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ARARs Q's & A's:
The Fund-Balancing Waiver

Office of Emergency and Remedial Response
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Quick Reference Fact Sheet

Section 121(d) of CERCLA, as amended by the 1986 Superfund Amendments and Reauthorization Act (SARA), requires that on-site remedial actions must attain (or waive) Federal and more stringent State applicable or relevant and appropriate requirements (ARARs) of environmental laws upon completion of the remedial action. The revised National Contingency Plan of 1990 (NCP) requires compliance with ARARs during remedial actions as well as at completion, and compels attainment of ARARs during removal actions to the extent practicable, considering the exigencies of the situation. See NCP, 40 CFR section 300.415(i) (55 FR 8666, 8843) and section 300.435(b)(2) (55 FR 8666, 8852) (March 8, 1990).

To implement the ARARs provisions, EPA has developed guidance, CERCLA Compliance With Other Laws Manual: Parts I and II (Publications 9234.1-01 and 9234.1-02), and has provided training to Regions and States on the identification of and compliance with ARARs. These "ARARs Q's and A's" are part of a series of Fact Sheets that provide guidance on a number of questions that arose in developing ARARs policies, in ARARs training sessions, and in identifying and complying with ARARs at specific sites. This particular Q's and A's Fact Sheet addresses the Fund-balancing waiver, which is one of six statutory waivers that may be invoked to allow the selection of a remedy that does not meet all ARARs.

Q1. What is the Fund-balancing waiver? How does it work?

A: The Fund-balancing waiver is one of the six statutory waivers that may be invoked under specified circumstances to allow selection of a remedy that does not meet all ARARs (see CERCLA Section 121(d)(4)(F)). A waiver based on Fund balancing first appeared in the 1985 NCP at 40 CFR section 300.68(i)(5)(ii). The concept of a Fund-balancing waiver was codified by the Superfund Amendments and Reauthorization Act of 1986 (SARA), which amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (see **Highlight 1** for specific statutory language and citation).

The Fund-balancing waiver may apply when the costs needed to meet an ARAR for an action would be so high as to threaten the availability of Fund monies for remedies at other sites (see Preamble to the NCP, 55 FR 8666, 8750). **Highlight 2** provides an example of the Fund-balancing waiver. The waiver applies only to Fund-financed remedial actions under CERCLA Section 104. Even when the waiver is invoked, the alternative remedy selected must still be protective of human health and the environment and meet all other standards (e.g., cost-effectiveness, permanent solutions, etc.). (See Preamble to the NCP, 55 FR 8666, 8750.) Regions should consult with Headquarters when considering use of this waiver.

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Q2. What is the purpose of the Fund-balancing waiver?

A: The purpose of this waiver is to ensure that EPA's ability to carry out a comprehensive national response program is not compromised by a disproportionately high expenditure at a single Superfund site.

Highlight 1: STATUTORY LANGUAGE

Section 121(d)(4)(F) of CERCLA, as amended, states that a remedial action not meeting an ARAR may be selected if:

"in the case of a remedial action to be undertaken solely under Section 104 using the Fund, selection of a remedial action that attains such level or standard of control will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats."

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Highlight 2: EXAMPLE OF THE FUND-BALANCING WAIVER

At site X, a State water-quality standard was identified as an ARAR. Attaining this State standard would have required the removal and off-site disposal of millions of cubic yards of contaminated sediments in the streams and reservoir, at an estimated cost of more than $1 billion. The cost of attaining the ARAR exceeds the threshold of four times the cost of a typical operable unit, and thus, the Fund-balancing waiver was considered. Based on an assessment of the Fund, and needs at other sites, the Agency decided to invoke the waiver. The waiver allowed selection of an alternative remedy that involved partial capping and surface-water diversion at a fraction of the original cost, while still achieving protectiveness and complying with other ARARs.

Q3. When should the Fund-balancing waiver be considered? Is there an absolute threshold for invoking the waiver?

A. The Fund-balancing waiver is to be routinely considered when the cost of meeting an ARAR for an operable unit is four times the national average cost of remediation of all operable units. (See Preamble to the NCP, 55 FR 8666, 8750.) However, there is no set amount at which the waiver must be invoked.

Currently the threshold for considering the waiver is 4 x $14.4 million, or $57.6 million. This average cost for an operable unit is based on the Outyear Liability Model (OLM), which is EPA's approach to estimating its long-term resource needs. The average cost figure was developed through an analysis of nearly 200 Records of Decision (RODs) that have been signed since the passage of SARA (i.e., FY 1987 to present). As a group, this body of documents is the most comprehensive and representative source of remedial action cost estimates available within the Agency. The OLM average cost of an operable unit is reported in the FY 1989 Superfund Annual Report to Congress. (Revisions will be reported in subsequent Annual Reports and also made available to Regions through subsequent fact sheets.)

Q4. Does the waiver have to be invoked when the costs of meeting an ARAR are estimated to exceed the dollar threshold?

A. No. Exceeding the threshold establishes a presumption that the waiver should be considered, but does not require that it be invoked. In instances where the threshold is reached but the Fund-balancing waiver is not invoked, either the ROD or the Administrative Record should document the fact that the waiver was considered and provide the rationale. For example, the Region might determine that the cost of performing this remedy is not so disproportionately high as to threaten the availability of the Fund to respond to other sites that may present a threat to human health and the environment.

Q5. Can the Fund-balancing waiver be invoked even when the cost threshold is not exceeded?

A. Yes. EPA has reserved the right to invoke this waiver in specific situations when the cost of meeting the ARAR is expected to fall below the threshold but EPA has determined that the single site expenditure would place a disproportionate burden on the Fund. (See Preamble to the NCP, 55 FR 8666, 8750.)

Q6. Is the waiver available for other Federal agencies or potentially responsible parties (PRPs)?

A. No. CERCLA Section 121(d)(4)(F) clearly restricts use of this waiver to remedial actions conducted under CERCLA Section 104 and financed by the Fund. The waiver is unavailable to other Federal agencies or PRPs, which use other monies for their CERCLA activities. (See also Preamble to the NCP, 55 FR 8666, 8750.)

Q7. Most remedies have to comply with more than one ARAR. If the Fund-balancing waiver is being considered, which ARAR should be waived?

A. The ARAR that increases the potential remedial action costs by the threshold amount should be considered for the Fund-balancing waiver. However, the remedial action must comply with other ARARs that do not excessively raise the cost of remediation.

Q8. Can the Fund-balancing waiver be used with other waivers?

A. Yes. For example, the Fund-balancing waiver could be used to waive an excessively expensive ARAR at the same site where it is necessary to waive another ARAR because of technical impracticability.

Q9. Can the Fund-balancing waiver be used for removal actions?

A. In theory, yes, but this is highly unlikely given the monetary limits and limited scope of removal actions. It is more likely that compliance with an excessively expensive ARAR for a removal action would be determined to be beyond the scope of the action, and therefore impracticable under the NCP. (See NCP at 40 CFR section 300.415(i)(2) and Preamble to the NCP, 55 FR 8666, 8696.)

Q10. Can the Fund-balancing waiver be invoked only at Fund-lead orphan sites (i.e., sites where no PRPs have been identified)?

A. No. The Fund-balancing waiver may also be invoked at a Fund-lead site where PRPs exist and may potentially settle. However, if PRPs do settle and subsequently take over the project, they cannot take advantage of the waiver -- the action will no longer be solely funded under Section 104 and the Fund-balancing waiver will no longer be available. Likewise, the waiver is not available for mixed-funding cases involving contributions by both PRPs and the Fund. Therefore, where circumstances for settlement with PRPs potentially exist, the Region should anticipate this possibility by including a contingent remedy (without the waiver) in the ROD. If such a contingent remedy has not been included in the ROD, and a settlement with PRPs is reached, the ROD should be amended to remove the waiver or an Explanation of Significant Differences (ESD) should be issued. The ROD should be amended if removing the waiver would fundamentally alter the basic features of the selected remedy. (See NCP at 40 CFR section 300.435 (c)(2)(ii) and Preamble to the NCP, 55 FR 8666, 8771-8772.) An ESD may be issued if removing the waiver significantly changes, but does not fundamentally alter, the remedy selected in the ROD. (See NCP at 40 CFR section 300.435(c)(2)(i) and Preamble to the NCP, 55 FR 8666, 8770-8772.)

Q11. If the Fund-balancing waiver has not been invoked in the ROD because a PRP settlement was anticipated, can it be subsequently invoked if no settlement ever occurs?

A. Yes. If a settlement with PRPs is not reached, and the remedy will be performed using Fund monies under CERCLA Section 104, the Fund-balancing waiver can be invoked by a ROD amendment or, in appropriate cases, an ESD.

Q12. Will the answer to the previous questions ever lead to an incentive for PRPs not to settle?

A. It could. However, the statute is clear that the Fund-balancing waiver is available only for Fund-financed actions. Of course, if such an incentive not to settle exists, PRPs may be encouraged to settle through the issuance of a unilateral order and the resulting possibility of fines and treble damages. (See CERCLA Sections 106 and 107(c)(3).)

Q13. If a remedy is undertaken solely using the Fund, and the Fund-balancing waiver is invoked, can the Agency later bring an action to recover its costs?

A. Yes. The fact that the statute allows EPA to select a remedy made less expensive by the waiver does not affect the right of the Agency to be reimbursed later under CERCLA Section 107 for the costs of that remedy.

Q14. What language should be used in the ROD for invoking the Fund-balancing waiver?

A. **Highlight 3** provides sample language for various sections of the ROD. This language is based on the hypothetical site circumstances presented in **Highlight 2** of this fact sheet and a hypothetical State law. For additional language, see *Guidance on Preparing Superfund Decision Documents* (the "ROD Guidance"), EPA/540/G-89/007, July 1989, page 6-5.

Highlight 3: SAMPLE ROD LANGUAGE

Sample language for the **Statutory Determinations Section** (of the Declaration):

> The selected remedy is protective of human health and the environment, complies with or meets the requirements for a waiver of Federal and State requirements that are legally applicable or relevant and appropriate to the remedial action, and is cost-effective. This remedy utilizes permanent solutions . . . .

Sample language for the **Description of Alternatives Section** (of the Decision Summary):

> The first remedial alternative, which involves the removal and off-site disposal of contaminated stream sediments, complies with the State water-quality standard at Reg. Sec. X.100, because it ensures that stream water contaminant levels will not exceed .001 ppm. The State water-quality standard is applicable to this remedial alternative because the standard requires maintenance of all in-State streams, reservoirs, and lakes at health-based levels, as established in State regulations at Sec. X.100.
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> The second remedial alternative, which involves partial capping and surface-water diversion, justifies a waiver of the State water-quality standard found at Reg. Sec. X.100, based on the Fund-balancing waiver found in CERCLA Section 121(d)(4)(F) and NCP section 300.430(f)(1) (ii)(C)(6). Attaining the State water-quality standard for this operable unit (as contemplated by the first remedial alternative) would cost more than $1 billion. EPA has determined that this site expenditure would not provide a balance between the need for protection of human health and the environment at this site, and the availability of Fund monies to respond to other sites that may present a threat to human health and the environment.

Highlight 3: SAMPLE ROD LANGUAGE (CONTINUED)

Sample language for the **Summary of Comparative Analysis of Alternatives Section** (of the Decision Summary):

> EPA has determined that each remedial alternative is protective of human health and the environment, and complies with (or justifies a waiver of) applicable or relevant and appropriate requirements.

Sample language for the **Statutory Determinations Section** (of the Decision Summary):

> The selected remedy complies with or waives all Federal and State ARARs. The State water-quality standard was waived for surface-water cleanup at this site because attainment of this requirement would cost more than $1 billion, which would not provide a balance between the need for protection of human health and the environment at this site and the availability of Fund monies to respond to other sites that may present a threat to human health and the environment. (See CERCLA Section 121(d)(4)(F) and the NCP, 40 CFR section 300.430(f)(1)(ii)(C)(6).)

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NOTICE: The policies set out in this fact sheet are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this fact sheet, or to act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

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