United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

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Approved for Review

Signature of Office Director: M. A. Rhodes

Date: 5-30-86

Title

Guidance on Drafting Consent Decrees in Hazardous Waste Cases

Summary of Directive

This guidance supplements the Agency's "Interim CERCLA Settlement Policy" It focuses on the consent decree provisions which are vital to settlement in hazardous waste cases, but which are handled differently (or not at all) under other programs.

Key Words: guidance, consent decree, draft, settlement, hazardous waste

Type of Directive *(Manual, Policy Directive, Announcement, etc.)*: Guidance Memorandum

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Does this Directive Supersede Previous Directive(s)? ☐ Yes ☒ No Does It Supplement Previous Directive(s)? ☒ Yes ☐ No

If "Yes" to Either Question, What Directive *(number, title)*

Interim CERCLA Settlement Policy - 9835.0

Review Plan

☐ AA-OSWER ☐ OERR ☐ OSW ☐ OUST ☒ OWPE ☐ Regions ☐ OECM ☐ OGC ☐ OPPE ☒ Other *(Specify)*

This Request Meets OSWER Directives System Format

Signature of Lead Office Directives Officer: M. A. Rhodes

Date: 5-30-86

Signature of OSWER Directives Officer

Date

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 1 1985

MEMORANDUM

SUBJECT: Drafting Consent Decrees in Hazardous Waste Imminent Hazard Cases

FROM: Courtney M. Price
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TO: Regional Administrators

## INTRODUCTION

On October 19, 1983, the Office of Legal and Enforcement Counsel issued guidance on drafting judicial consent decrees. That document provides general guidance on drafting consent decrees for settlement of hazardous waste cases, provides a checklist of provisions which ordinarily should appear in a decree, and offers sample language for many commonly used consent decree terms.

As the Agency enters into more and more consent decrees as part of the hazardous waste program, there has arisen an increasing need for supplemental guidance specific to imminent hazard enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and section 7003 of the Resource Conservation and Recovery Act (RCRA). These actions share common factual circumstances and yet are sufficiently distinct from other enforcement programs to warrant separate additional guidance. For example, many hazardous waste cases are characterized by multiple defendants, raising unique liability issues which must be addressed in each decree. This guidance document will focus on those consent decree provisions which are vital to settlement in hazardous waste cases, but which are handled differently (or not at all) under other programs.

The guidance is based upon and supplements the Agency's settlement policy as stated in a memorandum entitled "Interim CERCLA Settlement Policy" (hereinafter "Settlement Policy") which we issued, along with Hank Habicht of the Department of Justice, on December 5, 1984. EPA enforcement personnel should interpret and apply this memorandum consistently with the Settlement Policy and any subsequent revisions thereto.

Each decree will be negotiated amidst widely varying factual situations. Thus it is not appropriate to mandate the inclusion of model terms in each hazardous waste decree. Rather, this memorandum is intended to suggest ways of achieving the government's settlement goals. The sample consent decree provisions may be incorporated as is or modified to accommodate the inevitable eccentricities present in each case.

## I. Releases and Contribution Protection

Although the greater portion of this memorandum addresses terms which the government wishes to include within consent decrees, it is also useful to discuss the major provisions which are generally requested by responsible parties in settlement discussions, i.e., releases, covenants not to sue, and protections against contribution. Since releases directly affect liability for current and future hazards posed by a site, these provisions must be drawn as narrowly as possible.

### A. Scope of Release

The Agency's policy, absent extraordinary circumstances, is to grant releases from liability only for that part of a cleanup performed or funded by the responsible parties. If only surface cleanup has been effected, the release should clearly be limited to liability for the work undertaken to respond to surface contamination (as defined in the decree), and should expressly reserve our right to bring actions against the settling and non-settling parties for all other removal or remedial activities. The release ordinarily should not forgive government oversight, monitoring, and enforcement costs, unless the settlement payment takes these costs into account, nor should it include natural resource damages without the consent of the trustee.

The consent decree should clearly state that the release only extends to named parties to the agreement, and not to all parents, subsidiaries, and affiliates, unless 100% of the cleanup costs are recovered. Judicial or administrative causes of action against any other parties are to be reserved. This language is particularly crucial where State law may require the release of all joint tortfeasors if a release is given to

any one of them. Although it is our view that CERCLA calls for uniform federal rules of decision, as a precautionary measure consent decree releases in these States should be phrased in terms of a covenant not to sue in order to minimize the possibility that non-settling parties would be released from liability by the decree. Furthermore, the release should not extend to liability under any statutory claim which did not form the basis for the complaint or clearly apply to the activities of the settling party. (For example, a RCRA subtitle C regulatory action release should not cover liability under section 3013 or 7003 of RCRA or section 106 of CERCLA). Similarly, a release or covenant not to sue should expressly apply only to civil liability. Finally, in most cases (see the Settlement Policy, page 15), releases should specifically reserve the defendant's redisposal liability, i.e., liability arising from off-site disposal of wastes removed from the site.

B. Timing of Releases

Many responsible parties have sought to obtain releases which become effective in advance of completing the needed abatement actions. As a general rule, the Agency should require that releases only become effective when all of the work (including monitoring ) has been completed to EPA's satisfaction, whether defendants financed or conducted the work.

C. Limiting Releases to Account for an Inadequate Remedy

Although settlement agreements are often designed to accomplish a complete and permanent remedy, the Agency must protect itself from the possibility that the chosen remedial option will fail to entirely abate the releases at a site and the potential for an imminent and substantial endangerment resulting therefrom. The Agency should use the consent decree to minimize the risk that the government will be left to finance a future cleanup resulting from failure of the remedy at the site.

1. Where circumstances permit, compliance with the decree should be linked to achieving enforceable performance-based standards. The Agency must be in a position to move against the settling parties for failure to attain a standard. To the extent possible, the decree should not merely be a broadly phrased agreement on a remedy designed to generally meet the goals and objectives of the decree or the statute at issue.

2. The decree should contain detailed oversight, operation, maintenance, inspection, and monitoring requirements designed to prevent and uncover deviations from technical

standards over an extended period of time. These requirements should be embodied in workplans submitted for approval pursuant to the decree.

3. The decree should contain financial responsibility requirements, (discussed below), sufficient to cover any costs arising from failure of the remedy.

4. The decree should clearly articulate any assumptions upon which the remedial program is based. For example, a remedy may be designed with certain characteristics of the surrounding area in mind. If land use patterns change, (for example, where a previously unused aquifer is tapped for drinking water), the level of protection afforded to the environment by the remedy may be insufficient to protect human health. If any of the stated assumptions change, the Agency should reserve the right to pursue modifications to the remedial program.

5. Finally, the decree should contain a clause authorizing the government to reopen the decree if the site may present an imminent and substantial endangerment to the public health or welfare or the environment due to:

- The discovery of previously unknown or undetected conditions at the site; or

- the receipt of new information concerning the scientific premises of the decree. (See the Settlement Policy, page 16.)

This reservation should allow the government to obtain further remediation by the defendants or perform the work itself and seek cost recovery. Despite best efforts at designing, constructing, and implementing a remedial program, it is inevitable that in a certain percentage of cases additional work will have to be performed to eliminate such endangerments.

Responsible parties, of course, want the decree to represent a final disposition of responsibilities. However, hazardous waste site abatement technology has not progressed to the point where the Agency can be relatively sure that the remedial techniques selected and implemented today will provide complete and permanent protection to the public on the hundreds of sites where work has been or will be performed. The five-part program outlined above should maximize the degree of finality afforded to settling parties consistent with the need to safeguard the interests of the public.

D. Contribution Protection

Contribution is an equitable remedy based on the principle that one who has paid more than a reasonable proportion of a judgment or debt is entitled to reimbursement from other liable parties. The issue of contribution will be particularly critical in multi-party cases that involve settlements with fewer than all of the responsible parties and where the government may still sue some or all of the non-settling parties. Anticipating that the government may sucessfully pursue a non-settlor, a defendant may demand that the United States agree to protect it from any claim for contribution from any non-settling party as a condition to signing a consent decree. The effect of such a contribution protection clause sought by a settling defendant would be to have the United States agree to reduce its judgment against a non-settling responsible party by the amount of contribution ordered to be paid by a settling defendant to the non-settling party in subsequent litigation.

It is the Agency's view that contribution protection clauses are largely unnecessary. Many States* have already enacted laws which protect settlors from subsequent contribution actions. These laws have been modeled on Section 4 of the Uniform Contribution Among Tortfeasors Act (1955 Revision), drafted by the National Conference of Commissioners on Uniform State Laws, which provides:

> "When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> "(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

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* Seventeen States have adopted this Section or a similar provision: Alaska, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Missouri, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Virginia, and Wyoming.

> "(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."

Under this rule, once a reasonable, comprehensive, and good faith agreement has been reached, settling parties would be immune from third-party contribution claims.

The Agency is taking the position that federal courts should use the model rule as the standard for resolving contribution questions. The United States will be willing to include language in a consent decree which states that it is the intention of the parties that future contribution actions against settlors be prohibited and encouraging courts to consult the Uniform Act as the federal rule of decision. Contribution protection clauses will therefore generally not be necessary for consent decrees.

As the Settlement Policy points out, however, providing protection from contribution to settling defendants may be appropriate in limited cases. If, under the law likely to be applied, contribution actions by nonsettling defendants may be permitted, EPA may consider providing contribution protection when two factors are present:

1) the settlement addresses a very high percentage of the total cleanup; and

2) the relative responsibilities of the responsible parties can be clearly allocated, so that future actions are not likely to reapportion liability.

On a case-by-case basis, the litigation team will assess whether these factors and other circumstances in the case warrant inclusion of contribution protection in the decree.

Of course, the greater the percentage of cleanup covered by the decree, the lower the risk that claims for contribution will be successfully asserted against settling parties. Comprehensive settlements will maximize the chances that compliance with the terms of the decree discharges a company's liability for a site.

E. Sample Language on Releases and Contribution Protection

The following sample consent decree language assumes that total cleanup has been or will be undertaken by the responsible parties pursuant to EPA approved procedures. It also assumes that the site is located in a State where the release of one joint tortfeasor operates as a release on all others.

Covenant Not to Sue

In consideration of work which has been and will be performed and payments which have been made by the Company under the terms of the Decree, the Governmental Parties (hereinafter "Government") hereby covenant not to bring any civil judicial or administrative action against the Company and its officers and employees for any claim or cause of action cited in the Complaint relating to "covered matters." "Covered matters" include liability arising from [work performed under the decree] and [specified costs incurred to date]. The covenant shall become effective upon completion to EPA's satisfaction of the remedial activities described in the attached specifications. To the extent that State law is deemed to govern liability arising from activities related to the Site and the interpretation of the terms of this Decree, the parties do not intend this section to serve as a general unqualified release. This section should be construed as a covenant not to sue the Company, and should not act to release any other party from liability.

This covenant not to sue does not extend to liability for damage to natural resources, as defined in CERCLA, to liability arising from hazardous waste removed from the site, or to future monitoring or oversight expenses incurred by the Government. In addition, notwithstanding

any other provisions of this decree, the Government reserves the right to seek modification to this Decree or institute a new action to seek additional remedial measures at the site, through an action to compel the defendants to perform remedial work or reimburse the Government for cleanup costs, if:

(1) at any time previously unknown or undetected conditions at the Site present or may present an imminent and substantial endangerment to the public health or welfare or the environment;

(2) the Agency receives new information, concerning the nature of the substances at the site or the appropriateness of the remedy described in Appendix I, which indicates that site conditions may present an imminent and substantial endangerment to the public health or welfare or the environment.

(3) [there occurs a change in one or more assumptions upon which the remedial program is based. (See discussion in part C above).]

The parties recognize the possibility that there may be brought or asserted against the Company suits or claims for contribution for liability for covered matters by persons or entities that have not entered into this settlement that might, if successful, obligate the Company to pay amounts toward covered matters in addition to those recognized in this Decree. It is the expressed intention of the parties that the Company not be required to pay amounts in contribution for covered matters or be required to remain as parties in any suit or claim for contribution for covered matters. It is also agreed that the Government shall be under no obligation to assist the Company in any way in defending against such suits for contribution.

The parties represent that this Decree was negotiated in good faith and that the Company's undertakings at the Site represent a fair and equitable assumption of the Company's alleged responsibilities for covered matters considering, among other factors, the fact that it is in the best interest of the Government

to encourage equitable settlements without burdensome litigation. The parties agree that federal law should govern questions of contribution among parties that may be adjudicated to be liable jointly or severally for covered matters. The parties agree that, in determining the appropriate federal rule of decision to establish the effect of this Decree on possible rights of contribution, a court should adopt the principle set forth in Section 4 of the Uniform Contribution Among Tortfeasors Act.

II. Site Access

It is essential that EPA have access to the site in order to observe any work taking place and monitor compliance with the terms of the decree. Language granting access should provide access during the effective period of the decree and describe the scope of the inspector's powers.

A sample site access clause is:

> During the effective period of this decree, EPA or its representatives, including contractors, shall have access at all times to the Site and all property owned or controlled by the defendant for purposes of conducting any activity authorized by CERCLA, including but not limited to:
>
> A. Monitoring the progress of activities taking place;
>
> B. Verifying any data or information submitted to EPA;
>
> C. Conducting investigations relating to contamination at or near the site;
>
> D. Obtaining samples at the site; and
>
> E. Inspecting and copying records, operating logs, contracts, or other documents required to assess the defendant's compliance with the Decree.

> In addition, the defendant will not object to EPA's obtaining, for the above purpose, access to any establishment or place owned or operated by any third party under contract with the defendant. Nothing herein limits or otherwise affects any right of entry held by EPA pursuant to applicable laws, regulations, or permits.

Where it is necessary for EPA to have access to the property of a defendant for a long period of time, an easement over the property may be desirable. The easement should run with the land and be recorded to place all future purchasers on notice.

It is important that access considerations be taken into account at the beginning of a lawsuit in order that all appropriate parties be brought under the court's jurisdiction. The government may often want to name an "innocent" landowner as a defendant solely for the purpose of facilitating access to his or her property to conduct response activities.

## III. Authority of the Signatories

Obviously it is important that persons signing a settlement agreement have authority to sign for and bind their principals. Sample language to provide for this is:

> Each of the signatories to this Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to legally bind the party to the Decree so represented by him or her.

Where there is any doubt regarding the commitment of the principals to the decree, or in cases where substantial sums are at stake, the government, in an abundance of caution, may wish to require that the principals themselves be signatories to the decree.

## IV. Insurance/Financial Responsibility

A. Insurance. Where the cleanup is being conducted by a responsible party, the party should be required to protect both itself and EPA from liability, by purchasing insurance or through another financial mechanism, from injuries to third parties due to acts or omissions of the party conducting the work. For example:

> The Company shall purchase and maintain in force insurance policies in the maximum amount available, which shall protect the United

States and the public against any and all liability arising out of the Company's and its contractors' and other agents' acts or omissions in performance of the work. Prior to commencement of work at the Site, the Company shall provide EPA with a certificate of insurance and a copy of the insurance policy for EPA's approval.

B. Financial Responsibility. In addition to liability insurance, it is important to have assurance that the party conducting the work will have the financial capability to complete the work. This can be accomplished by several means:

(1) Performance bond;

(2) Letter of credit;

(3) Guarantee by a third party; or

(4) The party conducting the work can present the Agency with internal financial information sufficient to satisfy the Agency that the party has enough assets to make it unnecessary to require additional assurances. If this method of financial responsibility is chosen and if the term of compliance within the Decree is greater than one year, then the Decree should provide for the party to annually submit internal financial information. If the Agency then determines the financial assurances to be inadequate, the Decree should provide that the party can be required to obtain a bond or one of the other financial instruments listed above.

A performance bond by a reputable company is generally the preferred type of assurance. The bond should assure that the work will be completed regardless of remaining cost. The latter two mechanisms require a detailed examination of the financial status of the party doing the work and the Guarantor. No matter which financial instrument is used, EPA should be authorized in the Decree to approve such instrument before it is incorporated into the agreement.

## V. Establishment of a Trust Fund

Frequently in multiple-party generator cases, the generators will want to select a contractor to clean up the site. If the contractor is a party to the litigation, the consent decree may make the contractor expressly responsible for the cleanup and the generators responsible for paying for the cleanup. However, in order to assure completion of the work, the generators should also remain liable until completion. The funds to pay for the cleanup are collected in advance from

the generators. The most commonly used mechanism for accomplishing this is the establishment of a trust fund or escrow account for paying the contractor. The trust fund or the account can be administered by a State or other public entity or a bank or similar entity experienced in administering trust funds. Neither EPA nor other Federal agencies should administer the fund. However, the Decree should provide that EPA must approve the form of the Trust or escrow agreement. The consent decree should specify how the fund will be created, how much money is to be deposited into the fund, and how disbursements will be made from the fund. The fund account should earn interest.

Disbursements are usually linked to completion of certain milestones required by the decree. Agency approval may be required for each disbursement. The final payment should not be made until the contractor has certified, and the Agency has confirmed, that all work to be paid for by the fund has been completed. It may also be desirable to establish a schedule of payments from the fund to assure that the money remaining in the fund is sufficient to pay for completion of the cleanup should the contractor default. The Decree should provide that EPA does not guarantee the sufficiency of the fund. A sample trust fund clause is:

> Within three days after the entry of this Decree, the Companies each shall pay to the site Trust Fund (hereinafter the "Trust Fund") established at the Bank the sum which is shown for that Company in Exhibit A hereto. Prior to establishment of the Trust Fund, the form of the trust agreement must be submitted to EPA for its approval. The Trustee shall deposit the money in an interest-bearing account and use the money in the Trust Fund to pay the Contractor to perform the Work described in Exhibit B hereto (hereinafter referred to as the "Work"), which Exhibit is hereby incorporated by reference and made a part of this Decree as though it were set forth verbatim. All money remaining in the Trust Fund after completion of the work, including interest earned, shall be deposited in the Hazardous Substances Response Trust Fund as recompense for response costs incurred by the United States not otherwise reimbursed under the terms of this Decree.
>
> EPA does not guarantee the monetary sufficiency of the Trust Fund established by this section.

A sample Schedule of Payment clause is:

> The funds will be disbursed in accordance with the following schedule.
>
> (a) Upon entry of this Decree the Contractor shall receive $100,000 from the Trust Fund.
>
> (b) Upon completion and approval by EPA of items 1, 2, and 3 of the Work, the Contractor shall receive $300,000 from the Trust Fund within no more than 20 days after receipt of the Trustees of an application for payment by the Contractor.
>
> (c) Upon completion and approval by EPA, of items 4, 5, 6, and 7 of the Work, the Contractor shall receive $500,000 from the Trust Fund within no more than 20 days after receipt by the Trustees of an application for payment by the Contractor.
>
> (d) Upon inspection of the Site and certification by the United States that the Contractor has completed the Work, the Contractor shall receive $500,000 from the Trust Fund within no more than 30 days after receipt by the Trustees of an application for payment by the Company. All remaining money in the Trust Fund, including earned interest, shall be deposited in the Hazardous Substances Response Trust Fund.

## VI. Restrictions on Conveyance

It is important that a subsequent purchaser of real property is notified that the site is the subject of a consent decree, and that he may be required to fulfill the terms therein. There are several methods of providing such notice:

1. Depending upon the State, one may notify a subsequent purchaser by recording or filing a copy of the consent decree with the County Recorder (Registry of Deeds) or Clerk of Courts, so that a title search would reveal the existence of the decree. Individual State law will have to be considered as to the proper method of recordation.

2. The decree may require that the grantor notify the plaintiff, prior to the transfer of title, of the name of the grantee and, subject to EPA approval, what specific requirements of the consent decree will be performed by the grantee.

3. The grantor may be required to include notification in the conveyance (deed) that the property is subject to the terms of the consent decree, and may also be required to describe in the conveyance the prior use of the site, (e.g., use as a hazardous waste disposal facility).

The major concern in fashioning any type of language is to allow for free alienation. Language such as the following should achieve our objectives:

> Within thirty days of approval by the Court of this Decree, defendant shall record a copy of this Decree with the Recorder's Office, _____ County, State of _____.
>
> The site as described herein may be freely alienated provided that at least sixty days prior to the date of such alienation defendant notifies plaintiff of such proposed alienation, the name of the grantee, and a description of defendant's obligations, if any, to be performed by such grantee. In the event of such alienation, all of defendant's obligations pursuant to this Decree shall continue to be met by defendant or, subject to EPA approval, by the grantee.
>
> Any deed, title or other instrument of conveyance shall contain a notice that the site is the subject of this Decree, setting forth the style of the case, case number, and Court having jurisdiction herein.

These provisions, of course, are only applicable to sites where the landowner is a named defendant. In cases involving non-landowner defendants, the government may wish to specify in the decree that sale of the site has no effect on the obligations of such defendants.

## VII. Priority of Claims Versus Non-Settling Parties

When a case is settled for less than the total amount necessary to complete a response action or to reimburse plaintiff fully for costs incurred, it may be done so with the anticipation that the non-settling parties will be available to reimburse the Agency for the remaining balance and/or complete the response action. To ensure that sufficient funds are available or to avoid delay in collecting on any judgments as to non-settling parties, a provision may be included in the consent decree providing that an Agency judgment obtained against non-settling parties takes priority over that obtained

by any of the settling parties. Sample priority of claims language is as follows:

> Defendant's claim against any other responsible party in this or any other proceeding for contribution or indemnification of all or a portion of the cost of its settlement herein shall be secondary to the United States' claim against such other responsible party as to any remaining balance for the response actions or other costs incurred for action taken at the Site.

VIII. Preclusion of Claims Against the Fund

Section 112 of CERCLA provides a procedure whereby a private party which has performed a CERCLA cleanup may assert claims to recover such costs from the Fund assuming the party has received "preauthorization" pursuant to the National Contingency Plan. See 40 CFR § 300.25(d). The right to recover such claims is subrogated to the United States by the payment of such a claim.

In multiple party consent decrees, it is important to include a provision prohibiting future claims against the Fund by the responsible parties, unless the responsible parties are explicitly preauthorized to bring a claim as part of the settlement.*/ Such a provision is particularly important in cases where defendants may later allege that the percentage of the total remedial costs that they contributed to the settlement is disproportionate to the extent that they contributed to the problem at the site.

The language should be extremely broad and unequivocal. An example of such a provision is provided below:

> In consideration of the entry of this Consent Decree, defendants agree not to make any claims pursuant to Section 112 of CERCLA, 42 U.S.C. Section 9612, or any other provision of law directly or indirectly against the Hazardous Substance Response Trust Fund established by CERCLA or other claims against the United States

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*/ As EPA policy on the issue of combining private party cleanup with Fund expenditures evolves, there may arise situations where a claim against the Fund would be permissible. The language above should be followed pending further guidance on circumstances where exceptions might be permitted. In addition, statutory amendments to CERCLA that would obviate the need for this provision are currently under consideration by Congress.

> for expenses related to this case and this Consent Decree. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a CERCLA claim within the meaning of 40 CFR § 300.25(d).

Consent decrees with similar provisions include the Petro Processors, Bluff Road, Chem-Dyne, and Seymour decrees. In cases involving just one responsible party, such a provision should also be included since there is always some doubt concerning whether there may be other, perhaps unknown at the time, responsible parties.

This provision should be relatively non-controversial because any defendant willing to enter a consent decree presumably is willing to pay the portion of the cleanup specified in the decree.

## IX. Joint Responsibility Among Responsible Parties for Implementing the Decree

The Agency has consistently interpreted CERCLA as authorizing imposition of joint and several liability on all responsible parties. The predominant case law accepts that interpretation. It is important to preserve this principle in multiple defendant cases. Also, from a practical point of view, it is necessary to have the consent decree recognize joint responsibility in order to prevent the insolvency or other problems of one defendant from delaying the entire cleanup.

In order to provide assurance that cleanup will proceed on schedule, consent decrees should include a joint responsibility provision, such as the example set forth below:

> The Industry Defendants shall implement the remedial actions for both sites as provided in this Decree, in accordance with the schedules established in the various plans and in this Decree.
>
> In the event of the insolvency or other inability of any one or more Industry Defendants to implement the activities required by this Decree, the remaining Industry Defendants agree to complete all such activities and actions required by this Decree.

If there is only one responsible party, then particular care must be taken in drafting the Guarantee, Performance/ Completion Bond or Financial Responsibility provisions, to

provide assurance that there will be adequate resources to complete implementation of the remedial measures.

## X. Public Access to Documents

Many consent decrees require an elaborate investigation and study phase, similar to a CERCLA RI/FS, before some or all of the final remedial actions are determined. In all cases, many engineering details, protocols, and specifications are not determined until the consent decree is implemented. Substantial amounts of technical information and detail will be determined during the implementation of the consent decree under EPA's oversight.

The public is often intensely interested in the progress of such remedial actions. When EPA is performing the remedial action pursuant to CERCLA, the Agency makes information and draft proposals available through a community relations plan.

It is EPA policy to implement at all sites, regardless of whether the cleanup is performed by the government or the responsible party, a community relations plan which encourages public participation in the cleanup process. This policy, however, must be balanced against the need for confidentiality in enforcement actions. Since the implementation of a consent decree may give rise to disputes with the responsible party which end up before the court, implementation of the consent decree is still litigation-related.

In general, consent decrees should contain provisions that explicitly require that all technical data and factual information generated and submitted by the defendant are available for public inspection unless they are requested to be made confidential by the defendant pursuant to EPA regulations (see 40 C.F.R. Part 2). Where possible, specific and general categories of data and information that the defendant must make public should be specified. Because of the need to protect open and frank interagency communication, this provision should not apply to Agency information or documents. However, raw technical data generated by EPA or the State, if applicable, should be made public nonetheless after all applicable quality assurance/quality control protocols have been complied with.

After a consent decree is signed, EPA and the defendants may nonetheless continue negotiations over matters left unresolved by the decree, (e.g., remedial proposals which must await completion of additional sampling and analysis). In some cases, EPA and the defendants might be urged to make public all draft remedial proposals leading up to settlement. To avoid this unproductive and impractical procedure, EPA should include explicit language in the consent decree exempting negotiation documents from the public disclosure provision.

Also, EPA should consider clearly articulating from the outset of the community relations program that "negotiation" documents are not official submissions within the meaning of the consent decree clause.

An example of such a provision is provided below.

> All data, factual information, and documents submitted by the Defendant to EPA and the State pursuant to this Consent Decree shall be subject to public inspection unless identified as confidential by Defendant in conformance with 40 C.F.R. Part 2 or applicable State law or otherwise exempted by the terms of this Consent Decree. The data, factual information and documents so identified as confidential will be disclosed only in accordance with EPA regulations or applicable State law. The Defendant shall not assert confidentiality regarding any hydrogeological or chemical data, data submitted in support of a remedial proposal or any other scientific or engineering tests or data. This provision does not apply to documents exchanged by the parties relating to issues of liability or the determination what additional remedies, if any, other than those specifically required by the terms of this Decree, may be necessary to remedy conditions at the site.

## XI. Dispute Resolution Provisions

Hazardous waste consent decrees may require one or several parties to take samples, perform studies, and implement other remedial steps about which there may arise differences of opinion whether the obligation was satisfied. Such differences of opinion may also arise over whether or not a force majeure event has occurred, or whether the defendant has incurred liability to pay stipulated penalties under the decree. As noted in the general guidance on consent decrees, it is useful for the decree to specify a mechanism or mechanisms to resolve such disputes.

Such mechanisms may include negotiations among the parties as well as judicial resolution. The sample language below provides for both, although the parties would probably discuss the issue and engage in limited negotiations even if the decree did not expressly mention such a mechanism.

Particularly where the dispute concerns the implementation of remedial work, it is important to resolve it quickly. Some disputes may be more quickly resolved by discussion and

negotiation among the parties rather than a judicial hearing; however, it is important not to allow negotiations to consume too much time. Therefore, the government should not hesitate to seek judicial resolution of disputes which the parties cannot readily resolve among themselves.

Where possible, it is helpful to minimize the drain on Agency resources by placing on the defendant the burden to demonstrate that its proposal is most consistent with the purposes of the decree. An acceptable sample provision follows:

DISPUTE RESOLUTION

> The parties recognize that a dispute may arise among defendant, EPA and the State regarding plans, proposals or implementation schedules required to be submitted by defendant pursuant to the terms and provisions of this Consent Decree, or regarding whether a force majeure event, as defined in paragraph ___ of this Decree, has occurred, or whether defendants have incurred liability to pay stipulated penalties under paragraph ____. If such a dispute arises, the parties will endeavor to settle it by good faith negotiations among themselves. If the parties cannot resolve the issue within a reasonable time, not to exceed thirty calendar days, then any party may file a petition with the Court setting forth the matter in dispute. The filing of a petition asking the court to resolve a dispute shall not extend or postpone defendant's obligations under this decree with respect to the disputed issue.
>
> In the event of a dispute between defendant and EPA or the State, defendant shall have the burden of: (1) showing that its proposal is more appropriate than the proposal of EPA or the State to fulfill the terms, conditions, requirements and goals of this Decree, and (2) demonstrating that its proposal is consistent with the National Contingency Plan; will abate hazards at the site; and will protect public health, welfare, and the environment from the release or threat of release of hazardous substances at the site. If the dispute concerns an issue of science, technology, or public policy within the areas of EPA's expertise, the Court shall adopt the position (if any) proposed by EPA, unless the Court finds that position to be arbitrary and capricious.

XII. Stipulated Penalties

Hazardous waste decrees which establish obligations for defendants to complete in the future should contain stipulated penalty provisions to assure that the defendant will comply with its obligations and to minimize disputes over the appropriate sanction for failures to comply. Such obligations will typically include the implementation of remedial work (including construction requirements), and reporting and monitoring requirements.

The purpose of a stipulated penalty clause is to deter potential violations of the decree by associating with each violation the immediate obligation to pay a large enough penalty to make compliance more attractive than violation. However, even payment of a stipulated penalty should not deprive the government (or the court) of other remedies, including injunctive relief, and every stipulated penalty provision should contain a clause to this effect. Stipulated penalties should never be considered as setting a maximum penalty exposure, subject to negotiation downward.

The authority of the district court to impose monetary penalties or fines for prospective violations of consent decrees flows not only from the civil penalty authorities of the environmental statutes (e.g., RCRA §§ 3008, 7003(b); CERCLA § 106(b)), but also from the court's civil contempt power--its independent statutory authority to punish violation of its lawful orders by fine or imprisonment. 18 U.S.C. § 401. When fines under § 401 are prospective, applying only to future violations, they are considered "coercive," intended to give the defendant an incentive to comply with the court's order. Prospective fines under § 401 are not subject to the monetary limits in the penalty provisions of other statutes.

Stipulated penalties should be large enough to provide a real incentive to the defendant to fulfill its obligations on time, considering the financial strength of the defendant, any economic saving from delaying compliance, and any harm or risk of harm to public health or the environment from delaying compliance. (See Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc., 673 F.2d 53 (2d Cir. 1982), cert. denied 103 S.Ct. 73.) At the same time, the magnitude of stipulated penalties should not be so great that the defendant prefers to allow the government to perform remedial work with Superfund money, rather than perform work itself.

Depending on the facts of the case, it may be appropriate to: a) specify all numbered paragraphs the violation of which will be penalized; b) establish a schedule of per diem penalties which increases with the duration or extent of the violation;

or c) establish higher penalty amounts for more important violations.

Stipulated penalties may be divided between the United States and a State as co-plaintiffs, provided that: (1) the State has taken an active part in the litigation, including the seeking of stipulated penalties, and (2) State law provides independent authority for the State to obtain civil penalties.

The following sample language demonstrates escalated stipulated penalties, and a division of stipulated penalties between the United States and a State.

STIPULATED PENALTIES

(A) Unless excused by the provisions of paragraph [force majeure clause], the Defendant shall pay the following stipulated penalties for any failure to comply with time requirements of this Consent Decree, including any implementation schedules submitted by Defendant and approved by EPA/State or this Court:

| Period of Failure to Comply | Penalty Per Violation Per Day |
|---|---|
| 1st through 14th day | $1,500 |
| 15th through 44th day | $5,000 |
| 45th day and beyond | $10,000 |

(B) Stipulated penalties under this paragraph shall be paid by two certified checks of equal amounts with one-half of the daily penalty payable to the "Treasurer of the the United States" and the other one-half payable to the "Arkansas Department of Pollution Control and Ecology."

(C) The stipulated penalties set forth above shall be in addition to any other remedies or sanctions which may be available to EPA/State by reason of Defendant's failure to comply with the requirements of this Consent Decree.

(D) If the parties disagree whether Defendant has violated a provision of this decree for which a stipulated penalty is due, the Defendant may petition the Court under [dispute resolution paragraph]. Defendant must file any such petition within 30 days of receiving written demand for payment from the Plaintiff.

## XIII. Admissibility of Data

In order to avoid disputes over the integrity of sample results or other data in the event that the parties disagree over how to implement the consent decree, the decree should provide that verified data is admissible in evidence.

A model clause is:

> The Defendants waive any evidentiary objection to the admissibility into evidence of data gathered, generated, or evaluated pursuant to this decree that has been verified by the quality control/quality assurance procedures contained in part _____. However, a Defendant may object to a specific item of evidence if the objecting party demonstrates that such item of evidence was not gathered or generated in accordance with the sampling and analytical procedures established pursuant to the site Work Plan.

The Decree should provide that EPA must approve sampling and analytical procedures. Additionally, it is necessary for there to be a careful oversight program.

## DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.