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THE NEW RCRA CLEANUP REGIME: COMPARISONS AND CONTRASTS WITH CERCLA

by
Richard G. Stoll*

I. INTRODUCTION

FACILITIES that manage "hazardous waste" are regulated under the federal Solid Waste Disposal Act, more commonly known as the Resource Conservation and Recovery Act or "RCRA."¹ Facilities where "hazardous substances" have been released may have cleanup liabilities under the federal Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as "CERCLA" or "Superfund."² As explained below, hazardous wastes are a subset of hazardous substances. Accordingly, many facilities may be subject to both RCRA and CERCLA. This article will explain some of the basic overlaps and distinctions, particularly with respect to site cleanup activities.

RCRA has traditionally focused on the regulation and the granting of permits for ongoing hazardous waste activities, while CERCLA has traditionally focused on site cleanups. An increasingly significant component of RCRA, however, is quite "CERCLA-like" in scope and effect. This component is known as the RCRA corrective action program. It has been evolving in fits and spurts, but on July 27, 1990, the U. S. Environmental Protection Agency (EPA) finally came forth with the official details that will govern the program for at least the next two years.³ EPA estimates that at least 5700 facilities throughout the U.S. will be subject to the RCRA corrective action program.⁴

As the CERCLA cleanup program has now been with us for a decade, the literature is replete with descriptions of it.⁵ This article describes the evolu-

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1. 42 U.S.C. §§ 6901-6992k (1988) (hereinafter RCRA).

2. 42 U.S.C. §§ 9601-9675 (1988) (hereinafter CERCLA).

3. 55 Fed. Reg. 30,798 (1990) (to be codified at 40 C.F.R. pts. 264, 265, 270, 271) (proposed July 27, 1990).

4. *Id.* at 30,861.

5. *See, e.g.*, GOVERNMENT INSTITUTES, ENVIRONMENTAL LAW HANDBOOK ch. 3

tion of the RCRA corrective action program and draws some key comparisons and contrasts with the CERCLA remedial program. It begins with some of the basic jurisdictional and programmatic differences between RCRA and CERCLA. It then describes the RCRA corrective action program as it has grown from its infancy to its maturity, explains highlights from EPA's July 27, 1990, corrective action notice, and compares those highlights with key elements of the CERCLA remedial program.

II. JURISDICTIONAL BACKGROUND

A. RCRA

Since 1980, RCRA has imposed regulatory and permitting requirements upon on-going hazardous waste management activities. The new corrective action program focuses on cleanup at RCRA-regulated sites of conditions that were created in the past — often well before 1980. Before discussing the corrective action program, it is helpful to define a few key terms and describe generally the RCRA regulatory structure.

RCRA jurisdiction attaches only to wastes.⁶ All waste materials may broadly be split into hazardous and non-hazardous wastes. As described below, whether a waste is hazardous or non-hazardous will make a dramatic difference under the RCRA regulatory compliance program. The hazardous/non-hazardous distinction is not as significant, however, under the corrective action program.

Another important concept is the term "hazardous constituent."⁷ EPA has a long list of chemical compounds called hazardous constituents.⁸ EPA uses this list in determining whether to classify a waste as hazardous. A particular waste may contain hazardous constituents, however, 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 (which is sometimes awfully low).⁹ Thus, many wastes that are legally non-hazardous may nevertheless contain hazardous constituents.

All wastes (both hazardous and non-hazardous) fall under the general legal rubric of solid wastes. The adjective solid is very misleading: RCRA defines solid to include liquids, semisolids, sludges, and even contained gaseous materials.¹⁰

B. CERCLA

A CERCLA hazardous substance is any substance EPA has designated as

(10th ed. 1989) (chapter written by Richard Stoll); Frank & Atkeson, *Superfund: Litigation and Cleanup*, BNA Special Report (1985); Hayes & MacKerron, *Superfund II: A New Mandate*, BNA Special Report (1987).

6. Unlike some environmental laws, there is no RCRA jurisdiction over products. RCRA § 1004(27), 42 U.S.C. §§ 6903(27); RCRA § 3001, 42 U.S.C. § 6921; 40 C.F.R. pt. 260, App. I (1989).

7. 40 C.F.R. pt. 261, app. VIII (1990).

8. *Id.*

9. See 40 C.F.R. § 261.11 (1990).

10. RCRA § 1004(27), 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2 (1989).

hazardous or toxic under the Clean Air Act (CAA)¹¹ or the Clean Water Act (CWA),¹² and certain substances EPA has addressed under the Toxic Substances Control Act (TSCA).¹³ The term also includes all "hazardous wastes" under RCRA.¹⁴ Moreover, EPA must designate additional substances as hazardous if they may present substantial danger to health and the environment.¹⁵ EPA maintains and updates a list of all such hazardous substances.¹⁶ 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).¹⁷

By comparing how substances trigger jurisdiction under CERCLA to the RCRA hazardous waste program, one can see that CERCLA's reach is much broader than RCRA's. First, to trigger RCRA jurisdiction a substance must first be a waste.¹⁸ Under CERCLA, the issue of whether a substance is a waste or a product (or something else) is irrelevant.

Second, the concept of hazardousness is much broader under CERCLA. In fact, the RCRA hazardous constituents are a mere subset of the CERCLA hazardous substances.¹⁹ Moreover, under RCRA a waste must either be listed or meet one of the hazardous characteristics to trigger jurisdiction.²⁰ In either case, the determination is based on concentrations of hazardous constituents in some threshold amount.²¹ Under CERCLA, however, EPA contends that a substance that contains *any* amount of a hazardous substance will trigger jurisdiction.²² EPA's position has been upheld by the courts thus far.²³

Finally, CERCLA has one additional kicker. In the unlikely event that a material of concern escapes the definition of hazardous substance, CERCLA also gives EPA authority over pollutants or contaminants.²⁴ A pollutant or contaminant can be any substance not on the list of CERCLA hazardous substances which "will or may reasonably be anticipated to cause" any type of adverse effects in organisms and/or their offspring.²⁵ The only exclusions

11. CERCLA § 101(14), 42 U.S.C. § 9601(14); *see also* 42 U.S.C. § 7412 (1988).

12. CERCLA § 101(14), 42 U.S.C. § 9601(14); *see also* 33 U.S.C. § 1317(a) (1988).

13. CERCLA § 101(14), 42 U.S.C. § 9601(14); *see also* 15 U.S.C. § 2606 (1988).

14. CERCLA § 101(14), 42 U.S.C. § 9601(14); *see also* 42 U.S.C. § 6921 (1988).

15. CERCLA § 101(14), 42 U.S.C. § 9601(14); CERCLA § 102(a), 42 U.S.C. § 9602(a).

16. 40 C.F.R. pt. 302 (1990).

17. CERCLA § 101(14), 42 U.S.C. § 9601(14).

18. *See supra* note 8 and accompanying text.

19. *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).

20. 40 C.F.R. §§ 261.10-261.33 (1990).

21. *See supra* note 11 and accompanying text.

22. *See* United States v. Western Processing, 734 F. Supp. 930, 936 (W.D. Wash. 1990).

23. *See, e.g., id.* at 936; United States v. Nicolet, Inc., 712 F. Supp. 1205, 1207 (E.D. Pa. 1989); United States v. Conservation Chem. Co., 619 F. Supp. 162, 238 (D.C. Mo. 1985). *But cf.* Amoco Oil Co. v. Borden, 889 F.2d 664, 669-71 (5th Cir. 1989) (court held that if non-governmental plaintiff incurred response costs because of release of hazardous substance then liability attaches if release was of amount sufficient to violate any state or federal standard).

24. CERCLA § 102(a), 42 U.S.C. § 9602(a) (1988).

25. CERCLA § 101(33), 42 U.S.C. § 9601(33).

are (in harmony with the hazardous substance exclusions) petroleum and natural gas.²⁶ There is one significant limitation to the pollutant or contaminant concept in CERCLA, however. While EPA can respond (with Superfund dollars) to either hazardous substances or pollutants or contaminants,²⁷ private parties may incur liability for cleanup costs only to the extent that hazardous substances are involved.²⁸

III. RCRA HAZARDOUS WASTE MANAGEMENT SYSTEM

A. *Types of Activities*

Different RCRA requirements apply depending upon whether a party falls into one of three broad categories with respect to hazardous waste management: (a) generator, (b) transporter, and/or (c) treater, storer, or disposer.²⁹ A facility which treats, stores, or disposes is commonly referred to as a "T/S/D facility." Some facilities fit into only one of these categories; others fit into two or all three.³⁰

Generators must comply with recordkeeping and paperwork requirements and must assure that the hazardous wastes they generate are ultimately treated or disposed in accordance with applicable RCRA requirements.³¹ Transporters also must comply with recordkeeping and paperwork requirements and must assure that their vehicles are of specified structural integrity.³² The requirements for T/S/D facilities are much more onerous and comprehensive than the requirements for those parties that only generate or transport.³³ First, the T/S/D substantive regulatory requirements go far beyond generator and transporter requirements in terms of scope, complexity, and cost.³⁴ Second (and this is a key lead-in to the corrective action program), a T/S/D facility must obtain a RCRA *permit*.³⁵

B. *Permits*

Obtaining a RCRA permit is often a difficult and time-consuming process, and (because of requirements for notice and public hearings)³⁶ 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.³⁷ This reaches facilities that obtained RCRA permits before the corrective action program took effect, because all RCRA permits must be periodically

26. *Id.*

27. CERCLA § 104(a), 42 U.S.C. § 6904(a).

28. CERCLA § 107(a), 42 U.S.C. § 6907(a).

29. 40 C.F.R. pts. 262-265 (1990).

30. *See generally id.* pt. 260 app. I.

31. *Id.* pt. 262.

32. *Id.* pt. 263.

33. *Id.* pts. 264-65.

34. *Id.*

35. *Id.* pt. 270.

36. 40 C.F.R. pt. 124 (1990).

37. 40 C.F.R. § 264.101 (1990).

reviewed and renewed.³⁸

Moreover, even if one so desired, one cannot simply walk away from a permit. If a T/S/D owner wants to stop managing hazardous waste, he must first go through a closure process.³⁹ There are arduous regulatory requirements for closure.⁴⁰ EPA will insist that each T/S/D unit be "clean closed" before the facility can be released from its permit.⁴¹ In order to clean close, one may have to perform extensive and expensive cleanup around the unit until virtually no detectable level of hazardous constituents remains in the surrounding soil and groundwater.⁴²

If one cannot achieve such a clean closure, then — in a catch-22 fashion — EPA will deem the contaminated remainder to be hazardous waste land-fill and require the facility to obtain a post-closure permit.⁴³ Since a permit will be required (even if not voluntarily sought), corrective action is triggered for the facility.

C. Blurring of Hazardous v. Non-Hazardous Waste Distinction under Corrective Action

Traditionally, RCRA drew a bright-line distinction between the regulation of hazardous and non-hazardous wastes. All of the foregoing regulatory compliance requirements have applied only to generators, transporters, and T/S/Ds of hazardous wastes. For nonhazardous solid wastes, RCRA has taken a kinder and gentler approach.⁴⁴ In fact, there have merely been guidelines for states and there have been no federally-enforceable requirements at all.⁴⁵ As will be seen, however, the corrective action program now requires T/S/D facilities to address hazardous constituents from non-hazardous wastes.

IV. RCRA CORRECTIVE ACTION

A. In Its Infancy

The corrective action program evolved in two basic steps. These will be referred to as the "infant" and "mature" corrective action program phases. As the names imply, the mature phase is much more robust and complex than the infant.

Under the infant corrective action program,⁴⁶ only those land disposal units that a company chose to include in the RCRA hazardous waste regime for T/S/Ds *and* that received hazardous wastes after July 26, 1982, were affected.⁴⁷ The infant program principally assured that any groundwater

38. *Id.* § 270.50.

39. *Id.* §§ 264.110-.120, 264.178, 264.197, 264.228, 264.258, 264.280, 264.310, 264.351.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* § 270.1(c).

44. *See* RCRA Subtitle D, 42 U.S.C. §§ 6941-6949a (1990).

45. 40 C.F.R. pt. 257 (1990).

46. *Id.* §§ 264.90-.101.

47. *Id.* § 264.90(a)(2).

contamination from hazardous constituents spreading from the land disposal unit was remediated so that groundwater protection standards (defined as concentration levels for various hazardous constituents) were not exceeded.⁴⁸

Before describing how broadly the mature corrective action program goes beyond the infant in scope of coverage, it is useful to summarize the following points about the infant program:

- a. Corrective action is not triggered by all T/S/Ds, but only by the narrower subset of T/S/Ds with land-based units for hazardous waste disposal, and even the narrower subset of such units that received hazardous waste after July 26, 1982.⁴⁹
- b. If triggered, corrective action addresses only releases from those regulated hazardous waste land-based units.
- c. The only environmental medium covered is groundwater affected by those particular releases.

B. *In Its Maturity*

The mature corrective action program, which originated in 1984 with new RCRA legislation from Congress,⁵⁰ is much broader and comprehensive. Essentially, the 1984 legislation directs EPA to promulgate regulations that require "corrective action for all releases of hazardous waste *or constituents* from any *solid waste* management unit at a treatment, storage, or disposal facility seeking a permit . . . *regardless of the time* at which waste was placed in such unit."⁵¹ Further, corrective action is required to "be taken beyond the facility boundaries where necessary to protect human health and the environment."⁵² Since 1984, EPA has been developing the details of policies and procedures to carry out these Congressional directives. Because of the overwhelming complexities and extreme controversies involved, EPA took almost six years to issue proposed regulations. EPA issued its proposal on July 27, 1990.⁵³

EPA has announced it will be performing additional economic impact studies before it finalizes the corrective action regulations, and EPA personnel expect that EPA will not issue its final corrective action rules until 1992 at the earliest. It is important to stress, however, that the corrective action program will be implemented in accordance with the July 27 proposal in the interim. EPA personnel have made clear that their regional officials and state officials must follow the guidance of the July 27 proposal in addressing ongoing corrective action activities at RCRA facilities.

As foreshadowed by the emphasized language from the statute above, the

48. *Id.* § 264.92.

49. 40 C.F.R. § 264.90(a).

50. RCRA § 3004(u),(v), 42 U.S.C. § 6924(u),(v) (1988).

51. RCRA § 3004(u), 42 U.S.C. § 6924(u) (emphasis supplied). 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).

52. RCRA § 3004(v), 42 U.S.C. § 6924(v).

53. 55 Fed. Reg. 30,798 (1990) (to be codified at 40 C.F.R. pts. 264, 265, 270, 271) (proposed July 27, 1990).

mature corrective action program is truly broad in scope. In effect, it comes close to making every RCRA T/S/D facility subject to the same degree of examination and the same types of potential cleanup activities (and costs) as a CERCLA site. Three key elements of the mature corrective action program are described below, and the contrasts with the infant program are noted where applicable.

First, all T/S/Ds seeking a permit must go through the corrective action process.⁵⁴ Thus, even if a facility will merely store hazardous waste, it is now subject to the corrective action program. By contrast, the infant corrective action only covered the sub-set of T/S/Ds with land-based hazardous waste.⁵⁵

Second, if corrective action applies, the facility must assess, and clean up where necessary, hazardous constituents (i) from all *solid* waste management units (SWMUs) (ii) within the entire boundary of the facility, (iii) regardless of when the SWMU was created.⁵⁶ Thus, under the mature corrective action program, the facility must address hazardous constituent releases if they come from units containing any solid waste, regardless of whether the waste is legally classified as hazardous.⁵⁷ Moreover, under the mature corrective action program, the time when the waste was deposited is irrelevant. Like CERCLA, the mature corrective action program is retroactive.⁵⁸ In contrast, the infant corrective action program addressed hazardous constituents only if they came from hazardous waste units and only if such units received hazardous waste after July 26, 1982.⁵⁹

Third, the mature corrective action program requires assessment of all environmental media when addressing SWMUs.⁶⁰ The infant corrective action program only addressed groundwater.⁶¹ Now the focus turns not only to groundwater, but also to contaminated soil, air, surface water, and sediments.⁶²

V. JURISDICTIONAL COMPARISONS BETWEEN RCRA CORRECTIVE ACTION AND CERCLA REMEDIATION

A. Conditions Needed to Trigger Jurisdiction

To *trigger* the mature corrective action program under RCRA, one must find all four of the following conditions present: the facility must have (a) since November 19, 1980,⁶³ (b) stored, treated, and/or disposed of (c) a ma-

54. RCRA § 3004(u), 42 U.S.C. § 6924(u).

55. 40 C.F.R. § 264.10 (1990).

56. *Id.*

57. Hence, the term "solid waste management unit."

58. Courts have consistently upheld the retroactivity of CERCLA, *see* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986).

59. *See supra* note 51.

60. 55 Fed. Reg. 30,874 (to be codified at 40 C.F.R. 264.511) (proposed July 27, 1990).

61. *See supra* note 51.

62. *See* 50 Fed. Reg. 28,713 (July 15, 1985).

63. 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. 33,066 (May 19, 1980).

terial that fits the definitions of both solid and hazardous waste and (d) failed to obtain a certified RCRA closure for such storage/treatment/disposal by January 26, 1983.⁶⁴ Thus, facilities that stopped managing such wastes before November 19, 1980, are exempt. Further, facilities that ceased managing such wastes after 1980 and, before January 26, 1983, obtained a certified closure of T/S/D status (and have never again treated, stored, or disposed of hazardous wastes) are exempt. Moreover, facilities that merely generated hazardous wastes (without becoming T/S/D facilities or seeking a permit for T/S/D facilities) are exempt. Note that none of these factors would exempt a facility from CERCLA.⁶⁵

There is also a ninety day accumulation exemption for generators in RCRA.⁶⁶ This exemption provides that wastes stored or treated in certain types of tanks or containers and moved off-site within 90 days from the date of generation will not trigger T/S/D status.⁶⁷ Thus, generating facilities whose storage or treatment of hazardous waste has always fallen within this 90-day exemption (and who have not engaged in other treatment/storage/disposal) do not trigger corrective action.

Again, under CERCLA, the foregoing limitations are irrelevant. Whenever a hazardous substance (or a pollutant or contaminant) is involved, it triggers CERCLA response jurisdiction. The only exceptions include sites where the sole substance of concern is petroleum or natural gas⁶⁸ or where the only release of concern met the narrow definition of a federally permitted release.⁶⁹ More significantly, 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.⁷⁰

B. Once Jurisdiction is Triggered

If corrective action is triggered, jurisdictional distinctions between RCRA and CERCLA persist but are not as significant. The primary reason is that

64. 40 C.F.R. § 270.1(c) (1990); see 52 Fed. Reg. 45,795 (December 1, 1987). A facility owner who failed to obtain a certified closure by this date may still be able to avoid corrective action if he/she can achieve a clean closure. See *supra* text accompanying notes 43-45.

65. See *supra* text accompanying notes 13-30.

66. 40 C.F.R. § 262.34 (1990).

67. *Id.*

68. CERCLA § 101(14), 42 U.S.C. § 9601(14).

69. Under CERCLA § 107(j), 42 U.S.C. § 9607(i), there is no liability for a federally permitted release. This term is defined in CERCLA § 101(10), 42 U.S.C. § 9601(10), to include releases which are in full compliance with a permit or other standard issued under several federal environmental laws, such as the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); and the Safe Drinking Water, Act 42 U.S.C. §§ 300f-300j-26 (1988). As a practical matter, it provides little relief.

There are several other special types of releases excluded from CERCLA jurisdiction that should be noted for purposes of completeness: (a) releases solely within a workplace, (b) engine exhaust emissions, (c) certain nuclear releases subject to Nuclear Regulatory Commission jurisdiction, (d) the normal application of fertilizer, (e) certain releases of naturally occurring substances, (f) products in building structures (*i.e.*, asbestos), and (g) releases caused by drinking water system deterioration. CERCLA § 101(22), 42 U.S.C. § 9601(22); CERCLA § 104(a)(3), 42 U.S.C. § 9604(a)(3).

70. CERCLA, 42 U.S.C. §§ 9601-9675.

corrective action jurisdiction includes solid waste management units (SWMUs), not just hazardous waste units.⁷¹ Moreover, even though T/S/D facilities and SWMUs are prerequisites to corrective action authority (but not CERCLA), EPA does not interpret these concepts to be significant restraints.⁷²

1. Facility

All it takes is one small T/S/D area on a large facility to taint the entire facility with corrective action.⁷³ EPA broadly defines the concept of a single facility.⁷⁴ As CERCLA may be triggered without a T/S/D, the facility definition will not restrain CERCLA jurisdiction.

For corrective action purposes, EPA generally considers all contiguous property under control of the same owner or operator as one facility.⁷⁵ For instance, even if a tax map or plot plan defines two parcels as separate sections or plots, if the same party controls both parcels, then EPA considers both parcels a single facility under RCRA.⁷⁶ This means that the taint effect of one small T/S/D area can have even more dramatic effects.

EPA has announced the following additional corrective action interpretations:

- a. Two parcels under the same ownership that are completely separated by land owned by others will not be considered a single facility.⁷⁷
- b. EPA deems property separated only by a public right-of-way (such as a road or power transmission right-of-way) a single facility.⁷⁸
- c. Assume that on a 100-acre parcel, the owner leases a specific five-acre segment to a company that operates a T/S/D facility on that segment, but there is absolutely no hazardous waste management activity on the remaining 95 acres. Nevertheless, corrective action jurisdiction attaches to the entire 100 acres.⁷⁹
- d. Following the example immediately above, assume the owner also owns twenty acres adjacent to the 100-acre parcel, but no part of the twenty-acre parcel is contiguous to the five-acre leased parcel. Nevertheless, corrective action jurisdiction attaches to the entire 120 acres.⁸⁰
- e. Assume a parent company owns two separate subsidiaries. Sub A owns parcel A and Sub B owns the adjacent parcel B. Sub A operates a T/S/D facility on parcel A and Sub B does not manage hazardous waste at all. Both parcels are a single facility for purposes of

71. 55 Fed. Reg. 30,797, 30,805 (1990) (to be codified at 40 C.F.R. § 264.500) (proposed July 27, 1990).

72. *Id.* at 30,808.

73. *See supra* text accompanying note 66.

74. 55 Fed. Reg. at 30,808.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

corrective action.⁸¹

2. SWMUs

In the regulatory section of the July 27 proposed corrective action rule, EPA defines a 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.⁸²

In the preamble to the proposed corrective action rule, EPA further explains this definition. First, EPA explains that the term includes the types of units normally associated with the RCRA regulatory program.⁸³ Examples of this include, "landfills, surface impoundments, land treatment units, waste piles, tanks, container storage areas [sic] 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.⁸⁴

In addition to such typical RCRA treatment, storage, or disposal units, the proposed definition includes any area of a facility involving the routine and systematic release of solid wastes (but not products).⁸⁵ The preamble provides several useful examples of what the agency considers a routine and systematic release.⁸⁶ EPA first cites the example of loading and unloading areas.⁸⁷ The preamble explains the appropriateness of covering these areas, stating that activities in such areas often create a regular amount of spillage or drippage that gradually contaminates the soil to unacceptable levels.⁸⁸ EPA's second example refers to outdoor areas used for solvent washing, where drippage onto the soil occurs that could lead to serious contamination.⁸⁹ EPA's third example is a kickback drippage area, where the storage of pressure-treated wood routinely allows preservative fluids to drip onto the soil.⁹⁰

EPA also has identified certain types of releases that it does *not* consider to be an SWMU under the routine and systematic criterion. EPA does not

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* The proposed regulatory definition of SWMU is not necessarily consistent with the preamble. While the definition says that areas involving the routine and systematic release of solid wastes *are* SWMUs, it does not explicitly state the converse proposition — that areas not involving the routine and systematic release of solid wastes *are not* SWMUs. *Id.* The preamble seems quite clear, however, that EPA intends affirmatively to exclude such areas. Note that the routine and systematic issue relates only to areas at a facility which do not fit within the typical waste unit category. For example, a landfill or surface impoundment constitutes an SWMU regardless of whether routine and systematic releases existed.

86. *Id.* at 30,808-09.

87. *Id.* at 30,808.

88. *Id.* at 30,808-09.

89. *Id.* at 30,809.

90. *Id.* at 30,808.

treat a single spill of hazardous waste (for example, when a vehicle travels across the facility) as an SWMU.⁹¹ Nor would EPA consider leakage from a chemical product storage tank as an SWMU.⁹² In the preamble, EPA characterizes such leakage as passive and thus, generally not a routine and systematic release resulting from regular human activity.⁹³ Similarly, EPA will generally not consider releases from production processes and resulting contamination as an SWMU.⁹⁴

VI. RULES AND PROCEDURES FOR ASSESSING SITES AND SELECTING REMEDIES

A. Assessments and Studies

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

First, EPA will perform a RCRA Facility Assessment (RFA), which is analogous to a CERCLA Preliminary Assessment/Site Investigation (PA/SI).⁹⁵ 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 the likelihood of hazardous releases from any of them.⁹⁶ When an RFA identifies any potentially significant releases, the owner/operator must perform a Remedial Investigation (RI), which is analogous to the CERCLA RI.⁹⁷ The RI is a thorough study of sampling and analysis designed to characterize the nature and extent of contamination associated with each release.⁹⁸

If EPA finds, based on the corrective action RI, that a cleanup is likely, it will require the owner/operator to perform a Corrective Measures Study (CMS).⁹⁹ This CMS is analogous to a CERCLA Feasibility Study (FS).¹⁰⁰

91. *Id.* at 30,809.

92. *Id.*

93. *Id.*

94. *Id.*

95. 55 Fed. Reg. 8666, 8837 (1990) (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 (OSC) 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.*

96. 55 Fed. Reg. 30,798, 30,810 (proposed July 27, 1990).

97. 55 Fed. Reg. 8666, 8708 (1990) (to be codified at 40 C.F.R. § 300.430(d)). The purpose of the RI is to collect necessary data to characterize the site adequately for the purpose of remedy selection.

98. 55 Fed. Reg. 30,798, 30,810.

99. *Id.* at 30,814.

100. 55 Fed. Reg. 8666, 8712 (1990) (to be codified at 40 C.F.R. § 300.430(e)). "[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."

The CMS examines remedial alternatives, and assesses their costs and effectiveness.¹⁰¹

B. Remedy

Based upon the information presented in the CMS, EPA selects the corrective action remedy.¹⁰² The corrective action proposal details the criteria for remedy selection, which are in part analogous to the CERCLA remedial selection criteria.¹⁰³ Similarities appear in comparing the nine CERCLA selection criteria with the five corrective action criteria.¹⁰⁴ The nine CERCLA criteria are as follows, with comparisons to the five corrective action criteria noted in brackets:

- a. Overall protection of human health and the environment. [Not one of the five corrective action criteria.]¹⁰⁵
- b. Compliance with ARARs (applicable or relevant and appropriate standards from other federal and state environmental laws).¹⁰⁶ [Not one of the five corrective action criteria.]
- c. Long-term effectiveness and permanence.¹⁰⁷ [Corrective action analog: long-term reliability and effectiveness. *Permanence* deleted in corrective action criterion.]¹⁰⁸
- d. Reduction of toxicity, mobility, or volume through treatment.¹⁰⁹ [Corrective action analog: reduction of toxicity, mobility, or volume. *Through treatment* deleted in corrective action criterion.]¹¹⁰
- e. Short-term effectiveness. [Corrective action analog: same.]¹¹¹
- f. Implementability. [Corrective action analog: same.]¹¹²
- g. Cost. [Corrective action analog: same.]¹¹³
- h. State acceptance. [Not one of the five corrective action criteria.]¹¹⁴
- i. Community acceptance. [Not one of the five corrective action criteria.]¹¹⁵

As seen from the above, compliance with ARARs is not a specific requirement of corrective action. Moreover, even though EPA was obviously cribbing from the CERCLA criteria when it wrote the corrective action

101. 55 Fed. Reg. 30,798, 30,813.

102. *Id.* at 30,823.

103. *See infra* note 106.

104. The five corrective action criteria are listed at 55 Fed. Reg. 30,798, 30,824; the nine CERCLA criteria are listed at 55 Fed. Reg. 8666, 8712.

105. 55 Fed. Reg. 8666, 8712.

106. *Id.* One of the most important (and potentially costly) CERCLA requirements is that cleanups achieve ARARs. CERCLA § 121(d), 42 U.S.C. § 9621(d). Very generally, this means that standards from other environmental laws (such as the Clean Water Act and the Safe Drinking Water Act) may be imputed into the CERCLA regime even where Congress never intended such standards for that purpose.

107. 55 Fed. Reg. 8666, 8712.

108. 55 Fed. Reg. 30,798, 30,824.

109. 55 Fed. Reg. 8666, 8712.

110. 55 Fed. Reg. 30,798, 30,824.

111. 55 Fed. Reg. 8666, 8712; 55 Fed. Reg. 30, 798, 30,824.

112. *Id.*

113. *Id.*

114. 55 Fed. Reg. 8666, 8712.

115. *Id.*

proposal, it chose not to use such expansive words as permanence and treatment. It also chose not to require state and community acceptance.

Initially, one might think this exercise in tight textual semanticism silly and that the distinctions might be inadvertent. The July 27 corrective action preamble is strewn with evidence, however, that such is not the case. Numerous statements in the corrective action preamble point towards a corrective action program intended to be more procedurally flexible than CERCLA (particularly in the area of sampling, analysis, and the nature and extent of studies) and more substantively flexible than CERCLA (in both selection and implementation of the remedy).¹¹⁶ For example, EPA stated the following in the corrective action preamble:

“[F]or the most part, RCRA cleanups will be less complex and less expensive than those under CERCLA, and less detailed study will be required before remedial action begins.”¹¹⁷

“For most RCRA facilities . . . it will be possible to abbreviate the analysis, and frequently it may be appropriate for the owner/operator to propose a single alternative. . .”¹¹⁸

“Most RCRA facilities pose significantly lower environmental and human health risks than Superfund sites, and therefore the need to pursue complete cleanup at such [RCRA] facilities will often be less urgent.”¹¹⁹

Moreover, EPA has developed a conditional remedy approach in the corrective action proposal that is far more liberal than its CERCLA remedial policies.¹²⁰ EPA explains this concept in terms of allowing contamination to stay within the facility boundary — even at existing levels — for extended periods of time.¹²¹ EPA’s theory seems to be that so long as no significant off-site threat exists and a viable owner/operator can assure the stability of the present situation, expedient on-site cleanup is unnecessary.¹²² In fact, the proposed regulation does not even specify a maximum time period for the cleanup deferral.¹²³ One may fairly infer that so long as a viable owner/operator remains bound by a permit to assure site stability and ultimately take responsibility for remediation upon site closure, the *status quo* could be preserved for decades.

Much of the corrective action flexibility noted above never finds its way into the CERCLA regulations. Whether this flexibility will survive in the final corrective action regulations remains uncertain. Note that EPA intends for the proposal to reflect current policy.¹²⁴ EPA will not issue the final corrective action rules until at least 1992.

116. See *infra* notes 119-121 and accompanying text.

117. 55 Fed. Reg. 30,798, 30,802.

118. *Id.* at 30,805. A single alternative would clearly never succeed in the CERCLA remedial context. See 55 Fed. Reg. 8666, 8712.

119. 55 Fed. Reg. 30,798, 30,833.

120. *Id.*

121. *Id.*

122. *Id.* at 30,833-34.

123. *Id.*

124. *Id.* at 30,802.

Not all of the corrective action preamble, however, is entirely consistent with this kinder and gentler approach. In fact, an EPA staffer who felt that a corrective action cleanup and a CERCLA remediation would be virtually identical seems to have written another section of the preamble.¹²⁵ Nevertheless, the corrective action preamble contains enough kind and gentle messages to clearly authorize such an approach whenever the facility's owner could convince the permitting agency of its appropriateness.

VII. OVERLAP BETWEEN CERCLA AND RCRA JURISDICTION AT A SINGLE FACILITY

Both CERCLA remedial and RCRA corrective action jurisdiction may govern a particular facility.¹²⁶ EPA has expressed a general policy preference for deferring to RCRA where a viable owner/operator is onsite and RCRA corrective action is an option.¹²⁷ No statutory provision prohibits EPA from addressing such a RCRA facility under CERCLA.

At such a site, EPA has claimed broad authority to mix and match as it sees fit.¹²⁸ In the recent corrective action preamble, EPA stated that in situations where CERCLA remedial activities are in process, and where the facility will receive a RCRA permit, EPA "may choose to continue these remedial actions under CERCLA authority."¹²⁹ EPA added that in such cases, the RCRA permit would refer to the CERCLA cleanup, and EPA would take steps to ensure that further corrective action under RCRA would not be required at the affected portion of the facility.¹³⁰ At the same time, EPA noted (i) that RCRA corrective action may address other cleanup needs at the facility that the CERCLA action underway fails to address, or (ii) that RCRA may take over the cleanup and a permit modification incorporating the selected remedy into the permit.¹³¹ Thus, EPA's position grants the agency wide discretion to pick and choose between RCRA and CERCLA authorities at each site.

VIII. CONCLUSION

CERCLA has fewer jurisdictional restraints on its cleanup authorities than RCRA. Through EPA's expansive interpretations of such concepts of facility and SWMUs, however, many of the jurisdictional distinctions may not be very significant. Although the RCRA corrective action program has the potential to impose CERCLA-like studies and cleanups at RCRA sites, EPA has strongly suggested that it will implement the corrective action program with less complex studies and less costly remedies.

125. *Id.* at 30,852-53.

126. *Id.* at 30,853.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*