the need to regulate wastes as hazardous. Section 3001 requires that EPA, in determining whether to list or otherwise identify a waste as hazardous waste, decide whether a waste "should" be subject to the requirements of Subtitle C. Hence, section 3001 authorizes EPA to determine that Subtitle C regulation is not appropriate where a waste is not likely to be managed in such a way that it will threaten human health or the environment. Moreover, regulation of such waste under Subtitle C would not appear "necessary to protect human health or the environment" under RCRA sections 3002(a), 3003(a) and 3004(a). As noted elsewhere in this proposal, EPA interprets these provisions to give it broad flexibility in fashioning criteria to allow hazardous wastes to exit the Subtitle C regulatory system. EPA's existing regulatory standards for listing hazardous wastes also allow consideration of a waste's potential for mismanagement. See § 261.11(a)(3) (incorporating the language of RCRA section 1004(5)(B)) and §261.11(c)(3)(vii) (requiring EPA to consider plausible types of mismanagement). Where mismanagement of a waste is implausible, the listing regulations do not require EPA to classify a waste as hazardous.

Two decisions by the U.S. Court of Appeals for the District of Columbia Circuit provide potential support for this approach to defining hazardous waste. In Edison Electric Institute v. EPA, 2 F.3d 438, (D.C. Cir. 1993) the Court remanded EPA's RCRA Toxicity Characteristic ("TC") as applied to certain mineral processing wastes because the TC was based on modeling of disposal in a municipal solid waste landfill, yet EPA provided no evidence that such wastes were ever placed in municipal landfills or similar units. This suggests that the Court might approve a decision to exempt a waste from Subtitle C regulation if EPA were to find that mismanagement was unlikely to occur. In the same decision the Court upheld a temporary exemption from Subtitle C for petroleum-contaminated media because such materials are also subject to Underground Storage Tanks regulations under RCRA Subtitle I. The court considered the fact that the Subtitle I standards could prevent threats to human health and the environment to be an important factor supporting the exemption. Id. at 466. In NRDC v. EPA, 25 F.3d 1063 (D.C. Cir. 1994) the Court upheld EPA's finding that alternative management standards for used oil

promulgated under section 3014 of RCRA reduced the risks of mismanagement and eliminated the need to list used oil destined for recycling. (The Court, however, did not consider arguments that taking management standards into account violated the statute because petitioners failed to raise that issue during the comment period.)

B. Improvements in Management of Non-Hazardous Waste and in Risk Assessment Methodology

EPA's early regulations defining hazardous waste reached broadly to ensure that wastes presenting hazards were quickly brought into the system. When EPA promulgated its first listings and characteristic rules in 1980, its knowledge of toxic constituents, constituent transport pathways, and waste management options was more limited than it is today.

In addition, significant changes and improvements in waste management have occurred since the early 1980's. Many states have established or strengthened industrial nonhazardous waste programs since that time. For example, currently 26 states require liners and 28 states require groundwater monitoring for at least some surface impoundments. Up to 45 states require ground-water monitoring and 38 states require liners for at least some landfills. It is important to recognize however, that within a state, applicable requirements may vary according to a number of factors, including unit type, waste source, and location. See "State Requirements for Industrial Non-Hazardous Waste Management Facilities' EPA 1994. At the same time, industries have gained experience in managing wastes and many have improved waste management practices under incentives such as public access pursuant to the Emergency Preparedness and Community Right to Know Act, and avoiding liabilities under Superfund, RCRA corrective action and state cleanup programs.

EPA's ability to predict the risks that a waste may pose has also improved significantly. EPA has collected much more data on a variety of waste management units and other factors that impact the ability of waste constituents to reach a receptor. Models such as the EPACMTP and the models used in the multipathway analysis provide more sophisticated means of assessing the risks of a range of waste management options. As a result of all these changes, EPA is now in a position to begin to implement a more carefully tailored risk-based approach to regulating hazardous wastes.

C. Overview of Options for Conditional Exemptions

The Agency has identified several different approaches to providing conditional exemptions that would allow more wastes to exit the Subtitle C system. These options fall into two broad categories: (1) Establishing national conditional exemptions based on unit type either with or without assuming additional management controls; and (2) granting conditional exemptions to qualified state programs that ensure additional management controls.

1. National Approach: EPA Would Establish National Exit Levels for Contingently Managed Waste

The contingent management program could be adopted by any state that wants to implement it, without consideration of state programs for nonhazardous waste. The contingent exit levels would differ according to the degree of management/disposal restrictions imposed as a condition of exit. The possible options would include progressively more restrictive requirements, and allow progressively higher exit levels as disposal options are further restricted. The options under this approach are:

a. Distinguish Between Disposal in Land Application Units and Other Units

The multipathway risk assessment methodology used for this rulemaking takes into account management scenarios (such as land treatment of a waste), or exposure pathways (such as wind transport from an uncovered pile or volatilization from an open tank), resulting in calculated exit levels based on the riskiest scenario. In some cases this exit level may be significantly lower than the next most risky exposure pathway. The riskiest exposure pathway may not be applicable to some management situations. On review of the risk analysis results, the Agency determined that disposal in a land application unit is frequently the highest risk disposal option in both the multipath and groundwater modeling.

As described in detail in Section X. below, the Agency has developed for proposal an approach to contingent management relying on the multipathway exposure analysis, risk level of 10–6 and HQ of 1, and using the base case uncontrolled management scenarios, but with land application units removed from the analysis. Exit concentrations would still be protective across a wide variety of conditions nationally, for all non-land application unit disposal. The Agency is proposing