the 1990 proposal, continue to provide useful information and guidance for corrective action implementation. However, the ANPR updates our position on many of the issues discussed in the 1990 proposal, and should be considered the primary corrective action implementation guidance.

### **Content of the ANPR**

The ANPR introduces our strategy for identifying and developing improvements to the corrective action program, provides guidance, and requests public comments on a variety of corrective action issues and concepts. Section I identifies the statutory and regulatory basis of the corrective action program. Section II includes discussions of major corrective action program guidance and policy milestones that have occurred since 1990. Section III focuses on corrective action implementation. It describes how certain program elements have evolved since 1990, offers guidance on corrective action implementation and highlights approaches some program implementers and facility owners/operators have used to expedite cleanups. Section IV builds on the discussions in Section III by summarizing our corrective action implementation goals and strategies. Section V requests comments and data that will help us identify and implement improvements to the corrective action program.

Most important, the ANPR articulates our corrective action program management philosophy. As you know, more than 5,000 facilities are subject to corrective action. To account for the variety of corrective action facilities and site-specific circumstances, EPA has consistently emphasized a flexible, facility-specific approach to corrective action. Because of site- and community-specific circumstances, few cleanups will follow exactly the same course; therefore, program implementers and facility owners/operators should be allowed significant latitude to structure the corrective action process, develop cleanup objectives, and select appropriate remedies. At the same time, a number of basic operating principles should guide corrective action implementation and program development. As discussed in the ANPR (61 FR 19440 - 41), these principles are:

- Corrective action decisions should be based on risk.
- Corrective action implementation should focus on results rather than process.
- Interim actions and stabilization should be used to reduce risks and prevent exposure

- Corrective action activities should be phased to focus resources on the areas or pathways of highest concern.
- Corrective action implementation should provide for meaningful inclusion of all stakeholders through full, fair, and equitable public participation.
- Corrective action requirements should be addressed using the most appropriate authority, including state authorities, for any given facility.
- States will be the primary implementers of the corrective action program.

Section III of the ANPR provides guidance on our goals and expectations for various elements of corrective action, such as the initial investigation and remedy selection. It also summarizes our approach to the corrective action process, emphasizing that the various elements of the corrective action process "should not become ends in themselves...EPA continues to encourage program implementers and facility owners/operators to focus on the desired result of a cleanup rather than a mechanistic cleanup process." (61 FR page 19443, column 3.) Section III also includes information on a number of corrective action concepts that have evolved in recent years and highlights approaches or activities that some program implementers and facility owners/operators have successfully used to expedite or improve cleanups. For example, it emphasizes that current and reasonably expected future land use should be considered when selecting corrective action remedies. (61 FR page 19452, column 1.) It encourages use of innovative site characterization techniques to expedite site investigations. (61 FR page 19445, column 1.) And, it recognizes that, in appropriate cases, states may rely on non-RCRA state authorities to satisfy corrective action requirements. (61 FR pages 19441 - 19442.)

### **The ANPR as Guidance**

The ANPR is our effort to compile over ten years of corrective action implementation experience and represents our most recent thinking on corrective action. It was developed by a workgroup that included representatives from each of the regions, interested states, and other offices here at headquarters. We expect program implementers to become familiar with our positions on corrective action as recorded in the ANPR, and, excluding Section V which is a request for comment, to use the information in the ANPR as guidance.

### **Disclaimer**

This memorandum and the ANPR provide guidance to EPA personnel on how to best implement RCRA corrective action requirements. It is not a regulation, and it does not substitute for applicable statutes or regulations. Therefore, it cannot impose legally binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based on consideration of specific circumstances. EPA may change this guidance in the future.

### **Additional Information**

Each month, regional and headquarters personnel have an opportunity to discuss corrective action implementation on the Corrective Action Conference Call. We encourage you to use this call as a forum to share your experiences with using the ANPR as guidance and discuss the continuing evolution of the corrective action program. For more information on the corrective action conference call, please contact Colin Apse, in the Office of Solid Waste, at (703) 308-6081.

You also have an opportunity to participate in identification and development of improvements to the corrective action program through your continued support of the Subpart S Initiative. As discussed in the ANPR, the Subpart S Initiative includes both rulemaking and non-rulemaking (e.g., guidance, training) aspects of improving the corrective action program. For more information on the ANPR or the Subpart S Initiative please contact Hugh Davis, also in the Office of Solid Waste, at (703) 308-8633.

For questions on legal issues, please contact Dawn Messier, in the office of General Counsel, at (202) 260-9733.

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