

## **IV. G. Waivers**

# Waivers

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CERCLA Section 121(d)(4) establishes six waivers for on-site actions:

1. Interim measure
2. Greater risk to human health & environment
3. Technical impracticability
4. Equivalent standard of performance
5. Inconsistent application of State requirements
6. Fund-balancing

# 1. Interim Measure Waiver

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- May be used for temporary measures that are part of final action
- Final action must achieve ARAR compliance within reasonable period of time
- Interim measure may not cause or worsen problems at site or hinder final remedy

## 2. Greater Risk to Human Health & Environment Waiver

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- May be used when compliance with requirement will result in greater risk to human health & environment than noncompliance
- Considerations
  - Magnitude of adverse impacts
  - Risk posed by remedy using waiver
  - Duration of adverse impacts
  - Reversibility of adverse impacts

## 3. Technical Impracticability Waiver

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- May be used when compliance with requirement is impracticable from engineering perspective
- May not be invoked merely because compliance would require innovative technology
- Primary considerations
  - Engineering feasibility
  - Reliability
  - Cost (only if cost of compliance is highly excessive)

## 4. Equivalent Standard of Performance Waiver

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- May be invoked if alternative attains standard of performance equivalent to or more stringent than requirement
- Considerations
  - Time requirements of proposed action compared to time requirements of alternative that achieves compliance
  - Degree to which proposed action protects human health & environment
  - Level of performance of proposed action
  - Future reliability of proposed action

## 5. Inconsistent Application of State Requirements Waiver

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- May be used when State requirement has been applied variably or inconsistently
- Considerations
  - Similarity of site or circumstances
  - Proportion of noncompliance cases
  - Reason for non-compliance
  - Intention to consistently apply future requirements

## 6. Fund Balancing Waiver

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- Applies when cost of attaining ARAR for entirely Fund-financed action will threaten availability of Superfund money for other sites
- May not be used for Federal Facilities

# Waiver Statistics FY 1982-1994

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● Equivalent performance	12
● Greater risk	15
● Interim action	45
● Technical impracticability	69
● Fund balancing	2
● Inconsistent state application	0
● Type unknown	4
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# Waiver vs “Relevant But Not Appropriate”

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- Requirements determined to be relevant and appropriate must be waived if they will not be met
- Requirements determined to be relevant but not appropriate to the site-specific situation need not be waived
- Determination of “R&A” vs “R but not A” is often a “best professional judgment” call and can be negotiated

# Summary

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- *Applicable* requirements - comply with all parts
- *Relevant & appropriate requirements* - comply with only R&A parts
- On-site - comply with all *substantive applicable* and *R & A* requirements unless waived
- Off-site - comply with *substantive & administrative* parts of *applicable* requirements
- Permits are not required for on-site actions

## Summary (cont'd)

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- AOC includes areal extent of contiguous contamination
- “On-site” broader than AOC; includes areas in close proximity necessary for response action implementation
- Must qualify under one or more of six justifications in order for ARAR to be waived
- OSHA, NEPA, NRDA are not ARAR