

Eligible Response Site: Meaning, Impacts, and the Role for Site Assessment

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You May be Wondering

Why an Enforcement Attorney?

- Site assessment decisions may now affect EPA enforcement authority
- Certain site assessment determinations will require consultation with EPA legal enforcement

Eligible Response Site Defined

CERCLA Section 101(41)

- Section 101(41)(A)
 - ▶ Eligible Response Site = Brownfield Site § 101(39)
- Section 101(41)(B)
 - ▶ EPA authority to include certain sites otherwise excluded by brownfield site definition
- Section 101(41)(C)
 - ▶ EPA authority to exclude certain sites from the definition of an eligible response site

Impacts Under CERCLA

Sections 105(h) & 128(b)

- **Section 105(h)**
 - ▶ EPA will generally defer listing an “eligible response site” if addressed by the state or other party in agreement with the state under a state response program
- **Section 128(b)**
 - ▶ Limits EPA authority to take enforcement and cost recovery actions against persons addressing a release under a state response program at an eligible response site
- **Does not affect brownfields grant funding**

The Role for Site Assessment

CERCLA Section 101(41)(C)(i)

- EPA can exclude sites from the definition based on site assessment
 - ▶ After preliminary assessment (PA) or site inspection (SI); and
 - ▶ Consultation with State
 - ▶ Achieves a preliminary score sufficient for possible listing on the NPL; or
 - ▶ Otherwise qualifies for listing on the NPL

The Role for Site Assessment Cont'd

CERCLA Section 101(41)(C)(i)

- EPA can include a site which it previously excluded
- If “no further federal action will be taken”

EPA Guidance

Regional Determinations Regarding Which Sites are Not Eligible Response Sites under 101(41)(C)(i)

- Signed March 6, 2003
- Only addresses § 101(41)(C)(i)
- www.epa.gov/compliance/resources/policies/cleanup/index

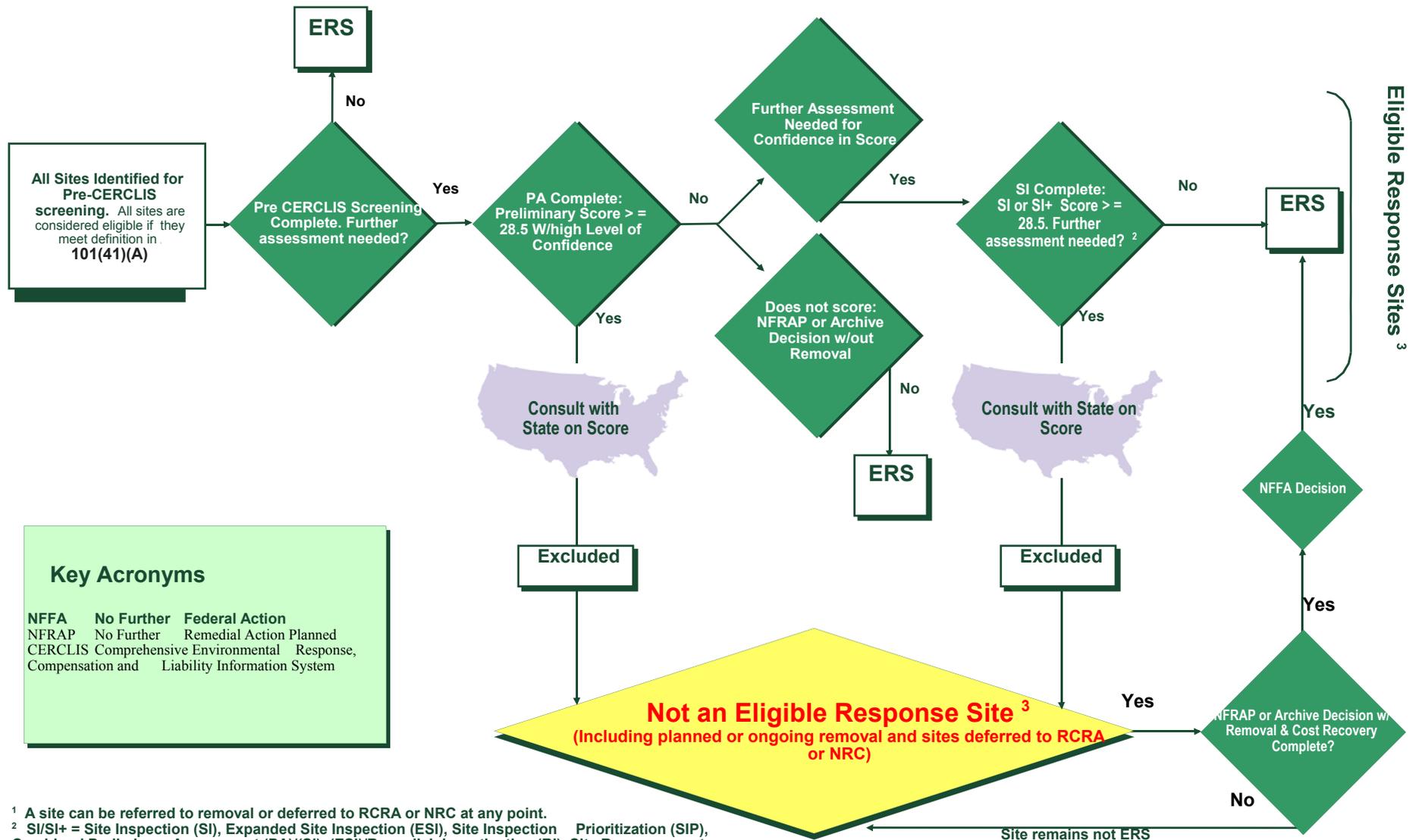
Key Points from Guidance

Directed Primarily at EPA and State Site Assessment Personnel

- When EPA will generally make a decision to exclude a site
- Consultation with State and Tribes
- When EPA will generally make a decision that “no further federal action will be taken”
- Making a determination for current CERCLIS sites already past the SI Stage

Attachment A

Site Assessment Process to Determine Whether or not a site is an Eligible Response Site (ERS)¹



Eligible Response Sites³

Not an Eligible Response Site³
(Including planned or ongoing removal and sites deferred to RCRA or NRC)

The Decision to Exclude

These sites will not be subject to NPL deferral or limitations on EPA enforcement

- EPA will continue to utilize the current process
- Strong preference for making the decision after the SI
- Pre-SI determinations only if nature and quality of the information allow for a decision with a high level of confidence
 - ▶ e.g., data indicating human exposure

Consultation with States and Tribes

Consultation Prior to Excluding a Site

- Consult with State and Tribe if on or near Tribal land
- Regions should work with States and Tribes to develop a process
- Where States and Tribes already conduct PA/SIs for EPA should be easy to satisfy through existing info exchange
- Communications should be documented

No Further Federal Action

These sites will again be subject to NPL deferral and limitations on EPA enforcement

- One of Two Points in Current Process
 - ▶ NFRAP – If not referred to removal or consultations with removal and enforcement do not reveal pending or potential removal, cost recovery, or enforcement actions
 - ▶ Archive – If referred to removal or pending or potential removal, cost recovery, or enforcement actions
- Key – No further action under CERCLA
 - ▶ No NFFA determination for sites deferred to RCRA or NRC and active CERCLIS sites being addressed under State program

Determinations for “Historical Sites”

Sites Where EPA has Previously conducted a PA or SI

- Many sites that are Post-SI and have a preliminary score sufficient for possible listing
- Regions will compile a list, share it with the States and Tribes, and make a single determination to exclude
- Key – Sites that would have otherwise been excluded had the statute and guidance been in place at the time of assessment determination
- HQ producing a logic sheet to help with CERCLIS pull

Who Will Make these Determinations

Delegations of Authority

- President to Administrator – E.O. 12580
- Delegation 14-17
 - ▶ Regional Administrator with authority to redelegate to Branch Chief
 - ▶ Consultation with legal enforcement
 - ▶ Regions will need to add language to site assessment determinations to capture exclusion and NFFA determinations