Question: Why will this new rule not be directly applicable to CERCLA actions or remediations? Please provide specific federal citation(s) in law or other pertinent documents.

Response: The sentence you refer to in our **Request for Comments** (February 11, 2008) reads, "The criteria would not apply directly to sites being remediated under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)"; and that discussion continues, "However, this rule would be a relevant and appropriate requirement, which the federal agency must consider in selecting a remedy."

In response to your question, we have concluded that the discussion is misleading as the result of the use of the term, "directly", by which we meant only to recognize the supremacy of federal law over State law: a State cannot unilaterally dictate to the United States.

To clarify and amplify the discussion, we offer the following:

The basic principle of federal law is expressed at CERCLA § 121(d)(2)(A) thus:

> "With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if – . . . any promulgated standard, requirement, criteria, or limitation under a State environmental . . . law that is more stringent than any Federal standard, requirement, criteria, or limitation . . . and that has been identified to the President by the State in a timely manner, is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 104 or secured under section 106 shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation . . . "

The respective definitions at 40 CFR § 300.5 provide that "Applicable Requirements" are requirements

> "... that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site. Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be applicable."

whereas "Relevant and Appropriate Requirements" are requirements

> "... that, while not 'applicable' to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site. Only those state standards that are identified in a timely manner and are more stringent than federal requirements may be relevant and appropriate."

But the distinction between "Applicable Requirements" and "Relevant and Appropriate Requirements" is academic, since the remedy-selection process must treat both alike; the two concepts may be combined, and, indeed, the operational abbreviation at 40 CFR § 300.4(b)

provides that “ARARs” is the single abbreviation for “Applicable or Relevant and Appropriate Requirements.”

And finally, we note that in the official history of the rulemaking action by which 40 CFR Part 300 was promulgated, the examples of potential “ARARs” derived from State law specifically included “State requirements for disposal and transport of radioactive wastes”: see item 2.i at 55 *Fed.Reg.* 8765 (March 8, 1990).

Based on the foregoing, we are confident that the criteria of this regulation, if they are more stringent than federal requirements at 10 CFR Part 20, would constitute “ARARs” for purposes of the federal CERCLA remedy-selection process, and as such would be mandated to be attained pursuant to federal law.