INTERIM GUIDELINES FOR PREPARING NONBINDING PRELIMINARY ALLOCATIONS OF RESPONSIBILITY

I. INTRODUCTION

Section 122(e)(3) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, which amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 et seq., requires the Environmental Protection Agency (EPA) to develop guidelines for preparing nonbinding preliminary allocations of responsibility (NBARs). As defined in section 122(e)(3)(A), an NBAR is an allocation by EPA among potentially responsible parties (PRPs) of percentages of total response costs at a facility. SARA authorizes EPA to provide NBARs at its discretion. NBARs are a tool EPA may use in appropriate cases to promote remedial settlements.

NBARs will allocate 100 percent of response costs among PRPs. The discretion to prepare an NBAR does not change the goal of the interim CERCLA settlement policy, published at 50 Federal Register 5034 (February 5, 1985), to achieve 100 percent of cleanup or costs in settlement.

In preparing an NBAR, EPA may consider such factors as volume, toxicity, and mobility of hazardous substances contributed to the site by PRPs, and other settlement criteria included in the interim settlement policy (50 Fed. Reg. 5034, 5037-5038). The settlement criteria include strength of evidence tracing the wastes at a site to PRPs, ability of PRPs to pay, litigative risks in proceeding to trial, public interest considerations, precedential value, value of obtaining a present sum certain, inequities and aggravating factors, and nature of the case that remains after settlement.

An NBAR is not binding on the government or PRPs; it cannot be admitted as evidence or reviewed in any judicial proceeding, including citizen suits. An NBAR is preliminary in the sense that PRPs are free to adjust the percentages allocated by EPA among themselves.

Should EPA decide to prepare an NBAR, it will normally be prepared during the remedial investigation and feasibility study (RI/FS), and provided to PRPs as soon as practicable, but not later than completion of the RI/FS for the site. The NBAR process will normally be used only in cases where the discretionary special notice

procedures of section 122(e) are invoked.

Following presentation of an NBAR to PRPs, PRPs have an opportunity to offer to undertake or finance cleanup. EPA need consider only substantial offers. A substantial offer is defined in part IV of these guidelines. EPA must provide a written explanation to PRPs if it rejects a substantial offer based on an NBAR. Under section 122(e)(3)(E), the decision to reject a substantial offer based on an NBAR is not subject to judicial review.

Section 122(e)(3)(D) states that the costs incurred by EPA in preparing an NBAR shall be reimbursed by PRPs whose offer is accepted. If a settlement offer is not accepted, NBAR preparation costs are considered response costs under SARA.

II. WHEN TO USE THE NBAR

The NBAR is meant to promote settlement and, thus, reduce transaction costs. Generally, EPA will consider NBAR preparation when it appears that an NBAR may help to promote settlement. EPA will give particular consideration to preparing an NBAR whenever a significant percentage of PRPs at a site request one. What constitutes a significant percentage is a case-specific determination. Regions should note the existence of the NBAR process in all pre-RI/FS notice letters, and indicate its potential availability if requested by a significant percentage of PRPs within 30 days of receipt of the notice.

There are certain situations where an NBAR may be particularly appropriate. For example, in a case that involves federal agencies as PRPs, preparing an NBAR in order to ascertain the percentage of federal agency responsibility is likely to promote settlement even though a significant percentage of PRPs did not request it. Similarly, if a state or municipality is involved at a site as a PRP, NBAR preparation may be deemed likely to promote settlement. Or, it might be appropriate to prepare an NBAR in a case with a large number of PRPs including, perhaps, a sizeable de minimis contingent. An NBAR may help coalesce a previously unorganized PRP group into a steering committee, and thus promote settlement.

There are also situations where an NBAR should probably not be prepared. For example, it may be clear very early in the process that there is insufficient information available on which to base an NBAR, or that the number of PRPs not de minimis is so small

that an NBAR would not expedite settlement. In some cases it may seem that an equitable settlement can be more expeditiously or effectively achieved without use of NBAR procedures. There may also be cases where NBAR preparation is ruled out because an allocation for the site is already being prepared by or for PRPs.

Again, whether to prepare an NBAR at any particular site, including any state enforcement lead site, is a decision within EPA's discretion and will depend on the particular circumstances of each case. The decision whether to prepare an NBAR at any particular site rests with the Regional Administrator.

If EPA decides to prepare an NBAR, it will notify PRPs of that fact in writing as early as is feasible. An NBAR notification should specify that the decision to prepare an NBAR is discretionary and is contingent, at a minimum, upon the availability of sufficient data.

III. HOW TO PREPARE AN NBAR

The purpose of the NBAR is to promote expedited settlement, thus minimizing transaction costs; an NBAR must be conducted in a fair, efficient, and pragmatic manner. For simplicity and other practical reasons, the allocation process presented here is based primarily upon volume and the settlement criteria.

EPA considered and rejected models based on toxicity because of the complexity of their application and the lack of agreement among the scientific community about degrees of toxicity of specific hazardous substances and synergistic effects. Also, toxicity is usually causally related to the cost of cleanup for only a few substances (e.g., PCBs, dioxin).

Still, the allocation process presented here is not intended to be exclusive. There will, of course, be cases where other factors, such as toxicity or mobility, must take priority in the interests of fairness to the parties. If a Region prefers to use another allocation process, it should confer with the Director of the Office of Waste Programs Enforcement prior to such use.

Activities involved in conducting an NBAR fall into two major categories: information collection and assessment, and allocation.

Information Collection and Assessment

While aggressive information collection efforts occur in every case, additional information may be

necessary for NBAR purposes. Additional information on actual volume and specific wastes with respect to each PRP at an NBAR site may be required.

Section 122(e)(3)(B) of SARA authorizes EPA to subpoena witnesses and documents. Section 104(e) of CERCLA, as amended by SARA, authorizes EPA to obtain access to information about a person's ability to pay and about the nature and quantity of hazardous substances generated, treated, stored, or disposed of by that person. These authorities may be used to gather data for an NBAR.

Subpoena of witnesses, authorized by section 122 (e)(3)(B), may be used in some cases as part of the information collection process. Considerable case-specific judgment must be exercised about the extent to which the subpoena authority will be used due to its resource-intensive nature.

Information being collected must be reviewed by technical and legal staff as it is received so that pertinent information may be culled and gaps and inconsistencies identified. Collection and assessment efforts should be completed by the end of the RI, so that the allocation can be completed by the end of the FS.

On the basis of information collection and assessment efforts, EPA will determine the waste types and volumes for each PRP. This volumetric ranking is part of the information that must be provided with a pre-cleanup negotiation special notice letter.

The legislative history of section 122 states that the allocation itself should be made by federal employees. Consultants or states with cooperative agreements may assist in the information gathering and assessment phase of the allocation process. The allocation phase of an NBAR can be most effectively undertaken by the same technical and legal personnel who directed the information collection and assessment efforts.

Allocation

In most cases, waste at a site is commingled and therefore indivisible. In commingled waste cases, the first step in the allocation phase of an NBAR is to allocate 100 percent of responsibility among generators, based on the volume each contributed. The product of this step will often differ from the volumetric ranking provided with special notice letters because any waste that is attributable to unknown parties is allocated

to known parties in proportion to their volume.

In a limited number of cases, it is possible to link particular remedial activities with specific waste types and volumes. For example, in the easy but rare case of divisible waste, the cost of removing barrels from a warehouse on a larger site can be separately attributed to the contributors of the barrels. Or, the cost of incinerating soil contaminated solely by PCBs can be attributed to PCB contributors. Where it is possible to do so, waste types and volumes that necessitate particular remedial activities will be fully attributed to the appropriate contributors.

The second step in the allocation phase of the NBAR process involves adjustments based on consideration of the settlement criteria. Any percentage allocated to a defunct or impecunious party should be reallocated. Where appropriate, credit may be given for any PRP contributions to RI/FS and/or removal activities at the site.

In addition, percentages of responsibility should be allocated to financially viable owners, operators and transporters. How much to allocate to such parties is a case-specific decision based upon consideration of the settlement criteria.

In general, owner/operator culpability is a significant factor in determining the percentage of responsibility to be allocated. For example, a commercial owner and/or operator that managed waste badly should receive a higher allocation than a passive, noncommercial landowner that doesn't qualify as innocent under section 122(g)(1)(B) of SARA. The relative allocation among successive owners and/or operators may be determined, where all other circumstances are equal, by the relative length of time each owned and/or operated the site. Transporter allocations may be based on volume, taking into account appropriate considerations such as packaging and placement of waste at a site. Detailed guidance on allocations for transporters, owners, and operators may be prepared at a later date on the basis of experience under these interim guidelines.

Again, an NBAR will allocate 100 percent of response costs, because the goal is to achieve 100 percent of cleanup or costs in settlement.

IV. OFFERS BASED ON NBARS

Once the technical and legal personnel complete the

NBAR, the numerical results will be transmitted in writing to PRPs. EPA will not provide a detailed explanation for the results, due to the enforcement-sensitive nature of the decisions involved. EPA will provide a general explanation of the rationale used in preparing the NBAR. Data gathered in the information collection phase may be made available to PRPs.

EPA will provide the NBAR results to PRPs as early as possible. The sooner PRPs receive the results, the more time they have to organize among themselves and negotiate with EPA on remedy. A limited period should be provided for PRPs to digest the NBAR results before notice for cleanup negotiations is sent.

EPA will attempt to complete the NBAR before selection of a preferred remedy and public comment, or at least prior to the Record of Decision (ROD).

Special notice under section 122(e)(2)(A) of SARA will generally be provided prior to cleanup negotiations in cases where an NBAR is used. If within 60 days of special notice for cleanup negotiations, EPA receives no offer for settlement, it may proceed as usual with action under section 104 or 106 of CERCLA. If EPA receives an offer that is not a substantial/good faith proposal, it should so notify the PRPs before proceeding with action under section 104 or 106.

A good faith offer is an offer in writing in which PRPs make a showing of their qualifications and willingness to conduct or finance the major elements of the remedy. A substantial offer must meet three criteria. First, it must equal or exceed the cumulative allocated shares of those making the offer. Second, it must amount to a predominant portion of cleanup costs. Third, it must be acceptable to EPA in regard to all other terms and conditions, such as release provisions or dispute resolution mechanisms.

If EPA receives a substantial/good faith offer within 60 days of special notice for cleanup, EPA will provide an additional 60 days for negotiation. If an agreement for remedial action is reached, it must be embodied in a consent decree. The State should be kept apprised of negotiations if it chooses not to participate. Should negotiations for settlement based on an NBAR fail, a section 106 unilateral order or civil action may be used to initiate remedial action. Should EPA proceed with cleanup under section 104, the NBAR may still be useful in developing demand letters for a section 107 cost recovery action.

De minimis and mixed funding settlements, also authorized by section 122, may occur in combination with an NBAR. Whether EPA will accept a mixed funding or de minimis proposal at an NBAR site will depend on the results of additional analyses specifically designed to evaluate such proposals.

If EPA rejects a substantial/good faith offer, it must provide a written explanation to the PRPs, after consultation with DOJ and review at EPA Headquarters. In general, rejection of a substantial offer that is sufficient in amount is likely to be based on failure to reach agreement on terms and conditions. After a written explanation for rejection of a substantial/good faith offer is sent, EPA may proceed under section 104 or 106.

ENVIRONMENTAL PROTECTION AGENCY

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Hazardous Waste Enforcement

AGENCY: Environmental Protection Agency

ACTION: Request for Public Comment

SUMMARY: Section 122(e)(3) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), which amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), requires the Environmental Protection Agency (EPA) to develop guidelines for preparing nonbinding preliminary allocations of responsibility (NBARs). EPA is publishing today the Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility to announce that the guidelines are in effect and to solicit public comment on them.

DATE: Comments must be provided on or before [60 days from date of publication].

ADDRESS: Comments should be addressed to Debbie Wood, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, WH-527, 401 M St., S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Debbie Wood, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, WH-527, 401 M St., S.W., Washington, D.C. 20460, (202) 382-3002.

SUPPLEMENTARY INFORMATION: As defined in section 122(e)(3)(A) of SARA, an NBAR is an allocation by EPA among potentially responsible parties (PRPs) of percentages of total response costs at a facility. The purpose of NBARs is to promote expedited settlement. NBARs are not binding on the government or PRPs; they cannot be admitted as evidence or reviewed in any judicial proceeding, including citizen suits. Whether to prepare an NBAR at any particular CERCLA site is a decision within EPA's discretion.

EPA will consider preparing an NBAR at a site if it appears that an NBAR may help to promote settlement. Still, NBARs will not be routine. In general, EPA's policy is that PRPs should work out among themselves questions of how much each will pay toward settlement at a site.

Comments may address the overall approach taken in the interim guidelines or focus on any aspect of it. EPA particularly solicits comment on appropriate factors to consider in determining percentage allocations for owners, operators, and transporters.

The policies and procedures set forth in the interim guidelines are guidance to EPA employees. The interim guidelines include enforcement policies and internal procedures that are not appropriate or necessary subjects for rulemaking. Thus, the guidelines do not constitute rulemaking by EPA and may not be relied on to create a substantive or procedural right or

benefit enforceable by any other person. EPA may, therefore, take action that is at variance with policies and procedures contained in this document.

EPA is publishing the interim guidelines to provide wide public distribution of information on this aspect of SARA implementation, and to gain the benefit of public comment. The interim guidelines follow.

Lee M. Thomas

Lee M. Thomas
Administrator

MAY 16 1987

Date