



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

ENTERED

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SEP 06 2000



Mr. James Bearzi, Chief  
Hazardous Materials Bureau  
New Mexico Environment Department  
P.O. Box 26110  
Santa Fe, NM 87502

Dear Mr. Bearzi:

The U.S. Environmental Protection Agency has made a preliminary determination that the U.S. Department of Energy's Waste Isolation Pilot Plant (NMED ID #NM4890139088), Carlsbad, New Mexico, is acceptable to receive waste from remedial or response actions taken pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, provided that the facility's actual receipt of such waste is consistent with applicable State and Federal requirements. The purpose of this letter is to consult with you prior to the issuance of this determination.

As provided for in the "Off-site Rule" - 40 CFR 300.440 (58 FR 49200, 49215 - 49218 September 22, 1993), we want to know if the facility is in compliance with State law requirements, including the requirements of any Federal program for which the State has been authorized, and if there are releases occurring at the facility. If you find a violation or a release at the facility or a specific unit of the facility, we will evaluate it for relevance under the "Off-site Rule."

Your agency's response is requested within 14 calendar days of your receipt of this letter to the attention of:

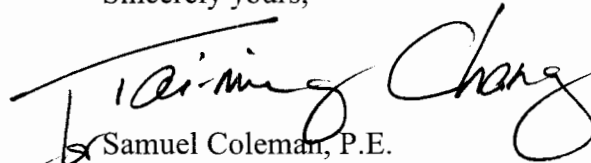
Ron Shannon (6EN-HS)  
Regional Off-site Contact  
U.S. Environmental Protection Agency  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733  
FAX (214) 665-7264

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If you would like to discuss this request, please contact me, or have your staff contact Ron Shannon of my staff at (214) 665-2282. If you object to our issuance of an acceptability determination please specify this in your response.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Samuel Coleman". The signature is fluid and cursive, with a large initial "S" and "C".

Samuel Coleman, P.E.

Director

Compliance Assurance and  
Enforcement Division

**Environmental Protection Agency, EPA**

**§ 300.440**

institutional controls, under § 300.510(c).

(2) A remedy becomes "operational and functional" either one year after construction is complete, or when the remedy is determined concurrently by EPA and the state to be functioning properly and is performing as designed, whichever is earlier. EPA may grant extensions to the one-year period, as appropriate.

(3) For Fund-financed remedial actions involving treatment or other measures to restore ground- or surface-water quality to a level that assures protection of human health and the environment, the operation of such treatment or other measures for a period of up to 10 years after the remedy becomes operational and functional will be considered part of the remedial action. Activities required to maintain the effectiveness of such treatment or measures following the 10-year period, or after remedial action is complete, whichever is earlier, shall be considered O&M. For the purposes of federal funding provided under CERCLA section 104(c)(6), a restoration activity will be considered administratively "complete" when:

(i) Measures restore ground- or surface-water quality to a level that assures protection of human health and the environment;

(ii) Measures restore ground or surface water to such a point that reductions in contaminant concentrations are no longer significant; or

(iii) Ten years have elapsed, whichever is earliest.

(4) The following shall not be deemed to constitute treatment or other measures to restore contaminated ground or surface water under § 300.435(f)(3):

(i) Source control maintenance measures; and

(ii) Ground- or surface-water measures initiated for the primary purpose of providing a drinking-water supply, not for the purpose of restoring ground water.

**§ 300.440 Procedures for planning and implementing off-site response actions.**

(a) *Applicability.* (1) This section applies to any remedial or removal action involving the off-site transfer of any

hazardous substance, pollutant, or contaminant as defined under CERCLA sections 101 (14) and (33) ("CERCLA waste") that is conducted by EPA, States, private parties, or other Federal agencies, that is Fund-financed and/or is taken pursuant to any CERCLA authority, including cleanups at Federal facilities under section 120 of CERCLA, and cleanups under section 311 of the Clean Water Act (except for cleanup of petroleum exempt under CERCLA). Applicability extends to those actions taken jointly under CERCLA and another authority.

(2) In cases of emergency removal actions under CERCLA, emergency actions taken during remedial actions, or response actions under section 311 of the Clean Water Act where the release poses an immediate and significant threat to human health and the environment, the On-Scene Coordinator (OSC) may determine that it is necessary to transfer CERCLA waste off-site without following the requirements of this section.

(3) This section applies to CERCLA wastes from cleanup actions based on CERCLA decision documents signed or consent decrees lodged after October 17, 1986 ("post-SARA CERCLA wastes") as well as those based on CERCLA decision documents signed and consent decrees lodged prior to October 17, 1986 ("pre-SARA CERCLA wastes"). Pre-SARA and post-SARA CERCLA wastes are subject to the same acceptability criteria in § 300.440(b)(1) and (2).

(4) EPA (usually the EPA Regional Office) will determine the acceptability under this section of any facility selected for the treatment, storage, or disposal of CERCLA waste. EPA will determine if there are relevant releases or relevant violations at a facility prior to the facility's initial receipt of CERCLA waste. A facility which has previously been evaluated and found acceptable under this rule (or the preceding policy) is acceptable until the EPA Regional Office notifies the facility otherwise pursuant to § 300.440(d).

(5) Off-site transfers of those laboratory samples and treatability study CERCLA wastes from CERCLA sites set out in paragraphs (a)(5)(i) through (iii) of this section, are not subject to

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the requirements of this section. However, those CERCLA wastes may not be transferred back to the CERCLA site unless the Remedial Project Manager or OSC assures the proper management of the CERCLA waste samples or residues and gives permission to the laboratory or treatment facility for the samples and/or residues to be returned to the site.

(i) Samples of CERCLA wastes sent to a laboratory for characterization;

(ii) RCRA hazardous wastes that are being transferred from a CERCLA site for treatability studies and that meet the requirements for an exemption for RCRA under 40 CFR 261.4(e); and

(iii) Non-RCRA wastes that are being transferred from a CERCLA site for treatability studies and that are below the quantity threshold established at 40 CFR 261.4(e)(2).

(b) *Acceptability criteria.* (1) *Facility compliance.* (i) A facility will be deemed in compliance for the purpose of this rule if there are no relevant violations at or affecting the unit or units receiving CERCLA waste:

(A) For treatment to standards specified in 40 CFR part 268, subpart D, including any pre-treatment or storage units used prior to treatment;

(B) For treatment to substantially reduce its mobility, toxicity or persistence in the absence of a defined treatment standard, including any pre-treatment or storage units used prior to treatment; or

(C) For storage or ultimate disposal of CERCLA waste not treated to the previous criteria at the same facility.

(ii) Relevant violations include significant deviations from regulations, compliance order provisions, or permit conditions designed to: ensure that CERCLA waste is destined for and delivered to authorized facilities; prevent releases of hazardous waste, hazardous constituents, or hazardous substances to the environment; ensure early detection of such releases; or compel corrective action for releases. Criminal violations which result in indictment are also relevant violations. In addition, violations of the following requirements may be considered relevant:

(A) Applicable subsections of sections 3004 and 3005 of RCRA or, where applicable, other Federal laws (such as the

Toxic Substances Control Act and subtitle D of RCRA);

(B) Applicable sections of State environmental laws; and

(C) In addition, land disposal units at RCRA subtitle C facilities receiving RCRA hazardous waste from response actions authorized or funded under CERCLA must be in compliance with RCRA section 3004(o) minimum technology requirements. Exceptions may be made only if the unit has been granted a waiver from these requirements under 40 CFR 264.301.

(2) *Releases.* (i) Release is defined in §300.5 of this part. Releases under this section do not include:

(A) *De minimis* releases;

(B) Releases permitted under Federal programs or under Federal programs delegated to the States (Federally permitted releases are defined in §300.5), except to the extent that such releases are found to pose a threat to human health and the environment; or

(C) Releases to the air that do not exceed standards promulgated pursuant to RCRA section 3004(n), or absent such standards, or where such standards do not apply, releases to the air that do not present a threat to human health or the environment.

(ii) Releases from units at a facility designated for off-site transfer of CERCLA waste must be addressed as follows:

(A) *Receiving units at RCRA subtitle C facilities.* CERCLA wastes may be transferred to an off-site unit regulated under subtitle C of RCRA, including a facility regulated under the permit-by-rule provisions of 40 CFR 270.60 (a), (b) or (c), only if that unit is not releasing any hazardous waste, hazardous constituent, or hazardous substance into the ground water, surface water, soil or air.

(B) *Other units at RCRA subtitle C land disposal facilities.* CERCLA wastes may not be transferred to any unit at a RCRA subtitle C land disposal facility where a non-receiving unit is releasing any hazardous waste, hazardous constituent, or hazardous substance into the ground water, surface water, soil, or air, unless that release is controlled by an enforceable agreement for corrective action under subtitle C of RCRA or other applicable Federal or

State authority. For purposes of this section, a RCRA "land disposal facility" is any RCRA facility at which a land disposal unit is located, regardless of whether a land disposal unit is the receiving unit.

(C) *Other units at RCRA subtitle C treatment, storage, and permit-by-rule facilities.* CERCLA wastes may not be transferred to any unit at a RCRA subtitle C treatment, storage or permit-by-rule facility, where a release of any hazardous waste, hazardous constituent, or hazardous substance from non-receiving units poses a significant threat to public health or the environment, unless that release is controlled by an enforceable agreement for corrective action under subtitle C of RCRA or other applicable Federal or State authority.

(D) *All other facilities.* CERCLA wastes should not be transferred to any unit at an other-than-RCRA subtitle C facility if the EPA Regional Office has information indicating that an environmentally significant release of hazardous substances has occurred at that facility, unless the release is controlled by an enforceable agreement for corrective action under an applicable Federal or State authority.

(iii) Releases are considered to be "controlled" for the purpose of this section as provided in § 300.440 (f)(3)(iv) and (f)(3)(v). A release is not considered "controlled" for the purpose of this section during the pendency of administrative or judicial challenges to corrective action requirements, unless the facility has made the requisite showing under § 300.440(e).

(c) *Basis for determining acceptability.* (1) If a State finds that a facility within its jurisdiction is operating in non-compliance with state law requirements including the requirements of any Federal program for which the State has been authorized, EPA will determine, after consulting with the State as appropriate, if the violation is relevant under the rule and if so, issue an initial determination of unacceptability.

(2) If a State finds that releases are occurring at a facility regulated under State law or a Federal program for which the State is authorized, EPA will determine, after consulting with

the State as appropriate, if the release is relevant under the rule and if so, issue an initial determination of unacceptability.

(3) EPA may also issue initial determinations of unacceptability based on its own findings. EPA can undertake any inspections, data collection and/or assessments necessary. EPA will then notify with the State about the results and issue a determination notice if a relevant violation or release is found.

(d) *Determination of unacceptability.*

(1) Upon initial determination by the EPA Regional Office that a facility being considered for the off-site transfer of any CERCLA waste does not meet the criteria for acceptability stated in § 300.440(b), the EPA Region shall notify the owner/operator of such facility, and the responsible agency in the State in which the facility is located, of the unacceptability finding. The notice will be sent by certified and first-class mail, return receipt requested. The certified notice, if not acknowledged by the return receipt card, should be considered to have been received by the addressee if properly sent by regular mail to the last address known to the EPA Regional Office.

(2) The notice shall generally: state that based on available information from a RCRA Facility Assessment (RFA), inspection, or other data sources, the facility has been found not to meet the requirements of § 300.440; cite the specific acts, omissions, or conditions which form the basis of these findings; and inform the owner/operator of the procedural recourse available under this regulation.

(3) A facility which was previously evaluated and found acceptable under this rule (or the preceding policy) may continue to receive CERCLA waste for 60 calendar days after the date of issuance of the notice, unless otherwise determined in accordance with paragraphs (d)(8) or (d)(9) of this section.

(4) If the owner or operator of the facility in question submits a written request for an informal conference with the EPA Regional Office within 10 calendar days from the issuance of the notice, the EPA Regional Office shall provide the opportunity for such conference no later than 30 calendar days after the date of the notice, if possible,

to discuss the basis for the underlying violation or release determination, and its relevance to the facility's acceptability to receive CERCLA cleanup wastes. State representatives may attend the informal conference, submit written comments prior to the informal conference, and/or request additional meetings with the EPA Region, relating to the unacceptability issue during the determination process. If no State representative is present, EPA shall notify the State of the outcome of the conference. An owner/operator may submit written comments by the 30th day after issuance of the notice, in addition to or instead of requesting an informal conference.

(5) If the owner or operator neither requests an informal conference nor submits written comments, the facility becomes unacceptable to receive CERCLA waste on the 60th day after the notice is issued (or on such other date designated under paragraph (d)(9) of this section). The facility will remain unacceptable until such time as the EPA Regional Office notifies the owner or operator otherwise.

(6) If an informal conference is held or written comments are received, the EPA Region shall decide whether or not the information provided is sufficient to show that the facility is operating in physical compliance with respect to the relevant violations cited in the initial notice of unacceptability, and that all relevant releases have been eliminated or controlled, as required in paragraph (b)(2) of this section, such that a determination of acceptability would be appropriate. EPA will notify the owner/operator in writing whether or not the information provided is sufficient to support a determination of acceptability. Unless EPA determines that information provided by the owner/operator and the State is sufficient to support a determination of acceptability, the facility becomes unacceptable on the 60th calendar day after issuance of the original notice of unacceptability (or other date established pursuant to paragraphs (d)(8) or (d)(9) of this section).

(7) Within 10 days of hearing from the EPA Regional Office after the informal conference or the submittal of written comments, the owner/operator or the

State may request a reconsideration of the unacceptability determination by the EPA Regional Administrator (RA). Reconsideration may be by review of the record, by conference, or by other means deemed appropriate by the Regional Administrator; reconsideration does not automatically stay the determination beyond the 60-day period. The owner/operator will receive notice in writing of the decision of the RA.

(8) The EPA Regional Administrator may decide to extend the 60-day period if more time is required to review a submission. The facility owner/operator shall be notified in writing if the Regional Administrator extends the 60 days.

(9) The EPA Regional Office may decide that a facility's unacceptability is immediately effective (or effective in less than 60 days) in extraordinary situations such as, but not limited to, emergencies at the facility or egregious violations. The EPA Region shall notify the facility owner/operator of the date of unacceptability, and may modify timeframes for comments and other procedures accordingly.

(e) *Unacceptability during administrative and judicial challenges of corrective action decisions.* For a facility with releases that are subject to a corrective action permit, order, or decree, an administrative or judicial challenge to the corrective action (or a challenge to a permit modification calling for additional corrective action) shall not be considered to be part of a corrective action "program" controlling those releases and shall not act to stay a determination of unacceptability under this rule. However, such facility may remain acceptable to receive CERCLA waste during the pendency of the appeal or litigation if:

(1) It satisfies the EPA Regional Office that adequate interim corrective action measures will continue at the facility; or

(2) It demonstrates to the EPA Regional Office the absence of a need to take corrective action during the short-term, interim period.

Either demonstration may be made during the 60-day review period in the context of the informal conference and RA reconsideration.

(f) *Re-evaluating unacceptability.* If, after notification of unacceptability and the opportunity to confer as described in §300.440(d), the facility remains unacceptable, the facility can regain acceptability. A facility found to be unacceptable to receive CERCLA wastes based on relevant violations or releases may regain acceptability if the following conditions are met:

(1) *Judgment on the merits.* The facility has prevailed on the merits in an administrative or judicial challenge to the finding of noncompliance or uncontrolled releases upon which the unacceptability determination was based.

(2) *Relevant violations.* The facility has demonstrated to the EPA Region its return to physical compliance for the relevant violations cited in the notice.

(3) *Releases.* The facility has demonstrated to the EPA Region that:

(i) All releases from receiving units at RCRA subtitle C facilities have been eliminated and prior contamination from such releases is controlled by a corrective action program approved under subtitle C of RCRA;

(ii) All releases from other units at RCRA subtitle C land disposal facilities are controlled by a corrective action program approved under subtitle C of RCRA;

(iii) All releases from other units at RCRA subtitle C treatment and storage facilities do not pose a significant threat to human health or the environment, or are controlled by a corrective action program approved under subtitle C of RCRA.

(iv) A RCRA subtitle C corrective action program may be incorporated into a permit, order, or decree, including the following: a corrective action order under RCRA section 3008(h), section 7003 or section 3013, a RCRA permit under 40 CFR 264.100 or 264.101, or a permit under an equivalent authority in a State authorized for corrective action under RCRA section 3004(u). Releases will be deemed controlled upon issuance of the order, permit, or decree which initiates and requires completion of one or more of the following: a RCRA Facility Investigation, a RCRA Corrective Measures Study, and/or Cor-

rective Measures Implementation. The release remains controlled as long as the facility is in compliance with the order, permit, or decree, and enters into subsequent agreements for implementation of additional corrective action measures when necessary, except during periods of administrative or judicial challenges, when the facility must make a demonstration under §300.440(e) in order to remain acceptable.

(v) Facilities with releases regulated under other applicable Federal laws, or State laws under a Federally-delegated program may regain acceptability under this section if the releases are deemed by the EPA Regional Office not to pose a threat to human health or the environment, or if the facility enters into an enforceable agreement under those laws to conduct corrective action activities to control releases. Releases will be deemed controlled upon the issuance of an order, permit, or decree which initiates and requires one or more of the following: a facility investigation, a corrective action study, and/or corrective measures implementation. The release remains controlled as long as the facility is in compliance with the order, permit, or decree, and enters into subsequent agreements for implementation of additional corrective measures when necessary, except during periods of administrative or judicial challenges, when the facility must make a demonstration under §300.440(e) in order to remain acceptable.

(4) Prior to the issuance of a determination that a facility has returned to acceptability, the EPA Region shall notify the State in which the facility is located, and provide an opportunity for the State to discuss the facility's acceptability status with EPA.

(5) An unacceptable facility may be reconsidered for acceptability whenever the EPA Regional Office finds that the facility fulfills the criteria stated in §300.440(b). Upon such a finding, the EPA Regional Office shall notify the facility and the State in writing.

[58 FR 49215, Sept. 22, 1993]