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

APR 21 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESI

MEMORANDUM

SUBJECT: RCRA Delisting Review Fee

TO: Sylvia K. Lowrance, Director
Office of Solid Waste

FROM: Michael Northridge, Attorney-Advisor
Office of Policy, Planning and Information

THRU: Michael Gruber, Director
Office of Policy, Planning and Information

Attached is an analysis of the feasibility of charging a fee for Agency review of RCRA delisting petitions. As you may know, the Agency-wide Task Force on user fees recommended that such an analysis be conducted. The Administrator accepted the Task Force's recommendations and subsequently directed OSWER to evaluate the possibility of such a fee.

The analysis concludes that the feasibility of a delisting fee depends on two factors: (1) the effect that the relisting program will have on the delisting program, and (2) the effect that the fee itself might have on the percentage of petition reviews that include a facility visit. Direction from your office regarding these two factors would help us to make a definitive determination. Alternatively, the analysis could simply be forwarded as currently drafted to the Assistant Administrator and Deputy Assistant Administrator for their consideration.

Below I have summarized some of the highlights of the analysis. The Agency-wide Task Force established six criteria for program offices such as OSW to use in reviewing possible fees. Thus, the analysis is organized according to these six criteria: legislative; administrative; financial; acceptance by States; economic; and environmental.

Legislative - the Agency clearly has the legal authority (and perhaps even an obligation) under the Independent Offices Appropriations Act to charge a delisting petition review fee. It does not, however, have legal authority to retain the fee receipts. At present, any receipts would be deposited into a special EPA fund within the U.S. Treasury. EPA could not use

the funds, however, until Congress had authorized such disbursement in a subsequent appropriation. Note that OMB, which strongly supports user fees, would be likely to accommodate the Agency on any budgetary restraints we might experience as a result of delays in receiving these funds.

Administrative - some difficulties exist but none seem insurmountable. A two-tiered fee, consisting of an initial base fee plus an additional hourly fee for review of incomplete petitions, would provide an incentive for well-prepared petitions. Key details surrounding the exact design would need to be resolved during the development of a regulation establishing the fee. OSW's experience with Superfund timesheets should prove useful in designing procedures for documenting time spent on petitions.

Financial - the fee would raise about $1 million annually. This figure could increase significantly, up to $2.6 million, if EPA included a facility visit as part of every petition review. On the other hand, the figure would be much lower if the relisting program drastically reduces the future number of delisting petitions. (The estimates above assume that relisting will cut the number of future delisting petitions in half). Administrative costs are estimated to range from $23,000 to $80,000, which is far less than gross revenue.

Acceptance by States - the States strongly oppose any RCRA fee, fearing that EPA will preempt them from charging their own RCRA fees. The analysis seriously questions this position, noting that the Agency only has legal authority to charge fees for services that it provides. In other words, EPA is not authorized to charge fees for services provided by others (e.g., the States). Therefore, we cannot preempt a fee that a State is charging a firm for a service that the State provides.

Economic - the fee, which would average roughly $15,000, would probably not have a significant economic impact. A grandfathering provision would minimize any inequitable results.

Environmental - the fee would probably have a very small positive impact on the environment.

Finally, I am not aware of how familiar you are with the work of the RCRA user fee study group to date. I would be happy to brief you on the subject if you so desire.

Attachment

cc: Bruce Weddle
Study group on RCRA delisting petition review fee
- Terry Grogan, PSPD/OSW
- Scott Maid, PSPD/OSW
- Terry Grist, PSPD/OSW
- Suzanne Rudzinski, PSPD/OSW
- Alex Wolfe, PSPD/OSW
- Wayne Anthofer, OPMS/OSW
- Catherine Smith, OPMS/OSW
- Tina Kaneen, OGC
- David Rowson, OARM
- Bryan Dixon, Texas
- Ron Nelson, Maryland

FEASIBILITY OF USER FEES

FOR RCRA DELISTING PETITIONS

U.S. Environmental Protection Agency
Office of Solid Waste
Office of Policy, Planning & Information
Policy Analysis Staff

April 21, 1988

DRAFT: Do Not Quote or Cite

ACKNOWLEDGEMENTS

The OSWER study group on RCRA user fees is chaired by Michael Northridge, OPPI/OSW. The principal study group members for the delisting fee analysis are listed below:

- Debora Martin, formerly OPPI/OSW
- Myles Morse, formerly PSPD/OSW
- Scott Maid, PSPD/OSW
- Suzanne Rudzinski, PSPD/OSW
- Jim Michael, PSPD/OSW
- Wayne Anthofer, OPMS/OSW
- Catherine Smith, OPMS/OSW
- Yvonne Garbe, formerly CAD/OSW
- Carolyn Szumal, formerly OARM
- David Rowson, OARM
- Bryan Dixon, Texas
- Ron Nelson, Maryland

The group's membership has recently changed. Most notably, Terry Grogan recently became acting chief of the delisting section, thus replacing Myles Morse. Next, Alex Wolfe is now acting chief of PSPD's implementation section, replacing Jim Michael. Finally, Terry Grist, who has recently joined the delisting section, has been added to the group.

ICF, Inc. conducted some of the preliminary analysis, including writing several initial drafts of this paper. The study group would like to thank Rena Kieval, the ICF project officer, plus Irene Witt, Karina Thomas, Meg Widmer and especially David Lennett for their efforts. In addition, the delisting program was assisted in its review of the draft analysis by its contractors, including Terry Grist, then of SAIC, and Howard Finkel/ICF.

The author would like to acknowledge the assistance of several individuals who have made significant contributions to the study group. In particular, special gratitude is expressed to Marcia Williams, former director of OSW, for her thorough review of the draft analysis; Lillian Bagus and George Garland, PSPD/OSW, for their review of the paper's discussion of State authorization; Robert Scarberry, CAD/OSW, for his review of the paper's discussion of generic petitions and the relisting program; Tom Gillis, OWPE, for his help in developing the economic affordability analysis; Joe Smith, Booz-Allen and Michael Burns, OPPI/OSW for their help in developing the revenue estimate analysis; Robert Brennis, OPTS and Richard Nalesnik, ORD for their help in crafting the discussion of previous Agency attempts to establish a fee; Kennan Garvey, formerly of OPMS/OSW, for his help in educating the study group on OSW's previous efforts in the area of fees; Ben Smith and Doreen

Sterling, CAD/OSW, for their help in developing the analysis regarding the relisting program; Chris Prins, OPPE, for his contribution of materials regarding other federal fees; and Phyllis Garnett, Arkansas, for her help in securing State representation for the study group.

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The following EPA personnel participated in analysis of fees for RCRA exceptions/waivers other than delisting petitions (i.e., double liner waivers, surface impoundment retrofit waivers, land ban petitions): Dave Eberly, Chris Rhyne, Terry Grogan, PSPD/OSW; Steve Weil, CAD/OSW; Gary Jonesi, formerly CAD/OSW; James Bachmaier, Walter DeRieux, Les Otte, Ken Skahn, Paul Cassidy, Lauris Davies, WMD/OSW.

FEASIBILITY OF USER FEES FOR RCRA DELISTING PETITIONS

Introduction

The EPA Task Force on User Fees proposed 11 fees to the Administrator for extensive study in its Draft White Paper of April 1986. In the RCRA program specifically, the Task Force recommended further study of the following RCRA waivers/exceptions:

Delisting petitions;
Land disposal ban petitions;
Double liner waivers; and
Surface impoundment retrofit waivers.

In response to the Administrator's directions, the Office of Solid Waste and Emergency Response (OSWER) established a study group within the Office of Solid Waste (OSW) to examine the feasibility of user fees for these four categories of RCRA waivers/exceptions. The task of the OSWER study group was to apply the criteria established by the Agency Task Force in evaluating the candidate waivers/exceptions fees and assess potential problems in implementing user fees in the RCRA program. Appendix A contains a list of detailed questions for each criterion.

This paper evaluates the feasibility of imposing a user fee specifically for the review of delisting petitions. The paper is divided into eight sections as follows. The first section presents background discussion on the delisting petition program, including a description of how EPA lists wastes as hazardous, the rationale for the delisting procedure, a summary of the delisting petition requirements, and the effect that the relisting initiative may have on the delisting program in the future. The next six sections discuss the feasibility of user fees for delisting petitions according to the six criteria developed by the Agency Task Force. Section Two examines the legal issues concerning the creation of a delisting fee; Section Three presents administrative issues in designing and implementing the fee; Section Four analyzes the financial feasibility of the fee; Section Five assesses environmental impacts from imposing such a fee; Section Six discusses issues concerning the fee's acceptability to States; and Section Seven discusses the economic impacts of the fee. The final section presents a summary of delisting fee issues and conclusions regarding such a fee's feasibility.

1. Background on the Delisting Program

1.1 Current Program for Delisting

In Part 261 of the hazardous waste regulations, the Agency lists approximately 90 industrial waste streams as hazardous and approximately 360 commercial chemical products as hazardous when they are discarded or intended for discard. These wastes are listed because they typically and frequently: (1) exhibit one or more of the characteristics of hazardous wastes; and/or (2) contain certain specific constituents that are known to be toxic or otherwise hazardous at levels restricted by the regulations.

The process by which EPA lists wastes as hazardous forms the basis for the delisting procedure. EPA lists a waste as hazardous if it meets at least one of the following three criteria:

1. It exhibits any of four hazardous waste characteristics: ignitability, corrosivity, reactivity, or extraction procedure (EP) toxicity; or

2. It has been found to be fatal to humans or to cause or contribute to serious or incapacitating irreversible illness; or

3. It contains one of the hazardous constituents listed in Appendix VIII of Part 261 and the Administrator concludes that the waste can pose a substantial hazard if improperly managed or disposed.

At a particular facility, however, a listed waste may not be hazardous. This situation would occur, for example, if a facility uses different processes or raw materials than were assumed when the regulations were written. In that case, a listed waste may not actually be hazardous if the waste: (1) does not exhibit the characteristics or contain the constituents for which it was originally listed[1]; (2) contains those constituents but at relatively low concentrations; or (3) contains the listed constituents, but in an immobile form.

The generator can submit a petition to delist its waste under 40 CFR sections 260.20 and 260.22. Since 1981, generators from various industries have submitted to the Agency about 735

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[1] Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), petitioners were required to demonstrate only that the waste was not hazardous based on the criteria used in listing it. HSWA revisions require the Agency to also consider other factors than those for which the waste was listed.

delisting petitions under this authority. The industries most heavily represented among the petitioners are electroplating and metal finishing, oil refining, and multiple waste treating. Although the process for reviewing delisting petitions that are submitted from different generators is similar, the time and resources involved in reviewing each petition depends on the completeness of the supporting analytical data that the Agency requires (e.g., sampling results) and the scope of the petition.

As discussed later in Section 6.1, EPA has performed a majority of the delistings thus far, although States can be authorized to make delisting decisions in lieu of EPA. However, an authorized State's decision to delist a waste has no legal effect outside the State. Exhibit 1.1 presents a schematic representation of the current process used by EPA Headquarters to review delisting petitions submitted under §§ 260.20 and 260.22.[2] The process begins when petitions are received, logged in, and filed with the Public Docket and with the Assistance Branch of OSW.[3] A person from the delisting staff is assigned to review the petition and correspond with the petitioner. Frequently, several data gathering "loops" between the Agency and the petitioner are required in order to complete the petition. In a few cases, the Agency has visited the petitioner's site in order to verify the information submitted in the petition.[4] The Agency has found inaccurate or

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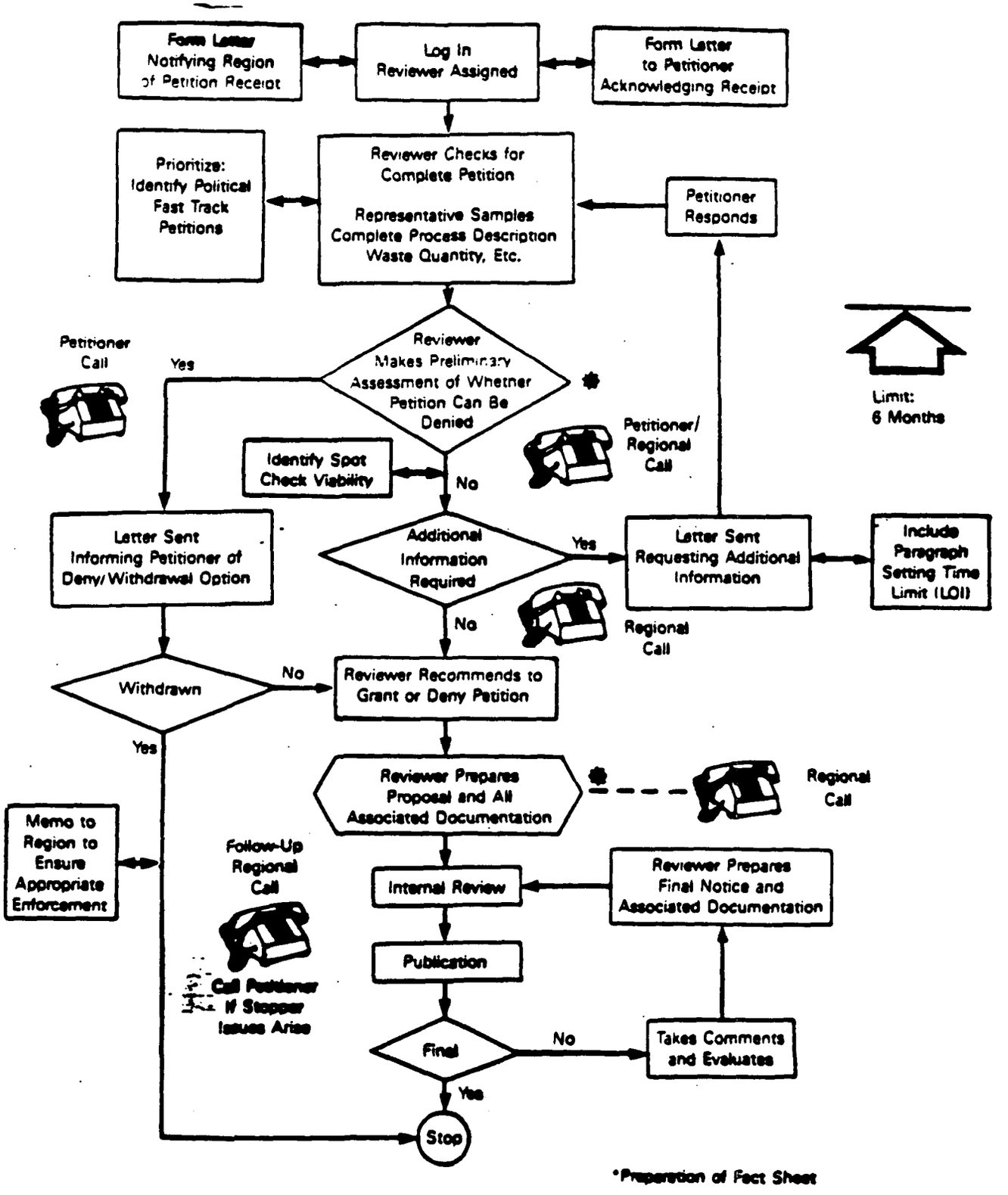
[2] This is a recently modified version of the schematic diagram from Petitions to Delist Hazardous Wastes, A Guidance Manual, U.S. EPA, OSW, April 1985.

[3] A proposal to integrate delisting and permitting procedures was published in the Federal Register last year (52 FR 20914, June 3, 1987). Under the proposal, a permit applicant could provide the Agency basic information on the waste to be treated and on hazardous constituents anticipated in the treated residue. As part of the permit conditions, EPA would set specific levels for each of the constituents identified. If the constituent levels in the treated wastes were below the permit levels, and if no additional constituents were identified, the waste would be considered nonhazardous. Note, however, that this provision, once promulgated, will only be automatically effective in unauthorized States. It will be effective in an authorized State only if that State decides to specifically adopt it. In other words, authorized States may choose to conduct a more stringent program and, hence, may decide to not allow integration of delisting with permitting.

[4] The Agency targets site visits where it suspects problems with the accuracy or completeness of a petition. As of September 1986, EPA visited 37 sites (approximately 6 percent) and had performed a complete sample analysis for 28. (Note: this is not a statistically valid sample.) At over 70 percent

Modified Petition Review Process



incomplete data during many of these visits. In light of this, the General Accounting Office (GAO) recently recommended that the Agency increase the number of site visits or implement other controls to ensure better information.[5] Limited resources prevent the Agency from increasing such site visits.

After a petition is judged to be complete, the Agency staffer completes his or her review and makes a tentative decision to grant or deny the petition. A draft Federal Register notice is sent to a delisting workgroup (unless the petitioner withdraws the petition based on a preliminary denial decision). The workgroup, consisting of representatives from OSW and other offices within EPA, evaluates the draft notice and responds with comments to OSW. The proposed and final Federal Register notices go through a sign-off loop from Section Chief to Office of the General Counsel to Office Director or Assistant Administrator for OSWER.

As of April 1988, 129 petitions were still pending final Agency decision. The petitions were at various stages of the review process, including review of technical information by the petition reviewer, workgroup review, preliminary decision to grant or deny petition, and Federal Register notification. Many of the outstanding petitions were incomplete and missing necessary sampling or analytical data. Other petitions were

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of these sites (20 of 28), EPA found problems such as the wastes or waste management practices differing from those described in the petition. "Hazardous Waste: EPA Has Made Limited Progress in Determining the Wastes to Be Regulated," GAO/RCED-87-27 (12/23/86)(hereinafter referred to as 12/86 GAO report).

[5] GAO does not elaborate on its reference to "other controls" that would ensure better petition data. During the development of this paper, Marcia Williams, then director of OSW, urged that steps other than site visits be explored. Analysis on different steps to improve the data depends on the nature of the problem with the data. For example, if the data is inaccurate because the wrong sampling method was used, then EPA could consider requiring the petitioner to use SW-846 test methods. [CAD, in fact, is beginning to develop a regulatory proposal requiring certain quality control procedures in SW-846 to be used.] If the inaccuracy is a result of the correct sampling method being conducted improperly, then EPA could consider requiring minimum qualifications regarding training for the employee who does the sampling. If the problem lies with dishonesty by petitioners, then EPA could consider requiring that sampling be done by an independent third party. Note that the alternatives to site visits might result in costs to the petitioner as large or greater than the cost imposed by a site visit fee. Thus, replacing site visits with other controls may not necessarily result in a reduction of petitioners' costs.

nearly complete.

Agency time and expense vary greatly from one petitioner to another since delisting petitions themselves vary in complexity and completeness. Inadequate petitions lengthen the review process and substantially increase the number of information exchanges between EPA personnel and petitioners. The general process for reviewing a delisting petition is the same, however, for all petitions in all industries. Note that review costs do not vary significantly once the petitions are complete.

1.2 Future Program for Delisting

Proposed changes in the listing program may dramatically affect the future of the delisting program. At present, the Agency is planning to amend the Subtitle C regulations so that a generator would no longer be automatically required to comply with the Subtitle C regulations for his listed waste. Instead, the Agency would specify exemption levels that will most likely resemble concentration limits for each waste listed. Only a generator whose waste exceeds these levels will be required to comply with the hazardous waste requirements for that waste.

This relisting program, as it is known, is currently in an early stage. The first regulatory proposal was sent by OSWER into the Agency's review process in December 1987. The final rule is scheduled to be promulgated within a year. Most of the other relistings would follow within one to four years.

The impact of the relisting program on the delisting program can be seen by analyzing three categories of wastes:

(1) wastes for which exemption levels have not been established;

(2) wastes which exceed the levels established by the relisting program; and

(3) wastes which are below the levels established by the relisting program.

First, a generator who believes that his waste is not hazardous but does not have an exemption level to use to prove his case, obviously can still submit a delisting petition. As noted above, the Agency expects to finalize the majority of relistings within a few years. For most wastes then, the potential for petitions is limited to a short, interim period (i.e., one to four years). For the remaining wastes (i.e., wastes for which levels will not be set for quite a while, if ever), the potential for petitions extends to the forseeable future.

Second, a generator who believes that his waste is not hazardous even though it contains hazardous constituents above the exemption levels will also still be able to submit a

delisting petition. Such a petition would obviously be futile if the delisting staff merely used the same criteria that were employed to set the exemption level in the first place. The delisting staff is currently considering various options in this area (e.g., whether to consider site-specific factors rather than generic ones). The current draft of OSWER's first relisting proposal specifically requests public comment on this issue.

Third, a generator whose waste is below the exemption level has no need to submit a delisting petition. By meeting the level set by the relisting program, his waste is already considered nonhazardous.[6] With this group then, the relisting program will likely result in a significant decrease in future delisting petitions.

The issue of how the Agency will implement the relisting program becomes relevant with this final group. OSWER has proposed a one-time notification for any generator wishing to take advantage of the relisting exemptions. This notification would primarily include information about the waste (e.g., description, quantity). Under this self-implementing approach, generators would not have to submit any additional information, such as their test data, for EPA review. If they did, then EPA could recover its review costs through a fee (i.e., sort of a "relisting petition" review fee).

In order to quantify the effect that the relisting program would have, one needs to determine how many generators will fall in this third group versus how many will belong to the first two groups. The greater the number of generators in the third group, the smaller the number of generators who potentially might submit delisting petitions, and vice versa. Although difficult to determine, it appears likely that a substantial number of generators will fall into this third group. In other words, it appears likely that the number of delisting petitions will decrease substantially in the near future due to the relisting program.

1.3 Generic Delisting Petitions

As noted above, petitions submitted under sections 260.20 and 260.22 are intended to exclude a waste produced at a particular facility. The Agency also occasionally receives

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[6] However, if relistings are not retrospective, such a generator may still need to submit a delisting petition. Final delistings are completely retrospective; accordingly, the delisted waste is considered to never have been hazardous. If relistings are not similarly retrospective, then generators may still be held accountable to hazardous waste standards for the period prior to the effective date of the relisting.

"generic" delisting petitions from trade associations or other interested parties. These petitions seek to exclude a certain waste but are not specifically tied to a particular facility. Such petitions are authorized under section 260.20, which broadly authorizes any petition to modify or revoke any provision in Parts 260 through 265 and 268. Some generic delisting petitions are handled by the Variance Section in the Permits and State Programs Division, while others are reviewed by the Listing Section in the Characterization and Assessment Division.

The process for reviewing generic petitions is similar to the review process for facility-specific petitions, except that a much broader range of data is required for the decision and different EPA staff are responsible for the review. Data required for a generic petition are not limited to the descriptive and sampling data from one facility, but must include representative samples from all handlers of the waste to be delisted. Due to the difficulty and cost of providing these data, generic petitions have typically been submitted by trade associations which can centrally coordinate data collection or by small groups of petitioners for wastes that are not widely handled. For wastes that are not widely handled, the data collection and sampling required for a generic petition is much less burdensome. Fewer generic petitions than facility-specific petitions have historically been submitted.[7] As of May 1987, less than 20 generic delisting petitions were pending versus 129 facility-specific petitions.

2. Legislative Feasibility

2.1 Introduction

Unlike certain other environmental statutes, such as the Clean Air Act (CAA), Marine Protection, Research, and Sanctuaries Act (MPRSA), and Toxic Substances Control Act (TSCA), RCRA does not contain a provision that expressly authorizes the Agency to charge user fees for programs under the statute. It is possible that such a provision could be included in RCRA during the next reauthorization, tentatively scheduled for November 1988.

Another option is for the Agency to rely on Title V of the

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[7] Memorandum from Jenny Utz, Work Assignment Manager for Science Applications International Corporation (SAIC), to Myles Morse, EPA, dated 6/2/87, "Summary of Generic Petitions and Petitions for Multi-waste Treatment Facilities". See also memorandum from Jeannine A. Lehman, Midwest Research Institute, to Matt Straus, EPA, dated 4/7/87, on status of rulemaking petitions under task 13, EPA contract no. 68-01-7287, work assignment no. 14.

Independent Offices Appropriations Act of 1952 (IOAA). Title V of the IOAA authorizes the Agency to assess fees for a "service or thing of value" provided by the Agency.

Currently, EPA does not impose a fee based solely on IOAA authority. The President's fiscal year 1987 (FY 87) budget for EPA included four environmental user fees. Two of the four fees (TSCA premanufacture notices and MPRSA ocean disposal permits) were specifically authorized under environmental statutes. The third fee (pesticides registration) is at least partly based on specific authorization in an environmental statute. Briefly, the Agency already charges a fee for setting limits on residues of pesticides on food. These "tolerance petition" fees are specifically authorized by the Federal Food, Drug and Cosmetics Act. The Agency proposed to expand this program and charge fees for other aspects of pesticide registration (51 FR 42974, 11/26/86). The proposal was based on IOAA authority; however, specific authority may be included during the next reauthorization of the Federal Insecticide, Fungicide, and Rodenticide Act. Finally, the fourth fee involves recovering costs for the Agency's quality control program for water samples. This fee is based solely on IOAA authority (51 FR 32886, 9/16/86). Public comments on both of these proposals have been overwhelmingly negative on the issue of the Agency's IOAA authority.. In conclusion, these latter two fees will provide an important precedent for EPA fees based largely on IOAA authority.

The balance of this section will provide a general outline of the types of user fees the IOAA allows, the adequacy and limitations of the IOAA authority for the purposes of developing and charging a delisting fee, and the proposed legislative solutions to these limitations.

2.2 Independent Offices Appropriations Act of 1952 (IOAA)

The IOAA contains a provision, commonly referred to as the "User Charge Statute," that allows Federal agencies to charge fees for a service or thing of value provided by the Agency if certain criteria are met. According to the statute, the amount of the fees shall be "fair; and based on the costs to the Government, the value of the service or thing to the recipient, public policy or interests served, and other relevant factors."

Office of Management and Budget (OMB) Circular A-25 provides additional guidance as to the types of governmental activities that constitute a service or thing of value.[8] According to the Circular, a fee should be imposed where a service or privilege provides special benefits to an identifiable recipient

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[8] Initially issued in 1959, the Circular was revised last year (52 Fed. Reg. 24890, 7/1/87).

above and beyond those which accrue to the public at large. Such special benefits include services performed at the request of the recipient that are above and beyond the services regularly received by other members of the same industry or group.

Since the enactment of the IOAA, Supreme Court and lower court decisions have narrowed the scope of the statute. The IOAA, as refined by judicial interpretation, authorizes an agency to charge user fees if the following tests are satisfied:

(1) A reasonable relationship between the fee and private benefits conferred must exist.

(2) The service produces a private benefit, as contemplated by OMB Circular A-25.

(3) Fees assessed must be limited to the recovery of direct and indirect costs of providing the special service or thing of value (e.g., fees must be broken out into component costs to demonstrate expenses incurred for performing the service or providing the thing of value).

(4) Where the fee produces a public benefit independent of the private benefit, the fee must be reduced by the portion of the Agency's cost attributable to that public benefit.

2.3 The Adequacy of IOAA Authority

The Agency believes the IOAA provides sufficient legal basis for charging user fees. To begin with, other government agencies, including the Interstate Commerce Commission (ICC), Nuclear Regulatory Commission (NRC), and the Federal Energy Regulatory Commission (FERC), have used IOAA authority to develop and levy user fees for services they provide under their respective programs. Second, the Agency has evaluated the delisting fee with respect to the four tests outlined above. Preliminary results indicate that the delisting fee satisfies all four tests.

To satisfy Test 1, the Agency must ensure that EPA expenses bear the requisite "nexus" or relationship, to the benefit derived. Without this nexus, a charge for delisting petitions may be characterized as a tax, which is not authorized by the IOAA. To satisfy the nexus test, the fee must bear a "reasonable relationship" to the Agency expenses, taking into account "administrative convenience" in calculating the expenses. In other words, the fee must be "roughly proportional" to the expenses associated with each petition.

A fee based on the average of all costs would likely not pass the nexus test. As explained earlier in section 1.1, Agency expense in reviewing petitions can vary greatly from one petition to another, depending on petition quality. The expense

in reviewing a complete petition would therefore likely be significantly less than the average expense.

The nexus test would be satisfied by a two-tiered fee, with an initial charge covering the average costs of reviewing a complete petition and an additional fee for the additional cost incurred in reviewing an incomplete petition. A base charge would pass the nexus test because review costs do not vary significantly once the petitions are complete. The additional charge would pass the nexus test so long as it was roughly proportional to the additional costs actually incurred. This could be ensured by having Agency staff track the actual costs incurred (e.g., by filling out time sheets for each review of an incomplete petition). Alternatively, the Agency may be able to establish categories based on petition quality. Whether a fee based on the average costs associated with the categories passes the nexus test would depend on the magnitude of the differences within the categories. The administrative hurdles posed by an additional charge are discussed later in section 3.3.

A delisting fee also passes Test 2. The Agency's review is performed at the petitioner's request.[9] In addition, the value of the Agency's review is received by the petitioner, not the general public (although the public may indirectly benefit through possible price decreases). In the case of generic petitions, the beneficiaries include the trade association or other petitioners as well as the firms that handle that waste. By definition, these firms must be identifiable, in order for the petitioner to collect and provide the sample data required as a part of the petition.

To pass Test 3, the Agency must be able to calculate the costs that it incurs in reviewing delisting petitions. As discussed later in Section 4, the Agency is generally able, albeit with some difficulty, to calculate these costs. Indirect component costs of a delisting can be estimated through analysis of the review process and of past delisting experiences. The costing exercise for facility-specific delisting petitions should be possible to perform since the process steps and affected Agency personnel, as indicated by Exhibit 1.1, are clearly identified. Since the generic delisting petition review process is essentially the same as the facility-specific review process (except that different EPA offices are involved and a wider range of data is required), costing should also be possible for these reviews.

Finally, a delisting fee does not involve any independent

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[9] For further discussion of the "request" standard, see "The Assessment of Fees by Federal Agencies for Services to Individuals," 94 Harv. Law Review 439 (1980), particularly p. 444 and fn 21 on p. 442.

public benefits that would trigger Test 4. Public benefits are not deemed independent if they are a "necessary consequence of the Agency's provision of the relevant private benefits".[10] Under this criterion, the public benefits associated with processing delisting petitions (e.g., public hearing, Federal Register notice) are not independent.

This last test may prohibit the levying of fees on Federal, State, and/or local government petitioners since these generators could be presumed to represent their citizens, with public benefits resulting from a delisting decision. Even if not legally prohibited, a fee might not be levied on government entities as a policy matter. Circular A-25 allows the Agency to recommend exceptions when any "condition exists that, in the opinion of the Agency head or his designee, justifies an exception."[11] EPA may recommend to OMB that the fee be waived for government entities.[12]

In summary, the IOAA provides an adequate legal basis to establish a delisting fee, although several issues affecting the specific design of the fee need to be satisfactorily resolved.

2.4 Limitations of the IOAA

Although the IOAA provides a legal basis for charging user fees, it also presents some implementation difficulties and legal uncertainties. These difficulties and uncertainties need to be evaluated to determine if they impose significant constraints on the feasibility of a delisting fee.

A key uncertainty regarding the IOAA concerns the lack of a clear precedent for EPA user fees. Although the proposed fees for pesticide registration and water sample quality control may provide important precedents (see Section 2.1), implementation of a delisting fee based on the IOAA may nevertheless be delayed by litigation.

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[10] Central & Southern Motor Freight Tariff Association Inc. v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985).

[11] Circular section 6.c(2)(b). Since this provision is ambiguous, it may be useful to review the provision it replaced. Specifically, old section 5.b allowed agencies to waive fees when "the recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare" or when "payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program."

[12] However, another OMB bulletin suggests that fees not be waived for State and local government entities. See section 7(e) of OMB Circular A-97 (dated 8/29/69, revised 3/27/81).

Another important limitation of the IOAA is that it does not provide for the return of fee receipts to the budget of the Agency that performed the service. Federal law (31 U.S.C. §3302(b)) requires all revenues collected by the government to be deposited immediately into the General Fund of the Treasury unless another statute allows an Agency to retain the funds. No existing statute expressly allows EPA to retain the revenues it would collect from charging a delisting fee. However, as discussed in the following section, the FY 88 appropriations bill for EPA does contain a provision allowing the Agency to retain certain fee receipts. This provision apparently covers any possible delisting fee.

2.5 Proposed Legislative Solutions

The Agency Task Force on User Fees discussed several legislative options for user fees, including amendments to the IOAA, amendments to specific program statutes, or entirely new legislation. Regarding establishment of a fee, IOAA provides sufficient legal authority, although it does pose several important restrictions (e.g., the nexus test). Thus, a legislative solution is not necessarily required, although a proposal to eliminate or modify the IOAA's restrictions is possible. Such a proposal may not be politically feasible since many of the IOAA restrictions represent reasonable components of any fee.

Despite the finding that the IOAA provides a sufficient legal basis for a delisting fee, it may be desirable to include a provision that specifically authorizes such a fee during the next reauthorization of RCRA (tentatively scheduled for November 1988).[13] As past experience demonstrates, the Agency has found it easier to establish a fee when such specific authority exists (see Section 2.1). A specific provision in RCRA would also avoid the legal uncertainty resulting from the lack of precedents on EPA fees under the IOAA. The threat of a legal challenge by industry would be significantly lessened if specific authority existed.

A significant drawback in using the next RCRA amendments to introduce delisting fees legislation is that it likely involves waiting until 1989 or 1990, assuming delays occur as they did with the previous reauthorizations of RCRA and Superfund. Delay in implementation of the fee would result in a lost opportunity

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[13] GAO has previously recommended that EPA use RCRA reauthorization to obtain specific authority to charge fees. "Hazardous Waste Management Programs Will Not Be Effective: Greater Efforts Are Needed," CED-79-14, 1/23/79. Although intended for the 1980 reauthorization, the recommendation is apparently still valid.

to collect revenue. In addition, by the time reauthorization occurs, proposed changes in the listing program (described in Section 1.2) may have already reduced the need for a delisting program. Arguably this point could be used to justify delay, i.e., it may be preferable to delay establishment of a fee when the revenue base is potentially subject to dramatic change in the near future.

Another drawback in using the next RCRA reauthorization or any other legislative option relates to potential political opposition in the House or Senate. The extent of political opposition is not yet clear. However, if there are no changes in the listing program, the Agency could expect some resistance from members of Congress who represent jurisdictions containing large numbers of potential petitioners. Political opposition would most likely originate in the heavily industrialized mid-Atlantic and southern States where many electroplating and metal and oil refining firms are located. It is not likely, however, that this potential political opposition would amount to "veto power" capable of stopping a bill.

The Agency is also interested in the disposition of receipts. As noted earlier in Section 2.4, Federal law currently does not allow the return of fee receipts to the budget of the government agency that performed the service. However, OMB recently amended Circular A-25 to make it easier for agencies to retain fee receipts. It may be desirable to have the receipts from a delisting fee returned to EPA. Several options for effecting this exist. They include amending RCRA, passing new legislation, or including a provision in a future appropriation.

First, work on a RCRA amendment to allow the Agency to retain the receipts would require less Agency resources than would a new legislative mechanism. However, the timing drawback noted earlier, i.e., waiting until 1989 or longer, also applies here.

The second option involves passage of a bill authorizing the Agency to retain fee receipts. The Agency forwarded draft language for such legislation to Congress two years ago. It was never introduced as a separate bill, although it was attached to a larger piece of legislation. The language was deleted before the larger bill was passed. [Specifically, the language was included in the Senate's version of the omnibus spending bill (Section 501 of S. 2706). However, it did not receive a wide reception in the House and was subsequently deleted in conference (see pp. 241-242 of H. Rept. 99-1012).] The Agency resubmitted the draft legislation, with minor changes, to the current Congress last year (see letter from the Administrator to the Honorable George Bush, President of the Senate, dated February 25, 1987). As of the end of 1987, the Agency still had not yet found a member of Congress to introduce it. Thus, the prospect of enactment of such legislation appears uncertain at present.

A third option would be to include language in the Agency's appropriations bill, authorizing EPA to retain all receipts. This option was recently used to grant EPA the authority to retain receipts. Specifically, the FY 88 appropriations bill for EPA authorizes the Agency to collect up to $25 million in fees, with the receipts to be deposited in a special fund in the Treasury reserved for EPA programs. [Congressional Record, 12/22/87, p. H12865] These monies would be available to EPA subject to subsequent appropriation.

As the conference report[14] implies, this provision was apparently added to allow EPA to retain receipts from the four environmental fees in EPA's FY 87 budget, discussed earlier in section 2.1 (i.e., quality assurance samples; pesticide registration; premanufacture notices; ocean disposal permits). However, the provision is worded broadly enough to cover any fee for activities authorized by the statutes administered by EPA. Thus, EPA has authority, at least during FY 88, to retain receipts from a RCRA delisting fee. Presumably such authority would need to be renewed in future appropriations bills.

Such language in an appropriations bill may, however, be considered substantive legislation that is subject to a point of order since it would not have been referred to the relevant committee(s). The chairman of the House Energy and Commerce Committee has indicated his opposition to efforts that "authorize fees" through an appropriations bill. In a letter to the Administrator dated February 2, 1987, Representative Dingell wrote, "I am sure you understand that such an effort to circumvent this legislative Committee would not be welcome." It is not clear whether the chairman opposes (1) appropriations bill language that authorizes the Agency to assess fees, (2) language that authorizes the Agency to have all receipts returned to it, or (3) both. The recent grant of authority to retain fee receipts, coupled with the chairman's letter's reference to efforts that authorize fees, suggests that his opposition may be limited to appropriations bill language authorizing the assessment of fees.

3. Administrative Feasibility

3.1 Introduction

Administrative considerations are important in assessing the overall feasibility of a delisting petitions fee system. Successful implementation of delisting fees depends, in part, on the level of administrative difficulty in justifying and designing a fee system, as well as the cost and difficulty of actually administering the necessary procedures.

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[14] H. Rept. 100-498, p. 852

To justify a delisting user fee system, EPA must be able to identify and quantify the Agency costs (broken down by cost components) of processing delisting petitions (e.g., costs for technical petition reviews, overhead costs). To design a delisting fee, EPA must satisfy legal requirements regarding design, and then weigh any policy considerations affecting design. To administer a fee, EPA must develop guidance for the petitioner identifying how much he has to pay, when he has to pay it, and how he should pay it. In addition, EPA must provide guidance for Headquarters staff identifying what will be done with the fee once it is received. A fee that accounts for differences in resources spent on petition review and creates an incentive for well-prepared and complete petitions is recommended. Sections 3.2 through 3.4 focus in more detail on the feasibility of justifying, designing, and administering a fee system.

3.2 Justifying a Fee System

To justify the reasonableness of a delisting petition user fee system, EPA needs to identify Agency expenses including direct and indirect costs that are "reasonably" related to the private benefits conferred by the delisting petitions. All of the major Agency cost components of the delisting petition review process must be identified and quantified.

EPA does not currently have an accounting system that could be used to itemize or track delisting costs. For example, no timesheets are currently used to track hours spent on delisting petition reviews. However, because the fee need only bear a "reasonable relationship" to Agency expenses, the Agency may take into account "administrative convenience" in calculating expenses.[15] In general, costs shall be determined or estimated from the best available records in the agency. This principle, combined with the increased reluctance of courts to second-guess agencies that make reasonable efforts to comply with the IOAA, indicate that very precise, complex accounting systems may not be needed to establish delisting fees that are "based upon a consideration of the relevant factors" and that are not found to be "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[16]

EPA can identify the relevant delisting petition costs, in part, based on past experience with delisting petitions. In addition, EPA can rely on guidance provided by OMB Circular

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[15] National Cable Television Assn. v. FCC, 554 F.2d 1094, 1108 (D.C. Cir. 1976).

[16] Central & Southern Motor Freight Tariff Assoc. Inc. v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985).

A-25, as well as on precedents established by other Federal user fee systems. The cost components could include: overhead costs; review work, including review by workgroup and response to workgroup comments; data verification activities; preparation of Federal Register proposed notices; response to public comments; and preparation of final notices for the Federal Register.

EPA is likely to experience several problems in identifying costs. For example, as explained below in Section 3.3, the study group recommends a two-tiered design consisting of a base fee, plus an additional hourly fee for review of incomplete petitions. EPA must, therefore, be able to distinguish between base and hourly costs. Based on past experience, EPA will be able to distinguish between such costs, albeit with some difficulty. Likewise, EPA may have difficulty distinguishing between costs incurred in reviewing required petition data and costs incurred in reviewing other, not required data requested of petitioners. EPA sometimes requests such supplementary data to verify parameters and assumptions in the delisting model. The costs of reviewing these supplementary data could be included in the indirect costs category (e.g., as part of the overall development of the model). Finally, EPA's experience in reviewing generic petitions is relatively limited. Thus, relatively little historical cost data on these petitions are available for use in identifying costs.

EPA must quantify direct and indirect costs of both facility-specific petition reviews and generic petition reviews. EPA can quantify the direct costs of facility-specific petition reviews using information on past expenditures for previous reviews.[17] In addition, EPA could supplement data from past expenditures with data gathered by interviews and/or time and motion studies of the petition review process and staff. OMB Circular A-25 provides guidance on quantifying indirect costs. Quantifying costs for generic delisting petitions may be difficult because previous experience with such petitions is limited.

The quantity and quality of data available to analyze the policy factors related to establishment of a delisting fee varies. For example, while limited data exist for estimating the size of the positive environmental impact of a delisting fee, a fair amount of relevant data on the number of State and local governments that will submit petitions is available. The sufficiency of the data available on policy concerns is discussed in each respective section of this paper (e.g., environmental impact, State acceptability, economic fairness). In general, it is administratively feasible to consider the

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[17] Presumably the data on past expenditures would show that reviews have become more expensive as a result of the additional requirements imposed by HSWA.

policy concerns affecting a delisting fee, although significant data gaps exist. However, the Agency need only meet the legal requirements discussed in section 2 to establish a fee.

3.3 Designing an Appropriate Fee System

The administrative feasibility and equity of the delisting user fee system will depend, in large part, on the design of the fee. The law establishes important limits on the design of the fee. For example, the law requires that the fee bear a reasonable relationship to the costs. Based on prior experience, EPA knows that the costs it incurs can vary widely if the petitions are not complete (because incomplete petitions require more interactions between the Agency and the petitioner). Thus, the law requires that any delisting fee be roughly proportional to the completeness of the petition.

To satisfy this legal requirement, the fee could have a two-tier design, with a base amount for complete petitions and an additional, hourly charge for review of incomplete petitions. The base fee would be based on the average cost, calculated from past expenditures, of reviewing complete petitions. The additional, hourly fee would be based on an estimate of the additional resources needed to complete the review. Portions of the fee could be refunded if the estimate exceeds the actual costs.

Within the parameters set by the legal requirements, the design can be modified to reflect certain policy considerations. For example, the fee should be designed to create an incentive for well-prepared and complete petitions. The general two-tier design described above would likely provide such an incentive. In addition, concerns over the accuracy of petition data would favor including a charge for site visits in the base fee so that a site visit could become a part of every review.

Various permutations of the two-tier design (i.e., base fee/hourly fee) exist. One version would have the base fee cover the average costs of reviewing a complete petition. When actual expenditures approach this base level, an additional hourly fee could be levied if the Agency estimates that extra resources will be needed. A second version, recently suggested by the delisting staff, involves a base fee covering only the average costs of initial review and identification of information needed to make the petition complete. All additional work would be done pursuant to an hourly fee. It is not necessary here to determine which design is more feasible. The study group's mandate is limited to merely determining whether a feasible design exists; the group concludes that such designs do exist.

Finally, the fees should be levied before the Agency provides its service. Otherwise the Agency may not be able to recover the costs it incurs in reviewing a petition. For

example, if a fee is not charged until a petition is complete, then a petitioner could withdraw his petition before supplying all of the data required for a complete petition. EPA might not be able to recover funds from the petitioner for the resources it had spent in reviewing the petition prior to its withdrawal. Note that this principle is embodied in Circular A-25, which mandates collection of the fee in advance of the service.

3.4 Administering a Fee System

To administer a delisting fee, EPA needs to: (1) tell the petitioner how much he has to pay, when he has to pay it, and how he should pay it; and (2) identify what will be done with the fee once it is received. Regarding the first item, EPA will be providing the petitioner with advance notice of most of this information when a Federal Register notice is published. [Alternatively, petitioners could follow the legislative process, if the fee is established in that manner.] The delisting staff has suggested that in addition to promulgating a rulemaking, EPA should also amend the existing guidance manual for petitioners to reflect any fee that is adopted. It seems unlikely, however, that major changes to the manual would be necessary.

OSW will also need to write guidance for Headquarters staff. This guidance should explain that once a petition is received, a letter explaining the fee (and how it should be paid) should be sent to the petitioner. EPA's Office of Administration and Resources Management (OARM) has already drafted guidance on how EPA fees should be paid (e.g., mail U.S. currency to a lockbox at a specified address). This guidance is currently in Red Border.[18] OARM's guidance describes how the bank in charge of the lockbox will send the program office (i.e., OSW) an acknowledgement of lockbox receipts. OSW staff can begin its review after receiving this acknowledgement.

OSW's guidance should also explain that Headquarters staff should not begin its review until it receives documentation that the fee has been paid. In addition, OSW's guidance should discuss what action the staff should take once they determine that the petition is not complete. The guidance should explain that when the staffer writes to the petitioning firm and informs it that the petition is missing certain information, he should also include a notice about the hourly fee. OSW's guidance should also discuss what the staff should do if the petition is withdrawn prior to completion of the review process. The financial officer will need to verify the basis of petitioner's request for a refund. Most importantly, OSW's guidance will

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[18] Draft Comptroller Policy Announcement No. 87-xxx, "Collection of User Fees for Services and Materials Provided by EPA."

also need to discuss what procedures the staff must follow in order to determine the number of hours to be charged via the hourly fee. These procedures could be modeled on the ones adopted by OSW for charging Superfund for CERCLA-related activities.[19]

4. Financial Feasibility

4.1 Introduction

This section reviews the financial feasibility of a delisting fee. Section 4.2 estimates the costs that EPA currently incurs in reviewing petitions. Section 4.3 reviews the potential amount of revenue that a fee might raise in the future. Section 4.4 discusses the budgetary implications the fee would have for the federal government, particularly EPA. Finally, Section 4.5 examines the administrative costs of implementing a fee, with a focus on whether such costs are high in relation to the amount of revenue generated.

Generic delisting petitions, discussed earlier in section 1.3, are few in number and would have a minimal impact on the financial feasibility of the delisting fee. Thus, they are not discussed further in this section.

4.2 Current Costs

Assuming full cost recovery, total revenue would equal the amount of money that EPA spends on petition review. Thus, the first step in estimating revenue is an examination of EPA's costs. As discussed in detail in appendix B, EPA spent approximately $2.4 million in fiscal year 1987 (FY 87) on delisting related activity -- an average of approximately $17,160 per petition review. In early 1986, the funding character underlying the delisting program was significantly altered, with the amount of FTE decreased and the amount of contractor support increased. Consequently, program costs are now largely committed to contractor services. This is reflected in the fact that nearly two-thirds of the FY 87 costs represent expenditures for contractor support. Specifically, the Agency spent approximately $1.522 million in FY 87 for contractor support in delisting. The remaining costs (approximately $880,000) represent EPA personnel involved in delisting. The breakdown of these costs is summarized below.

Regarding contractor funds, roughly half ($792,230) was spent on direct support for petition review. Another third ($545,379) was spent on site visits, mostly on laboratory

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[19] Memorandum from Tina Parker to Joe Carra, Bruce Weddle, Sylvia Lowrance and Mike Gruber, "Superfund Charging Policy for OSW," dated 4/29/87.

analysis of samples. The remainder ($184,667) was spent on development of guidance manuals and a computer database which tracks petitions. Note that some of these latter expenditures may not reflect regularly recurring activities and therefore will not be recoverable through a fee. It appears that the $59,000 expenditure for guidance manuals was the only one to fall into this category; a closer review of the data may reveal additional "one-time" costs.

Regarding EPA personnel, 22 FTE were expended Agency-wide to activity related to delisting during FY 87. This covers directly-involved FTE (e.g., FTE spent actually reviewing the petition) and indirectly-involved FTE (e.g., FTE spent preparing the payroll for actual reviewers), the costs of which EPA has authority under IOAA to recover in the fee.

The study group's estimate of $2.4 million differs sharply from the $0.57 million estimate prepared earlier by the Office of Program Management and Support (OPMS) for the Agency-wide Task Force. The main reason for the difference is that OPMS apparently did not include contractor costs. Of course, these costs account for $1.52 million of the study group's figure.

Aside from contractor costs, the two estimates also differed on FTE costs. The study group estimated 22 FTE at a cost of $880,000 while OPMS estimated 14.3 FTE at a cost of $567,000. There are several possible explanations for this difference. For example, OPMS apparently did not include indirectly related FTE in its estimate. Other possibilities include inaccurate inputs in the RCRA workload model and/or inaccurate assumptions by the study group. The appendix includes a more detailed comparison of the two estimates.

4.3 Amount of Revenue

A delisting fee would likely raise approximately $969,200 in revenue annually. Appendix C provides details on how this estimate was reached. The amount of revenue raised by a delisting fee depends on the future workload and associated costs of the program, and whether all of these costs are recovered through a fee. As described above, EPA incurred costs of $2.4 million in FY 87. The amount of future costs will change due to several factors, the most important likely being a future decrease in the number of petitions due to the relisting program. Other factors include the effect of the fee itself on the delisting program, and the delegation of delisting authority to the States. Finally, full cost recovery through a fee faces several obstacles.

First, as discussed earlier in section 1.2, the relisting program may significantly affect the delisting program in the future. Specifically, it appears likely that the relisting program will substantially reduce the fee's potential revenue base (i.e., the number of future delisting petitions). By meeting the exemption level set by the relisting program, a

generator's waste would be considered nonhazardous and he would have no need to submit a delisting petition. If OSWER's proposed self-implementing approach to relisting is not adopted, however, then the possibility of a slightly different type of fee (i.e., for review of a generator's test results) would exist.

Second, the fee itself may change the size of the delisting program, thereby affecting costs and revenue. For example, due to resource constraints, EPA currently conducts site visits at only a small percentage of petitioners' sites (section 1.1). In theory, the delisting fee could include a charge for a site visit as part of each petition review. In other words, delisting program activities could be expanded through fee receipts. [Note that the fee receipts might not be available for delisting activities; see section 4.4 below.]

A facility visit costs EPA an average of $33,000.[20] As noted above, it currently costs EPA an average of $17,160 to review a delisting petition. Thus, inclusion of a charge for site visits for each petition review would significantly increase the level of the fee. In such a scenario, revenue would total $2,632,400 (see appendix C).

The incentive effects of a fee could result in a decrease in the amount of revenue. For example, a higher fee for incomplete petitions encourages owners and operators to improve petition quality. The better the petitions, the less resources EPA spends on review. The lower amount of revenue, however, would reflect the fact that EPA is incurring lower costs. Similarly, a fee might deter submission of petitions with little merit. Although fewer petitions mean less revenue, they also mean less costs for EPA.

Third, costs (and hence, revenue) would decrease to the extent that EPA delegates the delisting program to the States. The Agency would not have legal authority under the IOAA to charge a fee, since it would not be providing the service upon which the fee is based (section 6.2). To date, the delisting program has been delegated to only one State, although 10-15 States are expected to seek such authority (section 6.1).

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[20] Letter from Carolyn Bosserman, Work Assignment Manager, SAIC to Wendel Miser, EPA, dated September 23, 1987. The letter includes a list of site visits conducted to date under EPA contract no. 68-01-7264. It also summarizes the average costs associated with each visit. Examination of the data reveals that the average cost per facility is actually $24,300, not $33,000. According to the letter, 10 trips to 30 facilities were made at a cost of $729,429. [$729,429 divided by 30 = $24,314.]

Finally, the design of the fee may also have an important impact on the amount of revenue generated. Circular A-25 directs that generally a fee should be sufficient to recover the full cost of providing the service. Thus, the delisting fee would presumably be designed to recover all of the costs incurred by EPA in reviewing delisting petitions. However, such a fee may be difficult to design and/or administer. Under the IOAA, EPA does not have the legal authority to charge all petitioners a flat fee based on the average of total costs (see section 2.3). As suggested above in section 3.3, however, EPA could impose a two-tiered fee, with an initial base charge covering the costs of reviewing complete petitions and an additional hourly fee for the additional costs incurred in reviewing incomplete petitions. An hourly fee might be difficult to implement, however. This administrative difficulty might force EPA to modify the two-tiered design, thereby reducing the amount of revenue.

As a matter of policy, EPA may decide to rebate fee for successful petitioners (see section 7.2). Given the high success rate, however, such a design would significantly reduce the amount of revenue raised.[21]

4.4 Administrative Costs

Administrative costs are likely to be relatively low, ranging from $22,700 to $80,000. Appendix C outlines how these costs were estimated. Note, however, that these costs may significantly increase depending on how the hourly fee is designed and implemented, and how an affordability waiver, if allowed, is designed. The following discussion examines the costs involved in identifying and quantifying review costs; designing the fee; and administering the fee.

The costs involved in identifying and quantifying the costs of petition review should be low. Based on its past reviews, EPA already has much of the cost information available. The records of past expenditures on delisting contractor support, for example, are easily accessible. One would have to review these records in some detail, however, in order eliminate any costs for nonrecoverable expenses. For example, an EPA contractor recently established a computer database to track delisting petitions. This one-time cost may not be recoverable, although the continuing costs of maintaining the database certainly are.

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[21] The delisting staff voiced its objection to the possibility of rebates. The significance of the staff's decisions would obviously increase if rebates were possible. Consequently, the pressure for the staff to improperly consider nontechnical factors, i.e., those unrelated to the waste's hazards, would continue to increase.

Identifying and quantifying the FTE costs may be more resource-intensive. As outlined in the appendix, several levels of interviews might be needed in order to document all delisting-related efforts. Only a small amount of resources seems needed, however, to conduct such interviews.

The costs involved in designing a fee are likely to be low, although they have the potential to be significant. This paper discusses a particular design for the fee; see section 3.3. Specifically, a two-tiered design featuring an initial base fee for all petitions and a second hourly fee for incomplete petitions, is suggested.

It will be necessary to spend some resources on spelling out certain details of the fee design. For example, in order to set the initial base fee, EPA will need to estimate how much it costs to review a complete petition. In other words, EPA will have to separate those costs which can be attributed to all petitions from the costs which are only incurred during review of incomplete petitions.

In addition, specifying the details of the hourly fee design may also result in significant costs. EPA may need procedures for estimating the number of additional review hours that an incomplete petition (or category of incomplete petitions) will entail. Establishment of a system tracking actual time spent on each incomplete petition would also be needed. Finally, procedures would be needed for refunds for petitions where the hourly fee exceeds EPA's actual costs (i.e., where the estimated number of hours exceeds the actual number of hours).

If EPA decides to allow waivers of the fee for small firms, then costs will be incurred in designing a waiver. It is very difficult to craft a fair ability-to-pay test. Consequently, administrative costs could significantly increase if affordability waivers are allowed.

The resources needed to administer a delisting fee will likely be relatively low. First, any fee rulemaking (e.g., pursuant to IOAA) ought to be a relatively straightforward process.[22] Development of guidance for OSW staff on how to implement the fee should be similarly simple. Note that both of these would be one-time costs.

Second, enforcement costs will be minimized by having EPA not perform any review work until the fee payment is received.

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[22] Compare the Agency's only other IOAA rulemaking to date, a proposed fee for EPA's water sample quality control program (51 FR 32886, 9/16/86).

However, some resources may be required to defend against any challenges to EPA's determination that a particular petition is incomplete (and hence, subject to the additional fee).[23] Such challenges should be few since the RCRA regulations and accompanying guidance manual[24] clearly state what information is necessary.

Some resources will be consumed in administration of the hourly fee. First, OSW staff will need to prepare and send letters to firms notifying them of the fee and outlining the information missing from their petitions. A form letter could reduce administrative costs here. Second, OSW staff will need to track the time they actually spend on each petition. Many OSW staffers already fill out Superfund time sheets on a regular basis. Their experience has shown that the administrative costs are small. Thus, although inconvenient for the delisting staff, it is unlikely that this task will take up very much of their time. Third, OARM staff will need to review the time tracking sheets with the previously paid fee and determine whether a refund is warranted. This should be a straightforward exercise.

Finally, administrative costs would be incurred in processing affordability waivers, if they are allowed. Few resources would be needed if an easy-to-apply formula was adopted. Significant resources may be consumed if the criteria for the waiver turn out to be vague or complex.

4.5 Budgetary Implications

Unless a specific statute states otherwise, EPA cannot keep the fee receipts. Without the fee receipts, the fee would appear, at first glance, to have no positive effect on EPA's budget.[25] However, the Agency's appropriation would likely increase as a result of the activity underlying the fee. Thus, the fee would indirectly have a positive effect on EPA's budget.

First, as discussed earlier in sections 2.4 and 2.5, federal law requires that all revenues collected by the government be deposited into the General Fund of the Treasury

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[23] EPA recently published a notice clarifying several of its policies, including its policy for dismissing incomplete delisting petitions. 53 Fed. Reg. 6822 (3/3/88).

[24] Petitions to Delist Hazardous Wastes, A Guidance Manual, U.S. EPA, OSW, April 1985.

[25] On the contrary, it would have a negative impact insofar as EPA does not receive an increase in its appropriation for the costs it incurs in administering the fee. However, as discussed above in section 4.4, these administrative costs are likely to be relatively low.

unless another statute allows an agency to retain the funds. The FY 88 appropriations bill gave EPA the authority to retain certain fee receipts. Specifically, the receipts would be deposited in a special fund in the Treasury reserved for EPA programs. EPA would not, however, be able to tap into the fund unless Congress passed specific legislation authorizing it.

Thus, until such legislation is enacted, the fee would not have a positive impact on EPA's budget. Even with such legislation, EPA's budget would increase only if there was no one-for-one offset in EPA's appropriation. Anything less than a full offset would result in an increase in Agency resources.

As noted above in section 2.5, EPA has previously submitted draft legislation to Congress in order to retain fee receipts. EPA's draft legislation would have much the same effect as the FY 88 appropriations bill, i.e., receipts would go into a special EPA fund at the Treasury. Unlike the FY 88 bill though, the Agency's draft legislation would allow the Agency immediate access to the funds. However, the budgetary effect would likely be the same since EPA's appropriation would then become a prime target for an offset.

Even with a full offset, however, the Agency's budget could still be increased by the fee, albeit indirectly. Specifically, with a fee in place, the Agency's appropriation would likely be increased to allow more facility visits. In other words, if the Agency requested more resources for facility visits, OMB and Congress would likely approve it because, with the fee, the net effect on the federal budget is neutral. An increase in EPA's appropriation would be balanced by the increase in payments to the Treasury.

Next, one should keep in mind the issue of net revenue to the government.[26] Presumably a delisting fee would be considered a cost of doing business and thus a legitimate business deduction. Hence, government revenue will decrease as firms write off this additional expense.

The issue arises as to whether a delisting fee would result in a sufficient net increase in government revenue. A simple review of the possible economics of the situation suggests that it would. Assume that the petitioning firms have a gross income of at least $1.0 million. The firms then pay approximately $1.0 million in delisting fees; see appendix C. By claiming this as

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[26] This issue was apparently first raised within EPA by a draft paper, dated July 20, 1984, "Overview of Current Work on Alternative Sources of Funding for Environmental Programs", by Gainor Eisenlohr of OPPE. Transmittal memo is from John Thillman, Acting Director, Program Evaluation Division, to Al Alm.

a business expense deduction, the firms can reduce their taxable income by $1.0 million. Consequently, the firms can save as much as $340,000 in payments to IRS. [The maximum corporate tax rate is 34%; thirty-four percent of $1.0 million equals $340,000.] Thus, the net increase in revenue to the federal government is at least $660,000 (i.e., $1.0 million minus, at the most, $340,000).

The question then becomes whether this amount exceeds the net increase in federal government costs, i.e., the amount that EPA spends to collect the fees (assuming that these monies are not included in the earlier determination of the level of the fee). As discussed in section 4.4 above, the administrative costs of a delisting fee would range from $22,700 to $80,000, far less than $660,000. Thus, the net revenue to the government is sufficient to justify the institution of the fee.

Finally, the delisting fee can not be considered a "one-time recovery". Such recoveries generally refer to the government's sale of chattels or real estate. Once sold, the particular asset cannot be sold by the government again, i.e., the potential revenue is limited to a single transaction. Here however, EPA can conduct petition reviews continuously into the future.

5. Environmental Impacts

5.1 Introduction

Theoretically, the environmental impacts of delisting a waste should be neutral, since the Agency will delist a waste only if the generator can demonstrate that no adverse impacts to human health or the environment would result. Imposing a delisting fee should not create any new environmental impacts. In practice, however, the delisting fee may cause positive environmental impacts. To illustrate these impacts, this section divides all petitioners into two categories: (1) petitioners whose wastes will not be granted a delisting or petitioners who will be granted undeserved delistings due to a decision based on inaccurate data; and (2) petitioners who will be granted a delisting because their wastes do not pose a threat to human health and the environment. This section first describes the current environmental impact of the delisting process for these two groups, then evaluates the potential environmental impact of delisting fees, particularly for the first group. Both types of impacts are presented to distinguish the potential incremental environmental effects of a delisting fee from the effects of delisting.

5.2 Environmental Impact of the Delisting Process

Ideally, the delisting process should result in no negative environmental impacts because generators must maintain compliance with the hazardous waste regulations, even after submitting a delisting petition, until the petition is formally

granted.[27]

For petitioners who deserve a delisting because their wastes do not pose a health or environmental hazard (i.e., the second group), requiring compliance until a delisting decision is made results in some unnecessary overprotection. Since the validity of a delisting petition cannot be determined until the petition is granted or denied, the Agency deliberately chose to ensure the protection of human health and the environment through temporary "over-regulation" of these petitioners. Continued compliance prior to a delisting decision will, therefore, have no adverse environmental impact by either group of petitioners.

Although pre-delisting compliance is required, the two groups of petitioners often do not comply with the regulations. Current experience shows that some facility owners and operators who have petitioned to have their waste delisted are in minimal compliance or complete non-compliance with the RCRA regulations, especially the ground-water monitoring requirements.[28] These owners and operators may believe that because their petitions might remove them from the regulated system within a year or two, there is no need to expend resources to comply with RCRA now.

This attitude of noncompliance results in no environmental problem with the deserving petitioners (i.e., the second group), but does with the other petitioners. Non-compliance by petitioners who will ultimately be denied a delisting or will be granted a delisting undeservedly (e.g., due to faulty data) may result in environmental problems. These wastes pose a hazard to human health and the environment prior to and during the entire delisting review process if these petitioners do not remain in regulatory compliance. Wastes that are undeservedly delisted are likely to cause the most negative environmental impacts since they will continue to pose a hazard after the delisting review and decision. Non-compliance by the group of deserving petitioners has no negative environmental impacts since these wastes pose no threat to humanhealth and the environment.

5.3 Environmental Impact of Delisting Fees

A delisting fee could create environmental impacts

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[27] As discussed later in section 6.2, EPA previously granted "temporary" delistings, allowing certain generators to not comply with the regulations even though their petitions were not yet fully processed. HSWA effectively ended this practice.

[28] Ground-Water Monitoring Survey, April 24, 1985, House Energy and Commerce Committee, Subcommittee on Oversight and Investigations, Print 99-I. It is not clear whether some of these petitioners had been granted "temporary" delistings.

independent of the ones that already exist with the delisting process. Since the wastes of deserving petitioners (the second group) do not pose a threat to human health and the environment, the issue of environmental impacts of a delisting fee is only relevant to the first group of petitioners.

A high delisting fee, especially one that imposes additional costs for incomplete petitions requiring more Agency review time, would encourage generators to submit more complete petitions at the beginning of the process in order to minimize their costs. In theory, more complete petitions would in turn reduce the Agency's review time and provide quicker decisions for petitions submitted by the first group. The sooner a denial is made, the sooner non-compliance is discouraged and the risk to human health and the environment is reduced.

In addition, a high fee may result in fewer petitioners who are granted a delisting undeservedly, since more complete petitions would mean better delisting decisions. The number of delisting petitions granted undeservedly could also be reduced by including a fee component to cover the cost of a data verification site visit. Petition fees that include the costs of site visits would allow a substantial increase in the number of site visits EPA could perform, and would likely result in a positive environmental impact. Knowledge of a site visit could act as an incentive to generators to submit accurate petition data. Greater data accuracy, combined with the possibility of data verification by EPA for all or an increased number of petitions, would reduce the number of petitions granted undeservedly, thereby reducing the risk to human health and the environment.

A high delisting fee may also discourage undeserving petitioners from seeking a delisting decision. The additional cost of a delisting fee, on top of the costs for preparing a delisting petition[29], may be enough of a disincentive for these petitioners to forego petitioning. Generators who do not submit delisting petitions may be more likely to remain in regulatory compliance. Moreover, a reduction in the number of delisting petitions, especially petitions that will eventually be denied, would reduce Agency review requirements and, therefore, free up additional Agency resources for other activities necessary to protect human health and the environment (assuming these resources are still appropriated).

The size of the fee's positive environmental impact, although difficult to estimate, is likely to be small. The

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[29] Generators generally spend between $15,347 and $59,460 to prepare a petition. Memorandum from Jennifer A. Bramlett, SAIC to Scott Maid, EPA, 8/20/87, "Estimated Range of Petition Preparation Costs".

impact is difficult to estimate, in part, because of insufficient data. For example, the only available information on the number of petitions that were undeservedly granted in the past are contained in the 12/86 GAO report, which addresses a small sample of inspections. As part of its effort to verify certain parameters of the delisting model, the Agency has recently begun collecting some information about the petitioners' compliance with RCRA, particularly the ground-water monitoring requirements. These information requests are expected to decrease the rate of non-compliance during petition review. Given the available information, the Agency expects that few, if any, petitions will be undeservedly granted due to inaccurate petition data.

6. Acceptability to States

6.1 Introduction

This section reviews the history of the delisting program in the States, identifying the level of State participation pre- and post-HSWA, as well as factors that may affect State participation levels. Section 6.2 reviews potential impacts of a Federal delisting fee on States, including the particular implications of user fees with regard to State authorizations. Finally, Section 6.3 discusses other State issues relevant to delisting fees.

Note that this section does not address the relationship of EPA's State grants to State fees. That issue is beyond the scope of this paper. As explained in the beginning of the paper, the Administrator directed OSWER to analyze the feasibility of establishing a federal fee for review of petitions for certain RCRA exemptions and waivers. Thus, the paper discusses State fees only to the extent that they affect the feasibility of a federal fee. The relationship of RCRA grants to State fees does not affect the feasibility of a federal fee. Consequently, the paper does not discuss the possibility of increasing EPA grants to States with their own fees in order to encourage other States to adopt them. Nor does it discuss the opposite possibility, i.e., phasing out grants to States with their own fees.

6.2 Background

Prior to HSWA, less than 25 percent of the authorized States were authorized for the delisting program and none of these States imposed user fees for review of delisting decisions.[30]

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[30] GAO estimated that 25 States had received such authorization with at least 14 of them having active delisting programs (12/86 GAO report, p. 39). It is not clear where GAO obtained this figure. The State Programs Branch staff at EPA

Few States applied for delisting authorization because of the complex technical requirements and insufficient staff or expertise. Public and political ramifications of facility delisting decisions may have also made States reluctant to take on delisting responsibility.

HSWA modified the delisting regulations in several ways:

- Prior to HSWA, EPA's evaluation of delisting petitions addressed only those factors considered by the Agency in listing the waste as hazardous; HSWA requires EPA to also consider additional factors if there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous.

- Pre-HSWA regulations also allowed the Agency to grant a temporary exclusion without prior notice and comment if there was substantial likelihood that an exclusion would be finally granted; HSWA requires EPA to provide public notice and a comment period before granting or denying a petition.

- HSWA required EPA to reevaluate all temporary exclusions granted before November 8, 1984 and nullified the effect of a temporary exclusion if a final decision to grant or deny a petition was not promulgated by November 8, 1986 (i.e , within 24 months from date of HSWA enactment)

Under Section 228 of HSWA, any requirements, including the delisting requirements, imposed pursuant to the amendments are effective in authorized States at the same time they are effective in other States. Since the HSWA delisting requirements are more stringent than the pre-HSWA requirements, EPA is responsible for administering the delisting program until such time as the States are authorized for this program. Currently, only one State, Georgia, is authorized under HSWA for delisting. If States want delisting authority, the deadline for modifying their programs is July 1, 1989, or, if statutory changes are necessary, July 1, 1990. The State Programs Branch at EPA Headquarters estimates that approximately 10-15 States may seek delisting authority as part of HSWA authorization.

6.3 State Concerns

There is considerable State opposition to a Federal delisting fee, although the impact of such a fee on the States does not appear great. According to the lead State representative on the study group, "the basis of the opposition is that for the fees collected to be substantial and worthwhile

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Headquarters estimates that the figure was much lower, i.e., only 10-15 States.

would require fees to be applied in areas that might preempt State fees (compliance monitoring fees, permit fees, etc.)."[31] A 1982 study found that many States have implemented fees as part of their RCRA programs.[32] Given the significant revenue generated by State fees under RCRA, the States are understandably concerned about any possibility of preemption.[33]

This concern is not an objection to a Federal delisting fee per se. The States are very worried that Federal fees may be implemented for other RCRA program activities besides delisting. The feasibility of other Federal RCRA fees is outside the scope of this paper. If these other candidate fees are examined in depth, they would be reviewed under the same criteria used here, including legal feasibility. Under the IOAA, the Federal government can charge fees only for a service that it provides. It does not have the legal authority to charge fees for a service provided by others (e.g., the States). Thus, it cannot preempt a fee that a State is charging a firm for a service that the State provides. Given this legal restriction, preemption cannot be an issue.

The States' concern about preemption also does not apply to delegation of the RCRA program to the States. EPA bases its decisions regarding State authorization only on the conditions specified in Part 271. Exhibit 6.1 summarizes and presents Part 271 conditions for State authorization. The amount of revenue that the Agency may raise through a Federal delisting fee in a particular State is not one of the factors considered by EPA in determining whether to delegate the program to that State.

The States have also expressed concern that some sort of user fee system may be required for delegation of delisting authority. This concern echoes one of the main points raised in 1985 by State representatives on the Agency-wide Task Force on user fees, i.e., that adoption of fees should not be linked to program delegation. Again, however, EPA must base its RCRA delegation decisions only on the conditions specified in Part 271. A user fee system is not one of the conditions specified in Part 271. The State representatives noted that two of the

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[31] Letter from Bryan W. Dixon, Director, Hazardous and Solid Waste Division, Texas Water Commission to Mike Northridge, EPA Headquarters, dated 5/19/87.

[32] "A Study of State Fee Systems for Hazardous Waste Management Programs," SW-956, July 1982, prepared for EPA by Fred C. Hart Associates, Inc.

[33] Congress recently stated that in developing its fees, EPA should give "special consideration" to the concerns of the States. H. Rept. 100-498, p. 852 (12/22/87).

EXHIBIT 6.1

REQUIREMENTS FOR FINAL AUTHORIZATION

	RCRA Standard	EPA Regulations (40 CFR)	State Application
1.	State program must be "equivalent" to the Federal Program - § 3006(b)	271.9-13	Program Description Attorney General Statement, and Memorandum of Agreement
2.	State program must not impose any requirements "less stringent" than the Federal requirements - § 3009	271.9-14	
3.	State program must be "consistent" with the Federal program and other State programs	271.4	Program Description and Attorney Genera Statement
4.	States may impose requirements which are "more stringent" than those imposed by Federal regulations	No analog in the regulations; the standard is outlined in RCRA § 3009	Program Description
5.	State program must "provide adequate enforcement" - §§ 3006(b), 7004(b)(1)	271.15-16	Program Description Attorney General Statement, and Memo randum of Agreement
6.	State program must follow specific procedures for public "notice and hearing" in the permitting process - §§ 7004(b)(1) & (2)	271.14	Program Description Attorney General Statement, and Memo randum of Agreement
7.	State program must provide for the public availability of information "in substantially the same manner, and to the same degree" as the Federal program	271.17	Program Description Attorney General Statement, and Memo randum of Agreement

NOTE: The seventh standard was added by HSWA.

conditions ("equivalency" and "consistency") could conceivably be interpreted to require some type of user fee system. However, the Agency does not have and will not adopt such an intepretation. Similarly, the regulations regarding the Memorandum of Agreement between EPA and a State contain authority to include additional conditions for authorization (40 CFR 271.8(a)). Again, the Agency does not and will not exercise this authority to require any sort of user fee system.

In addition, the requirement in section 271.6(b)(3) that a State describe its source(s) of funding could arguably be interpreted to require States to establish some sort of user fee system. Again, the Agency rejects any such interpretation. This particular requirement does not and will not affect the Agency's authorization decision.[34] Hence, a user fee system is not and will not be one of the factors considered in granting delisting authority.

The States have pointed out, however, that the Agency conducts capability assessments as part of the authorization process. (See e.g., "National Criteria for a Quality Hazardous Waste Management Program under RCRA", EPA/530 SW-86-021, July 1986, OSWER Policy Directive No. 9545.00-1.) These assessments are currently not included in Part 271; the Agency plans to add them to the regulations in the near future. The States fear that through these assessments, EPA may require the States to establish user fees. Note that this concern applies to delegation of all parts of the RCRA program, not just to delegation of the delisting portion.

The Agency's assessment of State capabilities is limited to a determination of whether a State's performance in a given policy area is or will be adequate. (See Memorandum from J. Winston Porter, Assistant Administrator, OSWER, to Regional Administrators, "Capability Assessments for RCRA Authorization Program Revisions" dated 4/8/87.) If the State's performance is unsatisfactory (or its capability appears inadequate), then the Agency will negotiate specific tasks designed to improve

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[34] The requirement that a State submit a description of its funding sources is, in a sense, an anachronism. When the requirement was promulgated in 1980, the federal government intended to phase out grants to the States for operating their own programs. EPA was interested in whether a State would be able to carry out its program after the grants were phased out. In other words, EPA imposed the requirement because of its interest in any restrictions or limitations upon the sources, not because of any desire to determine the appropriateness of the types of sources. The federal government subsequently decided not to phase out the grants in the near future. Consequently, the requirement currently has no effect on the Agency's authorization decision.

performance. The Agency assessment focuses on how the State's performance or capability can be improved. The negotiations do not involve how the improvements in performance or capability will be financed, except to the extent that federal funds are or will be used.

6.4 Potential Impacts on States

Despite the States' concerns, a Federal delisting fee system may, in fact, have a positive impact on States. For example, a fee system designed and implemented on the Federal level could later be adopted or modeled by States after they receive authorization and serve as a useful means of revenue generation. If a Federal delisting fee demonstrates that it is capable of generating substantial revenue, that it does not require extensive changes to States' accounting systems, and that it is consistent with State program goals, then States may consider adopting a similar fee system when authorized.

Another potential impact may be inequities across the States due to possible variations in user fee systems. For instance, States that are authorized for delisting may not charge a fee, or may charge a lower fee than is charged by the Federal user fee system. Petitioners in those states would have a comparative economic advantage over generators in other States. Incomplete data exist regarding the issue of industrial "havens": the 1982 survey of States is inconclusive, although the Agency does have some data on the costs facing a generator who is deciding where to locate (or whether to relocate). However, inequities among delisting fees in various States are unlikely to create significant "havens" for industry. The presence or absence of a delisting fee alone is not likely to create strong enough incentives/disincentives for firms to relocate in a different State. Therefore, fees are not considered a significant factor in industry geographic distribution. Possible exceptions may be firms with new facilities that have yet to be constructed and that plan to locate near the border of two States, one with a high fee and the other with a low or no fee.

Based on past experience, as well as data from the Hazardous Waste Data Management System and the RCRA Firm/Facility Financial database, EPA expects few State or local governments to submit delisting petitions for wastes at facilities that they own or operate (e.g., fewer then 5 percent of RCRA facility owners and operators are States or local governments). Moreover, as noted earlier in Section 2.3, those entities that do submit petitions may not be subject to a fee because of legal constraints or an Agency policy decision to exempt them. Thus, the direct impact of a Federal delisting fee is expected to be very small, if any.

Under a Federal user fee system, EPA can continue its policy for turning over petitions that are in the Federal review process when the State receives delisting authority. If a State

participates only in a concurrence role, the State will not be responsible for implementing the delisting program and EPA will continue to process the petition. In this case, the fee system would remain unchanged. If a State is authorized to implement the delisting program, however, EPA will stop processing the petition and will turn all relevant data over to the State. The State can choose to refer to the work EPA has done, or to reinitiate the review process. In this case, EPA could prorate the fee depending on how much time was spent with each partial petition review prior to the State's authorization, and refund the petitioner accordingly. Some accounting procedures exist that could be used for tracking Agency expenditures and prorating fees.

7. Economic Fairness

7.1 Introduction

This section reviews the delisting fee in terms of its economic fairness. Economic fairness issues include the effect of a delisting fee on resource allocation and prices: positive or negative shifts in allocation of private resources that may result from a fee; the likely effect of a fee on product prices; and whether or not the fee satisfies the "polluter pays" principle. This section also examines issues relevant to burdens and inequities likely to result from a user fee: the level of hardship to the payer caused by transition to the fee; whether the fee will lead to unfair burdens on the consuming public; and the extent to which fees may cause cross-subsidies or other inequities among delisting petitioners.

7.2 Resource Allocation and Pricing Effects

A delisting fee may cause some generators to forego submitting a petition. On the one hand, this could result in an undesirable allocation of resources if the petition would have been granted. In that case, these firms will unnecessarily use Subtitle C capacity to manage their wastes. Such capacity is becoming increasingly scarce. In theory, this may even increase the price of Subtitle C capacity for other firms wanting to use it. However, it is not likely that a deserving petitioner will be deterred. The savings that a firm would realize in having its petition granted and no longer having to comply with RCRA Subtitle C requirements are much greater than any fee level being contemplated. A rough estimate of the savings can be calculated from past Regulatory Impact Analyses of RCRA Subtitle C regulations.

On the other hand, if a fee deters firms from submitting petitions that will not be granted, an improved allocation of society's resources would result. A firm would not spend resources in developing the unsuccessful petition and the Agency would not spend resources in reviewing and eventually rejecting the petition.

One member of the study group suggested that the fee might be rebated for successful petitioners. This would minimize any possible misallocation of private resources. However, as discussed in section 4.3, it would also significantly reduce the amount of costs that the Agency can recoup, thereby undermining one of the key objectives of the fee.

The effect of a delisting fee on product prices and competitive relationships in an industry depends, in part, on the level of the fee. If the petition is approved, then the firm faces reduced costs in the future as a result of no longer having to comply with RCRA. This reduction in future costs will very likely outweigh the one-time cost of the fee and result in decreases in product prices. If the petition is denied, then the firm has spent resources that it cannot recoup. Unless the fee is exceptionally large, it is unlikely to affect product prices.

The "polluter pays" principle is not exactly applicable to the fee proposed for delisting petitioners. Under the polluter pays principle, parties that are responsible for "polluting" incur the costs of one or more of the related activities or consequences. The delisting petition fee is similar only in the sense that the party responsible for or desirous of the delisting is also responsible for the cost (or a portion of the cost) of the delisting. Since the delisting will only be permitted if the delisted waste is not hazardous, however, the petitioner is not "polluting". The delisting is in no sense a license to pollute; the petitioner does not pay to pollute, rather he pays for a special review from the Agency.

7.3 Burdens/Inequities Caused by Delisting Fees

The level of hardship inflicted on the regulated community by transition to a fee will differ depending on how far along the firms are in the petition process. Three types of petitioners are considered here: (1) petitioners who are still in the process of petition review at the time of transition to a fee (there were 129 facility-specific petitions in the review process as of April 1988); (2) petitioners who are planning to submit a petition and have begun analytical preparations, but have not yet formally submitted a petition; and (3) future petitioners who have not yet considered a delisting petition.

The first category of petitioners are those who have already submitted petitions that are still undergoing Agency review. These petitioners were not aware of the possibility of a fee when they submitted delisting petitions. The Agency may have legal difficulties levying a fee against petitions submitted prior to the fee's implementation. If a fee is levied against petitions "in process", these owners and operators are more likely than others to experience undue hardship. Because these petitioners have already committed significant resources to prepare the petition, they may be reluctant to withdraw on the basis of the fee, although, if they had had knowledge of the fee

initially, they may not have submitted a delisting petition. A proposed solution for these petitioners is to establish a termination date for grandfathering, before which a reasonably prepared petition could exit the system. Prior to that date, fees would not be charged. After that date, a petition still in the review process would be subject to all relevant fees.

Petitioners who have begun analytical preparations but have not yet submitted a petition to the Agency by the time a fee is introduced will be subject to the fee. These petitioners can still withdraw from the process and cease their preparations, although they will have already incurred some costs and invested resources. Since implementation of a fee will require Agency notice and a public comment process (or passage of legislation by Congress), these owners and operators will have advance notice. They may be able to speed up their submittals, or, alternatively, reconsider petition submission given knowledge of a future fee.

Immediate transition to a delisting user fee will inflict no hardship on the last category of petitioners (future delisting petitioners). A generator is not likely to submit a petition if the expected costs of doing so are too great. Since information regarding the fee will be available to future petitioners, these petitioners can assess the cost of delisting relative to their available resources prior to submittal.

The delisting staff has warned that the grandfathering date must not be set arbitrarily. Heeding this warning, the Agency could estimate the amount of time it takes most petitoners to prepare a petition. This would then become the length of the grace period during which any petitions submitted would not be subject to the fee. (Conversely, any petition submitted after this grace period ended would be subject to the fee.) The grace period would commence whenever notice of the fee is effectively given, which presumably would be the date that the proposed regulation is published in the Federal Register.

Imposition of the fee will not unfairly affect consumers. As noted above in Section 7.2, the fee is unlikely to have any effect on product prices. Hence, it will likely have no effect on consumers.

A fee for all petitions based on average costs may result in a cross-subsidy. Specifically, firms whose petitions require relatively few resources to review may be subsidizing firms whose petitions require relatively substantial resources. As noted earlier in Section 2.3 however, such a fee may pose legal problems (e.g., it may not satisfy IOAA's nexus test). There is no cross-subsidy issue if the fee is roughly proportional to the actual costs incurred, e.g., if a higher fee was charged for review of petitions requiring more resources.

Several members of the study group have raised the issue of affordability of the fee. They are concerned that a large fee

might impose an unfair burden on small firms. It is not clear whether this factor should be considered. First, there is no provision in IOAA expressly requiring EPA to weigh this factor. The IOAA does, however, have a vague provision stating that the amount of the fee must be "fair"; see section 2.2. In addition, the legislative history of IOAA implicitly suggests that Congress intended to allow agencies to consider affordability.[35] Also, in the the FY 88 appropriations conference report, Congress stated that EPA should give "special consideration" to the concerns of small businessmen when developing its fees.[36]

Second, the Agency Task Force on user fees did not mention this as one of the policy factors to be considered by the study group in reviewing a fee (see appendix A). In addition, Circular A-25 also does not mention this factor in its list of policy factors that may be considered. A-25 does, however, provide for a fee waiver in conditions that justify one.

Third, most other federal fees do not have affordability waivers.[37] However, at least one other federal agency has based the amount of the fee on the firm's ability to pay. Specifically, the Interior Department included affordability in its fee for grazing on public land. Note that this scheme has been criticized by the Grace Commission[38], and was the subject of litigation brought by the Natural Resources Defense Council.

Significant issues would be raised if this factor was considered. First, as discussed in Section 4.4, it would be very difficult to design an affordability waiver that is fair and simple. Significant resources may be needed to cover the costs of designing an ability-to-pay test. Second, if design costs are minimized by adopting vague criteria, then the costs of processing the waivers would increase. Even if specific criteria are adopted, implementation costs could be relatively high, e.g., if the criteria are complex. Finally, the Agency would have to develop a rationale justifying affordability waivers, i.e., an explanation for why the general taxpayers

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[35] S. Rep. No. 2120, 81st Congress, 2d Sess., p. 4 (1950).

[36] H. Rept. 100-498, p. 852 (12/22/87).

[37] Draft Report to the Office of the Chairman, Administrative Conference of the United States, "A Survey of Federal User Fee Programs", by Eastern Research Group, Inc., December 1986.

[38] President's Private Sector Survey on Cost Control, Task Force Report on User Charges (1983) (Grace Commission Report).

should subsidize small companies. In analyzing this issue, one should also bear in mind that the savings a firm would realize from a successful petition (e g., elimination of the need to comply with RCRA Subtitle C) are quite substantial.

A description of how to consider affordability is outlined in Appendix E. Due in part to a lack of resources, this approach has not been fully developed or implemented.

Finally, generators may consider any type of delisting petition fee to be inequitable. They may feel that it is unfair to pay a fee to petition to delist wastes that should not have been deemed hazardous in the first place. As noted in Section 1.2, the Agency is attempting to address this underlying inequity by reassessing its listing program.

8. Conclusions

The previous discussion indicates that no significant obstacles exist to implementing a delisting user fee based on the six Task Force criteria.

Currently, the User Charge Statute of the IOAA provides EPA with the authority to charge fees if certain criteria are met regarding the amount and structure of the fee. The recommended option is to develop a regulatory proposal assessing a delisting fee based on IOAA and then seek specific authorization during the next reauthorization of RCRA. Regarding retention of fee receipts, the Agency received some authority in this area in the FY 88 appropriation. The recommended course is to continue pursuing the Agency's initiative for new legislation and, if that fails, to seek specific authority during the next RCRA reauthorization. In the interim, the Agency's authority to retain fee receipts should be renewed annually during the appropriation process.

A delisting fee would be administratively feasible, although there may be some significant difficulties. First, it may be difficult to identify and quantify some of the costs of reviewing petitions. For example, EPA's limited experience with generic delisting petitions may make it difficult to determine the resources that it will spend in reviewing them. Second, some data gaps on policy concerns will make it difficult to sufficiently consider these factors in evaluating a fee. For example, although it is expected that a delisting fee will have a positive environmental impact, it is difficult to estimate the size of this impact. Finally, OSW will need to draft guidance for Headquarters staff on key aspects of administering the fee (e.g., how to determine the number of hours to charge via an hourly fee). A base fee for complete petitions, plus an additional hourly fee to cover resources spent reviewing petitions with incomplete data, is recommended. This type of fee structure will likely encourage more complete applications and reduce Agency resource expenditures.

A delisting fee would likely raise about $1 million annually. EPA's budget would probably increase slightly, depending on the Agency's access to the fee receipts and any corresponding change in EPA's appropriation. The revenue estimate is based on an estimate of how the Agency's past delisting expenditures would change in the future. EPA spent approximately $2.4 million on delisting in FY 87. These costs will decrease due to several factors, the most important likely being the relisting program. Other factors include the incentive effects of the fee itself and State delegation. However, revenue could increase significantly, up to $2.6 million, if EPA included a facility visit as part of every petition review. Finally, net revenue to the federal government would be, at a minimum, approximately $660,000, far greater than the administrative costs, which would range from $23,000 to $80,000. Thus, it is financially feasible to institute the fee.

No significant adverse environmental impacts are expected as a result of a delisting fee. Relative to no fee, a fee can be expected to decrease the number of petitions and increase petition quality. To the extent that a fee discourages non-serious petitioners, or encourages more complete and accurate petitions (which require less review resources), Agency resources will be conserved. An indirect, positive environmental impact could, therefore, result from conservation of Agency resources for use in other environmental areas (assuming the level of resources does not change). In addition, more complete delisting petitions will decrease the review time, thereby denying unworthy petitions sooner. Quicker petition turnaround time, for petitions that are denied, might reduce the non-compliance time of certain generators and the threat to human health and the environment. Finally, a fee that provides funds for data verification activities will ensure that only non-hazardous wastes are delisted.

State opposition to a Federal delisting fee exists due to concern that fees will eventually be applied in areas that might preempt State fees. This concern exists for user fees in all RCRA programs, not simply fees for delisting. Under the IOAA, however, the Federal government can charge fees only for a service that it provides, not for State-implemented activities. Another State concern is that a State user fee system may be required for delegation of delisting authority. However, RCRA delegation decisions must be based only on conditions specified in Part 271. Establishment of a user fee system is not one of the conditions. A Federal delisting fee system may have a positive impact on States. For example, a revenue generating fee system designed and implemented on the Federal level may later be adopted or modeled by States.

A delisting fee is not likely to have significant negative economic effects. A fee may, in fact, result in better allocation of private resources if it discourages illegitimate petitioners. A fee is not likely to have any effect on product prices or competitive relationships in an industry. The level

of hardship inflicted on the regulated community by transition to a fee will differ depending on how far along the firms are in the petition process. The Agency may establish a termination date for grandfathering prior to which petitions submitted would not be charged a fee. It is unclear whether the affordabilityof a fee should be considered in determining its feasibility. If it is to be considered, EPA could use the approach outlined in appendix E.

Appendix A

Questions for Six Criteria
Established by EPA Task Force on User Fees

Legislatively Feasible

- Is there already specific statutory authority?

- Would Independent Offices Appropriation Act (IOAA) authority be satisfactory?

- Would the fee be characterized as a tax? (E.g., especially when mixed public and private benefits are involved or if the fee is based upon criteria other than cost recovery.) If yes, it would not be recoverable under the IOAA.

- Would political opposition make adoption of legislation unlikely? (E.g., if an interest group has "veto power.")

- Is legislative action prerequisite? (E.g., Agency-wide legislation, statutory amendment, Appropriations language.)

- What kind of new legislation would have the most promise for success? (E.g., statute-specific legislation, Agency-wide legislation.)

- Would legislation authorizing dedication of revenues in a way that bypasses the Congressional appropriations process be politically acceptable?

- What "political capital" would EPA need to spend for successful introduction of new legislation?

- Would seeking legislation on fees upset other negotiations? (E.g., reauthorizations.)

- Would the fee be levied against public entities (e.g., States, municipalities) or constitute simply an accounting shift of Federal funds (e.g., grants)?

Environmental

- Would the fee encourage positive environmental behavior? (E.g., encourage risk reduction, stimulate environmentally beneficial innovation, assist environmental education, expand environmental protection.)

- Would the fee impede information transfer to the States or to the regulated community? (E.g., by making information too costly.)

- Would the fee discourage compliance with regulations? (E.g., late submission of data, illegal waste disposal.)

- Would the fee make enforcement more difficult? (E.g., result in more enforcement actions, make them more complex.)

Financially Acceptable

- Would fee revenue be substantial and amount to a sizable portion of program costs?

- Would net revenue to the government be significant? (E.g., corporate income tax deductions for fee payment should be taken into account.)

- What are the fee's budgetary implications for EPA? (E.g., availability of revenue for program operation, revenue to offset "bottom line" EPA expenditures.)

- Would administrative costs be high in relation to revenue generated? (E.g., guidance, collection, and accounting costs.)

- Would the fee increase enforcement or general counsel costs substantially? (E.g., more enforcement actions, ruling internally on waiver requests.)

- Would the fee serve as a stable revenue source? (E.g., fees for activities soon to be delegated and fees designed as policy tools to alter behavior may not provide a stable revenue source.)

- Would the fee be only a one-time recovery?

Acceptable to the States

- Would the Federal fee have an impact on established State policies? (E.g., affect collection of fees at the State level.)

- Would the fee be levied against public entities (e.g., States, municipalities) or constitute simply an accounting shift of Federal funds (i.e., grants)?

- Would the fee affect State regulatory resource requirements? (E.g., increase or decrease need for State enforcement and compliance actions.)

- Would the Federal fee provide an incentive for State-level fee initiatives without entailing undue development costs?

- Would the imposition of a Federal fee differentially affect delegated and non-delegated programs? (E.g., create regulatory burdens for States, serve as a disincentive to delegation.)

- Would the fee lead to regional disparities? (E.g., creation of "pollution havens" or a disincentive for industry to locate in a certain area.)

Administrable

- Does sufficient data exist to justify reasonableness of fees? (E.g., data on administrative costs, data enabling projection of fee impacts.) If not, what costs and time are necessary to gather the data?

- Are beneficiaries of the service sufficiently well-identified to levy the fee accurately against them?

- What costs would the fee recover? (E.g., costs for specific actions, generic scientific review costs, other overhead costs.)

- Could a clear protocol for calculating direct and indirect costs be developed easily?

- Are necessary accounting procedures specifiable and easily implemented? Would the Inspector General be able to approve them as auditable?

- Would fee implementation involve administrative complexity? (I.e., factors related to number of parties charged, nature and number of components comprising the charge, point at which the charge is levied, variable charges among parties.)

- Upon what criteria would the fee be based (e.g., volume of product produced, risk), and are these criteria readily quantifiable?

Economically Fair

- Would the fee satisfy the "polluter pays" principle and encourage better allocation of private resources?

- Would the fee substantially affect prices? (E.g., shift competitive relationships in an industry, influence cost of a product.) If designed to effect policy changes, fees may alter prices and change competitive balances.

- Would the fee influence international trade or balance of payments?

- Would abrupt transition to the fee inflict debilitating hardship on the payer?

- Would imposition of the fee unfairly affect the consuming public? (E.g., if availability of an essential product or service is reduced.)

- Would a cross-subsidy result from the fee? (I.e , when one class or group pays fees although a competitor does not.)

Appendix B

FY 87 Delisting Program Costs

EPA spent approximately $2.4 million on delisting related activity during fiscal year 1987 (FY 87). This figure represents expenditures for both contractor support and Agency FTE. As Table 1 shows, nearly two-thirds of the annual costs are spent on contractor support.

Table 1

FY 87 Delisting Program Costs
(in thousands)

$1,522	Contractor support
880	FTE
$2,402	Total

These costs are broken down further below. The appendix concludes with a comparison of the study group's cost estimate with the one made earlier by the Office of Program Management and Support (OPMS).

A. Contractor Support expenditures

The Agency spent approximately $1.522 million on contractor support in delisting in FY 87. Specifically, EPA budgeted $2,840,670 in its contract no. 68-01-7244, which spanned fiscal years 1986 and 1987.[1] A review of the contractor's progress reports shows at least five work assignments (WA's) related to delisting. [Note: it is not known whether work assignments 2 and 4-7 were related to delisting. The progess reports which Wendell Miser gave OPPI did not discuss these assigments since they were closed. They totaled $407,982. Note that WA #11 (for $11,805), dealing with the air toxicity characteristic, is apparently not related to delisting.] As shown in Table 2, these five assignments totaled $2,420,883. This represents over 85% of the contract's total amount.

These work assignments had different periods of performance, some covering parts of FY 86 as well as FY 87. Thus, in order to determine the costs for FY 87 alone, one needs

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[1] Additional funds were apparently spent for delisting support under other contracts. This discussion is limited to contract #68-01-7244, under which most of the contractor support was provided.

to adjust the figures. Accordingly, costs for work assignments with performance periods spanning more than the 12 months in FY 87 are adjusted to a one-year basis. For example, WA #1 covered a period of 20 months, including all 12 months of FY 87. The costs for this WA ($1,320,384) are multiplied by 0.6 (i.e., 12/20), resulting in a FY 87 figure of $792,230. The costs for work assignments with performance periods entirely within FY 87 remain the same.

The adjustments of costs to the FY 87 baseline are shown below in Table 3.

Table 2

Delisting related Work Assignments in EPA Contract No. 68-01-7264

WA No.	WA Title	Work Plan Budget	Contractor With Lead Responsibility
1	Support for Petition Review	$1,320,384	SAIC
3	Spot Check Program	886,241	ENSECO
8	Support for Delisting Petition Data Management System (DPDMS)	131,048	SAIC
9	Guidance Manuals	59,907	Cadmus
10	DPDMS Maintenance, Enhancement and Training Support	23,303	SAIC
	Total	$2,420,883	(which equals 85% the total contract amo of $2,840,670)

Table 3

Adjustment of Delisting Contractor Costs to FY 87 Baseline

WA	Performance Period	Duration of Performance Period	Work Plan Budget	FY 87 Baseline (i.e., adjusted to 12 months)
1	2/4/86-9/30/87	20 months	$1,320,384	$ 792,230
3	2/20/86-9/30/87	19 1/2 mos.	886,241	545,379
8	6/18/86-9/30/87	15 1/2 mos.	131,048	101,457
9	12/4/86-8/30/87	(within FY 87)	59,907	59,907
10	5/26/87-9/30/87	(within FY 87)	23,303	23,303
				Total $ 1,522,276

B. Agency FTE expenditures

The Agency spent roughly $880,000 in FTE on delisting related activity in FY 87. This represents approximately 22 FTE, assuming a cost of $40,000 per FTE.

As to be expected, the majority of the 22 FTE came from the Office of Solid Waste and Emergency Response (OSWER), with most of that coming from the Office of Solid Waste (OSW). Specifically, 19 of the 22 delisting related FTE were from OSWER. Of these 19 FTE, 17 were from OSW; Table 4 shows the breakdown of FTE Agency-wide.

Table 4

Agency FTE spent on Delisting in FY 87

	FTE	Running Balance of FTE
Variance Section professional staff	6	6
Variance Section clerical staff	1	7
Other Assistance Branch sections and other PSPD Branches	3	10
PSPD Director's immediate office	1	11
WMD, CAD and OPPI	4	15
OSW Director's immediate office and OPMS	2	17
OWPE, OERR, OUST	1	18
OSWER AA's immediate office	1	19
Other AA-ships (excluding OARM)	2	21
OARM and Adm'r's immediate office	1	22
	TOTAL	22

To derive this estimate, staff in the Office of Policy, Planning and Information (OPPI) reviewed the number of FTE allocated to the Agency's different offices, and estimated the amount related to delisting. A detailed description of this review is given below. Note that each assumption made by OPPI is clearly stated. This makes it convenient to later check one or more of the assumptions. For example, in step 1 below, it is assumed that the Variance Section had 6 total professional FTE in FY 87. It should be relatively easy to check with OPMS and compare this estimate with the actual figure.

First, as illustrated above in table 4, it was assumed that the Variance Section professional staff totals 6.0 FTE, all of which is spent on delisting-relisted activity. Second, it was assumed that the Variance Section had 1.0 clerical FTE, with all of it also being spent entirely on delisting-related activity. Third, it was assumed that interviews would reveal that personnel in the other Assistance Branch sections and other branches in the Permits & States Program Division (PSPD) spent a total of 3.0 FTE on delisting. Fourth, it was assumed that the total FTE for PSPD staff (excluding personnel on the Division

Director's immediate staff) was 50 FTE. Note that 20% of this total was spent on delisting (i.e., 10 FTE out of 50 = 20%). Fifth, it was assumed that there were 5.0 FTE in the PSPD Director's immediate office. Sixth, it was assumed that the Division Director's immediate office spent the same percentage of resources on a particular activity as the rest of the staff that it oversees does. Thus, since 20% of the PSPD staff FTE was related to delisting, then 20% of the immediate Division Director's office FTE was deemed to be spent on delisting. Note that 20% of 5.0 FTE equals 1.0 FTE. Seventh, it was assumed that the total FTE for the Waste Management Division (WMD), the Characterization and Assessment Division (CAD), and OPPI was 125 FTE. Eighth, it was assumed that interviews would reveal that these personnel spent a total of 4.0 FTE on delisting-related activity.

At this point, it may be useful to pause and review the total FTE overall and the total FTE spent on delisting. Tallying the assumptions above, one finds that (aside from the Office Director's immediate office and OPMS) OSW has a total of 180 FTE. [This breaks down to 55 in PSPD and 125 in WMD, CAD and OPPI.] Of this 180 FTE, 15 is estimated to be spent on delisting. [This represents 11.0 from PSPD and 4.0 from WMD, CAD and OPPI.] Note that 15 delisting-related FTE out of 180 total FTE equals 1/12.

Ninth, it was assumed that the total FTE for the OSW Director's immediate office and OPMS was 24 FTE. Tenth, similar to the sixth step above, it was assumed that the allocation of FTE in these two offices reflects the allocation of the staff it oversees. Thus, 2.0 additional FTE (i.e., one-twelfth of the 24 FTE) is deemed to be spent on delisting activity.

Eleventh, a total of 350 FTE was assumed for the Office of Waste Programs Enforcement (OWPE), the Office of Emergency Remedial Response (OERR) and the Office of Underground Storage Tanks (OUST). Thus, the total FTE for OSWER (excluding the staff of the Assistant Administrator (AA)) is 554. [This breaks down to 204 FTE for OSW and 350 for the other offices.] Twelfth, it was assumed that interviews with OWPE, OERR and OUST would reveal a total of 1.0 FTE related to delisting. Thirteenth, it was assumed that the total FTE for the AA's staff is 33. Fourteenth, similar to steps six and ten above, it was assumed that the allocation of FTE in the AA's office reflects the allocation of FTE in the offices it oversees. Note that roughly 3% of the FTE in offices below is allocated to delisting activity. [This is calculated by dividing the 18 FTE related to delisting by the 554 total FTE.] Three percent of the 33 FTE in the AA's office means that approximately 1.0 FTE in the AA's office is spent on delisting activities. Table 5 shows the breakdown of delisting related FTE within OSWER.

Table 5

Delisting related FTE within OSWER

AA's immediate office (1 total)

OWPE, OERR, OUST (1 total)

OSW (17 total)

2 - OD's immediate office, OPMS
4 - WMD, CAD, OPPI
11 - PSPD

Fifteenth, it is assumed that interviews would reveal that delisting-related activity in other offices headed by Assistant Administrators (excluding the Office of Administration and Resources Management (OARM) but including, e.g., the Office of General Counsel and the Office of Policy and Program Evaluation) total 2.0 FTE. Note that the total FTE related to delisting now stands at 21.0. Sixteenth, a total of 4,200 FTE is assumed for all offices headed by an AA (except OARM). Note that 21 divided by 4,200 equals 0.005%. Seventeenth, similar to steps six, ten and fourteen, it is assumed that the allocation of FTE in OARM and the Administrator's office reflects the allocation of FTE in the rest of the Agency. Eighteenth, it is assumed that the total FTE for OARM and the Administrator's office is 200. Thus, 1.0 FTE from these offices is deemed to have been spent on delisting activity. [This is calculated by multiplying 200 by 0.0005%.] Table 6 shows the breakdown of delisting related FTE among AA's offices.

Table 6

Delisting related FTE according to AA's offices

Administrator's Office
and OARM

1 FTE

OSWER

19 FTE
(broken down in
table 5 above)

Other AA's
(e.g., OGC & OPPE)

2 FTE

C. Comparison with earlier estimate

The $2.4 million estimate described in this appendix differs sharply from the $0.57 million estimated earlier by OPMS

for the Agency-wide Task Force.[2] The main reason for the difference is that OPMS apparently did not include contractor costs. Note that OPMS apparently made its calculations prior to the large increase in delisting contractor support, which occurred early in calendar year 1986. Of course, these costs account for $1.52 million of the OSWER study group's figure.

Aside from contractor costs, the two estimates also differed on FTE costs. The study group estimated 22 FTE at a cost of $880,000 while OPMS estimated 14.3 FTE at a cost of $567,000.[3] There are several possible explanations for this difference. First, unlike the study group, OPMS apparently did not include indirectly related FTE. It is not clear why OPMS did not include them; the IOAA clearly authorizes EPA to recover these costs through a fee. Perhaps the RCRA workload model is not designed to track indirect FTE, i.e., does not account for FTE not spent on one's area of direct responsibility. EPA may, however, face administrative difficulties in providing sufficient documentation for indirect FTE; see section 3.2. If so, then the study group estimate would have to be revised downwards, making it closer to OPMS' estimate.

The two estimates were also based on two different methodologies. OPMS used the RCRA workload model to estimate the costs of one petition review, and then multiplied that by the number of petitions per year. OPMS included several caveats to its estimate, noting that the workload parameters were very tentative and might be too low. The study group estimate, on the other hand, was based on an analysis prepared by OPPI staff, which made several key assumptions. Some of these assumptions may turn out to be inaccurate, thereby leading to an overestimate. For example, OPPI staff assumed that interviews with OWPE, OERR and OUST would reveal a total of one delisting related FTE in those offices. However, EPA may decide not to conduct these interviews, or such interviews may find no delisting-related FTE.

Next, the estimate by OPMS was apparently based on FY 86 data, while the study group's estimate reflect FY 87 costs. However, delisting activity was at roughly the same level during these two years. Thus, it is unlikely that this could have been a significant factor.

Finally, the study group used a slightly higher cost

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[2] Memorandum from Kennan Garvey/OPMS, OSWER Representative on Fee Collection Workgroup, to John Adams (Comptroller's Office), Chairperson, Fee Collection Workgroup, entitled "Initial Report on the Status and Opportunities for RCRA Fee Collection" and dated February 25, 1986.

[3] Ibid.

estimate for 1.0 FTE ($40,000) than OPMS did ($39,600). This, however, represents only a very minor part of the difference between the groups.

The estimates also differed in the current number of petitions per year: OPMS assumed 126 petitions/year while the study group assumed 140 petitions/year.[4] Although the annual number of petitions is a key factor in the estimate by OPMS, it does not directly affect the study group's estimate. As discussed above, the study group examined total costs of the delisting program, regardless of the number of petitions. Thus, for the study group, this number only became a factor when determining the average fee. Consequently, these inconsistent assumptions do not really explain the difference in the estimates of total costs, although the difference would be reduced if OPMS had made the same assumption as the study group.

The difference in the estimated number of petitions per year does partly explain the difference in estimated average fee: OPMS - $4,500; study group - $17,160. The study group's figure is calculated by dividing total costs ($2.402 million) by the number of petitions (140). Note that this figure is not very useful since EPA does not have the legal authority under the IOAA to charge an average fee based on total costs (see section 2.3).

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[4] Memorandum, dated 10/2/87, from Suzanne Rudzinski, Chief, Assistance Branch, PSPD to Debora C. Martin, Chief, Policy Analysis Staff, OPPI, "Costs Associated with Spot Visit Check Site Visits for the Delisting Program".

Appendix C

Estimated Revenue from a Delisting Fee

A delisting fee would likely raise approximately $969,200 in revenue annually (with an average fee of roughly $15,000 for approximately 63 petitions). This figure may vary significantly depending largely on the effect of the relisting program and the number of facility visits. For example, the total could rise to as much as $2,632,400 if EPA decided to conduct site visits as part of every petition review. On the other hand, revenue could also be zero if, for example, the relisting program results in the end of the delisting program.

Section A explains the formula used to derive these estimates. Section B discusses the estimated values for the variables in the formula. Section C shows the arithmetic calculations.

A. Revenue Estimate Formula

The total amount of revenue (TR) will equal the total costs of the program (TC) multiplied by the percentage of costs recovered by the fee (CR). This relation can be shown in the following expression:

(1) $TR = TC*CR$

Total costs will equal the sum of facility visit costs (FVC) and total remaining costs, hereinafter referred to as total base program costs (BPC). This relation can be shown in the following expression:

(2) $TC = FVC + BPC$

The total facility visit costs will equal the number of facility visits multiplied by the average cost per facility visit (AF). The number of facility visits will depend on the number of petitions (N) and the percentage of petition reviews that include a facility visit (P). This relation can be shown in the following expression:

(3) $FVC = AF*N*P$

As suggested in section 4.3, the number of petitions in the future may be significantly lower than the number of petitions submitted in the past (N'). First, the relisting program (R) will likely cause the number of petitions to drop substantially (see section 1.2). Second, the number of petitions will decrease to the extent that EPA delegates the delisting program to more States than it did prior to HSWA (HS). Finally, the fee itself may deter submission of petitions, e.g., those with little merit, (D). This relation can be shown in the following expression:

(4) $N = N' * R * HS * D$

Simple algebraic substitution of (4) into (3) results in the following expression:

(5) $FVC = AF * N' * R * HS * D * P$

Next, the total base program costs (BPC) will equal the past base program costs (BPC') discounted by various factors. These factors include two of the factors above (R and D). Base program costs will also be reduced to the extent that EPA delegates the delisting program to the States (S). In addition, they will be reduced to the extent that the fee provides an incentive for improved petition quality (Q). This relation can be shown in the following expression:

(6) $BPC = BPC' * R * S * D * Q$

Simple algebraic manipulation of (2), (5) and (6) results in the following expression:

(7) $TC = AF * N' * R * HS * D * P + BPC' * R * S * D * Q$

Additional manipulation, of (1) and (7), results in the following expression:

(8) $TR = AF * N' * R * HS * D * P * CR + BPC' * R * S * D * Q * CR$

This is the basic formula for estimating delisting fee revenue.

B. Estimating Values for the Variables

As shown in expression (8) above, the formula for calculating total revenue includes ten variables. This section includes estimated values for each of these variables.

AF - EPA's average cost per facility visit. In FY 87, this cost was $33,000; see appendix B. OPPI staff assumed that this figure is unlikely to change significantly in the near future.

Note that the $33,000 figure represents only the funds spent by EPA on contractor support for facility visits. It does not include the cost of Agency FTE spent on facility visits. This underestimate of the true value of AF should not significantly affect the total revenue estimate however. If AF is adjusted upwards to reflect this Agency FTE, then BPC' would have to be revised downwards by a similar amount. The two adjustments would largely cancel each other out.

N' - the number of petitions submitted in the past. EPA has

received approximately 140 petitions per year in the past; see appendix B.

R - the effect of the relisting program on the number of petitions in the future. This variable ranges from 0 (complete elimination of the delisting program) to 1.0 (no effect). OPPI staff estimated 0.5, which represents a 50% reduction in the number of petitions and base program costs.

HS - the effect on the number of petitions of a higher level of State delegation than that which existed prior to HSWA. As seen above with N', the estimate of the number of future petitions is based on the average number of petitions throughout the history of the delisting program. This number already reflects delegation of delisting authority to 10-15 States. In other words, the number of petitions received by EPA in the past (i.e., 140 per year) does not include the petitions processed by the authorized States. As explained in section 6.2, the number of States expected to seek delisting authority in the future is likely to be the same as that prior to HSWA (i.e., 10-15); a higher level is not expected. Thus, state delegation is not expected to have any effect on the number of future petitions, aside from the delegation to 10-15 States already accounted for. Consequently, OPPI staff assumed HS equalled 1.0 (i.e., no effect).

D - the deterrent effect of the fee. The fee may have no effect at all (i.e., D = 1.0) or a large one (e.g., D = 0.7, with 30% of the potential petitioners deterred by the fee). OPPI staff estimated that D would equal 0.9.

P - the percentage of petition reviews that include a facility visit. This variable can range from zero (i.e., EPA conducts no facility visits) to 1.0 (i.e., EPA includes a facility visit with each petition review). In the past, EPA has conducted facility visits during 6% of the petition reviews (see section 1.1). Limited resources have prevented EPA from increasing such visits. With a fee, EPA would be able to increase the percentage of visits significantly. OPPI staff assumed that 20% of the petition reviews in the future include a facility visit, i.e., P = 0.2.

Note that although the percentage of reviews including a facility visit is estimated to increase significantly in the future, the actual number of facility visits would not. This is a result of the number of petitions submitted in the future dropping below current levels. As discussed later, the number of petitions is estimated to drop from 140 to 63. A change in P from 6% to 20% would mean 12.6 visits per year (i.e., 0.2*63) instead of 8.4 (i.e., 0.06*140).

CR - the percentage of costs recovered through a fee. Circular

A-25 instructs EPA to recover all costs through a fee. Administrative difficulties, e.g., satisfying all the IOAA requirements, may hinder EPA however; see sections 3.2 and 3.3. OPPI staff assumed that these obstacles could be overcome and full cost recovery is achieved (i.e., CR = 1.0).

Note that EPA may decide, as a matter of policy, to rebate the fee for successful petitioners (see section 7.2). If so, then CR would be close to zero, given the high success rate of petitions (i.e., CR = 1.0 - success rate). A rebate would significantly reduce the amount of costs that EPA could recoup. Since full cost recovery is one of the key objectives of the fee, OPPI staff assumed that there would be no rebate.

Note also that EPA may decide to waive the fee based on a firm's ability to pay; see section 7.3 and appendix E. If the fee were waived for firms that could not afford it, then CR would be decreased. OPPI staff assumed that no affordability waivers would be allowed.

BPC' - the total base program costs in the past. OPPI staff used data from the most recently completed fiscal year. Specifically, EPA spent approximately $2.402 million on delisting during FY 87 (see appendix B). Subtracting the facility visit costs ($545,000) brings the total down to $1.857 million. Next, as discussed in section 4.2, "one-time costs" need to be deducted. For example, EPA spent approximately $59,000 on preparing delisting guidance manuals during FY 87. Presumably this was a one-time activity and EPA will not spend similar sums in the future. The guidance manual expenditures appear to be the only one-time costs during FY 87. Thus, BPC' equals $1.798 million (i.e., $1.857 million minus $59,000).

As noted above with AF, the figure used for facility visit costs represents only contractor support costs. Thus, the FY 87 figure for base program costs incorrectly includes Agency FTE costs for facility visits. This overestimate should not significantly affect the estimate of total revenue however. Any downward adjustment of BPC' would be roughly cancelled out by the corresponding upward adjustment of AF.

S - the effect of State delegation on the base program costs. EPA estimates that 10-15 of the 54 States and territories will receive authorization for the delisting program; see section 6.2. Thus, S ranges from 0.72 (i.e., 1.0 - 15/54) to 0.81 (i.e., 1.0 - 15/54). OPPI staff used a mean value of 0.76.

Note that S, which affects base program costs, differs from HS, which affects number of petitions. As seen above with BPC', base program costs are estimated using FY 87 costs. Only one State was authorized for delisting in FY 87. Thus, the effect of State delegation is not really reflected in the figure for FY

87 BPC. By contrast, the number of petitions was estimated based on the history of the delisting program, including the pre-HSWA period when 10-15 States were authorized for delisting. Thus, this figure already reflects the effect of delegation to 10-15 States.

Finally, note that the estimate for S can be improved by reviewing the level of base program costs throughout the history of the delisting program. For example, one could check the base program costs for FY 84, when pre-HSWA state delegation was at its peak, and compare them with the costs in FY 87, when the number of authorized States was low. If the costs do not differ significantly, then one can conclude that State delegation does not greatly affect delisting costs (i.e., the value of S should be closer to 1.0).

Q - the improvement in petition quality as a result of the fee. As discussed in section 3.3, it is recommended that the fee be designed to encourage better petitions. The better the petition, the less resources EPA spends on review. OPPI staff assumed that this incentive effect of the fee will result in a 10% reduction of EPA's costs (i.e., Q = 0.9).

C. Calculations

Plugging the values estimated in section B into the formula outlined in section A results in an estimate of $969,200 total revenue. The arithmetic is shown below.

(8) $TR = AF*N'*R*HS*D*P*CR + BPC'*R*S*D*Q*CR$

AF = $33,000; N' = 140; R = 0.5; HS = 1.0; D = 0.9; P = 0.2; CR = 1.0; BPC' = $1.798 million; S = 0.76; Q = 0.9.

TR = ($33,000)(140)(0.5)(1.0)(0.9)(0.2)(1.0) +
($1.798 million)(0.5)(0.76)(0.9)(0.9)(1.0)

TR = ($33,000)(70)(0.18) + ($1.798 million)(0.38)(0.81)

TR = ($33,000)(12.6) + (1.798 million)(0.3078)

TR = $415,800 + $553,400

TR = $969,200

As noted above in section A (specifically, expression (4)), the number of petitions submitted in the future (N) would equal N'*R*HS*D. Plugging values into this formula results in N = (140)(0.5)(1.0)(0.9), which comes out to 63. The average fee would be the total revenue ($969,200) divided by the number of petitions (63) -- approximately $15,380.

Next, EPA may elect to include a site visit as part of every petition review. Thus, if P = 1.0 and all the other values remain the same, then:

TR = ($33,000)(14)(0.5)(1.0)(0.9)(1.0)(1.0) + $553,400

TR = ($33,000)(70)(0.9) + $553,400

TR = ($33,000)(63) + $553,400

TR = $2,079,000 + $553,400

TR = $2,632,400

Appendix D

Administrative Costs

Administrative costs for a delisting fee are estimated to range from $22,700 to $80,000. A large portion of these costs would be one-time expenditures for the initial establishment of the fee. Consequently, once the fee is in place, annual administrative costs are likely to be far lower. Finally, note that the total costs could increase by as much as $40,000 more (i.e., for a maximum total of $120,000) if an affordability waiver is allowed.

The following analysis estimates the costs involved in: (1) identifying and quantifying review costs; (2) designing the fee; and (3) administering the fee. The estimates are in terms of weeks spent by EPA personnel on specific tasks in these three areas. The final section of this appendix tallies the numbers of weeks and translates them into costs to EPA.

The costs involved in identifying and quantifying the costs of petition review should be rather low since such data is easily available from EPA's past reviews. The entire effort is estimated to range from 4 to 12 weeks. First, 1-3 weeks is estimated for review of contractor reports. These records are easily accessible, and would be reviewed in order to identify which of the costs are recoverable. Second, identifying and quantifying the FTE costs would require 2-6 weeks. As outlined in Appendix A, several levels of interviews might be needed in order to document all delisting-related efforts. For example, 1-hour interviews with the following managers may be desirable: Variance section chief; Assistance Branch chief; Directors of CAD, WMD and OPPI; Directors of OWPE, OERR and OUST; the Associate General Counsel for OSWER; and one or two office directors in OPPE. Third, 1-3 weeks is estimated for the confirmation, through OPMS and OARM, of the precise allocation of FTE during FY 87. Finally, note that all of these tasks would be one-time costs.

Since the rough outlines of the design of the fee already exist, the costs involved in designing a fee should be relatively low. Hammering out the details of the design is estimated to range from 16 to 20 weeks, although this could significantly increase if affordability waivers are allowed. First, approximately 8 weeks will be needed to separate the costs which can be attributed to all petitions from the costs which are incurred only during review of incomplete petitions. This is necessary in order to document the basis for the two-tiered fee design.

Second, 2-6 weeks would be needed to establish procedures for estimating the number of additional review hours that an incomplete petition will entail. Third, 3 weeks would be needed to establish a system tracking actual time spent on each

incomplete petition. Finally, 3 weeks would be needed to establish procedures for refunds for petitions where the hourly fee exceeds EPA's actual costs.

Again, all of these tasks represent one-time costs.

Significant costs might be incurred if EPA decides to allow affordability waivers. Specifying an ability-to-pay test which is clear and fair might take as much as 44 weeks (i.e., one FTE). Allowing a vague waiver would save costs in design, but result in higher costs in administration.

The resources needed to administer a delisting fee are estimated to range from 12 to 56 weeks worth of work by EPA. First, any fee rulemaking (e.g., pursuant to IOAA) ought to be a relatively straightforward process, and could take as little as 4 weeks. However, unanticipated issues may arise, resulting in a much larger effort, perhaps as much as 22 weeks. Second, development of guidance for OSW staff on how to implement the fee would require 2 to 10 weeks. Both of these would be one-time costs.

Third, 2 to 10 weeks may be required annually to defend against any challenges to EPA's determination that a particular petition is incomplete (and hence, subject to the additional fee). Next, some resources will be consumed in administration of the hourly fee. Correspondence with firms, notifying them of the fee and outlining the information missing from their petitions, may take 2-6 weeks per year. Finally, an additional 2-8 weeks would be spent annually on administration of the time tracking system. This includes the time spent by delisting staff filling out the sheets, and the time spent by OARM staff reviewing them and calculating the appropriate fee.

The following chart tallies the number of weeks for each of these tasks.

Administrative Costs of a Delisting Fee

(1) Identifying and quantifying costs	
- Review contractor reports	1-3 weeks *
- Interviews re: FTE	2-6 weeks *
- Review of allocation of FTE	1-3 weeks *
(2) Designing a fee	
- Separation of base fee costs from hourly fee costs	8 weeks *
- Procedures for estimating hours	2-6 weeks *
- Time tracking system	3 weeks *
- Refund procedures	3 weeks *
(3) Actual administration of a fee	
- Rulemaking	4-22 weeks *
- Guidance for HQ staff	2-10 weeks *
- Defense against challenges	2-10 weeks
- Correspondence w/petitioners	2-6 weeks
- Completion/review of timesheets	2-8 weeks
TOTAL	25-88 weeks

* One-time only costs

In order to translate work weeks into EPA costs, it was assumed that one FTE equals 44 work weeks and that one FTE costs EPA $40,000. Thus, 25 weeks translates into a cost of $22,700 for EPA (i.e., 25/44 times $40,000) and 88 weeks translates into $80,000 of EPA costs (i.e., 88/44 times $40,000). Affordability waivers, which might consume as much as 44 weeks, would therefore add as much as $40,000 to the administrative costs.

Finally, a large portion of the administrative costs are

one-time costs. Once the fee is in place, annual administrative costs would range from approximately $5,500 to $21,800.[1]

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[1] One-time tasks range from 19-64 weeks. (19/44) times $40,000 = $17,272 and (64/44) times $40,000 = $58,180. Annual tasks range from 6-24 weeks. (6/44) times $40,000 = $5,456 and (24/44) times $40,000 = $21,820.

Appendix E

Possible Method for Determining Affordability

OSWER may decide to consider the issue of a delisting fee's affordability. Although not expressly required by law or recommended as policy, consideration of this issue is suggested by legislative history. Thus, in considering the Task Force's economic fairness criterion, OSWER may opt to review whether the fee would pose an unfair burden on small firms. This appendix outlines how OSWER might consider this affordability issue. As noted in section 7.3, this approach has not been fully developed or implemented due in part to a lack of resources.

In order to determine whether a delisting fee would be "affordable", the following is needed:

(1) estimates of the costs that a potential petitioner may face;

(2) a rule predicting the ability of a potential petitioner to bear these costs; and

(3) any financial information regarding the generator required by the above rule.

1. Costs that a Potential Petitioner May Face

The first section below outlines a possible modeling approach for determining what type of costs a potential petitioner may face. The second section discusses ways of estimating values for these various costs.

A. A Possible Modeling Approach

A generator (G) must first decide whether to submit a delisting petition or not. He does this by comparing the sum of the costs of complying with RCRA Subtitle C requirements until a final decision on the petition is issued (C), of preparing a petition (P), and of paying a fee (F) with the present value of the future costs of complying with RCRA Subtitle C requirements (PV), multiplied by the probability of the petition's success (P(S)). In other words, G determines whether $C + P + F < PV*P(S)$. If so, then G will want to submit a petition, assuming he can afford one. An ability-to-pay (ATP) rule, described in the following section, can be used to model whether G can afford to submit a petition, i.e., whether $ATP > C + P + F$.

Next, if a generator has the incentive to submit a petition and can afford to do so, then he will. In other words, G will pay the fee and submit a petition where $C + P + F < PV*P(S)$ and $ATP > C + P + F$.

A generator may, however, be unable to afford a petition, i.e., ATP < C + P + F. The issue raised by several members of the work group is that the fee may be the reason why these generators cannot afford to submit a petition. In other words, some generators may be able to afford a petition only if the fee were not imposed. This issue can be modeled.

If a generator cannot afford the full costs of petition submission, one could then check whether G can afford these costs if the fee were not included. In other words, if ATP < C + P + F, then see whether ATP < C + P alone. If not, then there are some generators who could afford a petition only if the fee were not imposed. Conversely, if ATP is less than the sum of C and P, then the fee has no effect, i.e., these generators cannot afford to either comply with Subtitle C or submit a petition (even if there is no fee).

The group of petitioners who want to submit a petition but cannot afford to do so because of the fee needs to be divided into two groups: those whose petitions will eventually be granted and those whose petitions will eventually be denied. An estimate of the former can be derived by multiplying the total number of generators in this group by the petition success rate (i.e., P(S)). This will give the number of deserving petitioners who would be deterred by the fee from submitting a worthy petition. The remaining petitioners in this group will be undeserving petitioners who would be deterred from submitting an unworthy fee if a fee were imposed.

Finally, to complete the description of what the modeling approach would look like, one needs to return to the first step, i.e., whether C + P + F < PV*P(S). The discussion above outlines what happens if C + P + F is less than PV*P(S). If it is not, then G will elect to continue to comply with RCRA Subtitle C and avoid the course of submitting a petition, which will likely be more expensive. However, the fee may be the reason why the delisting petition cost is greater than PV. Thus, one needs to check whether C + P < PV*P(S) for these generators. If so, then these generators will want to submit a petition, assuming no fee is charged and they can afford the remaining costs. The remaining analysis is the same as above. If ATP > C + P, then these are generators who could afford a petition only if no fee were imposed. If ATP < C + P, then the fee has no effect, i.e., these firms are financially weak regardless of the fee.

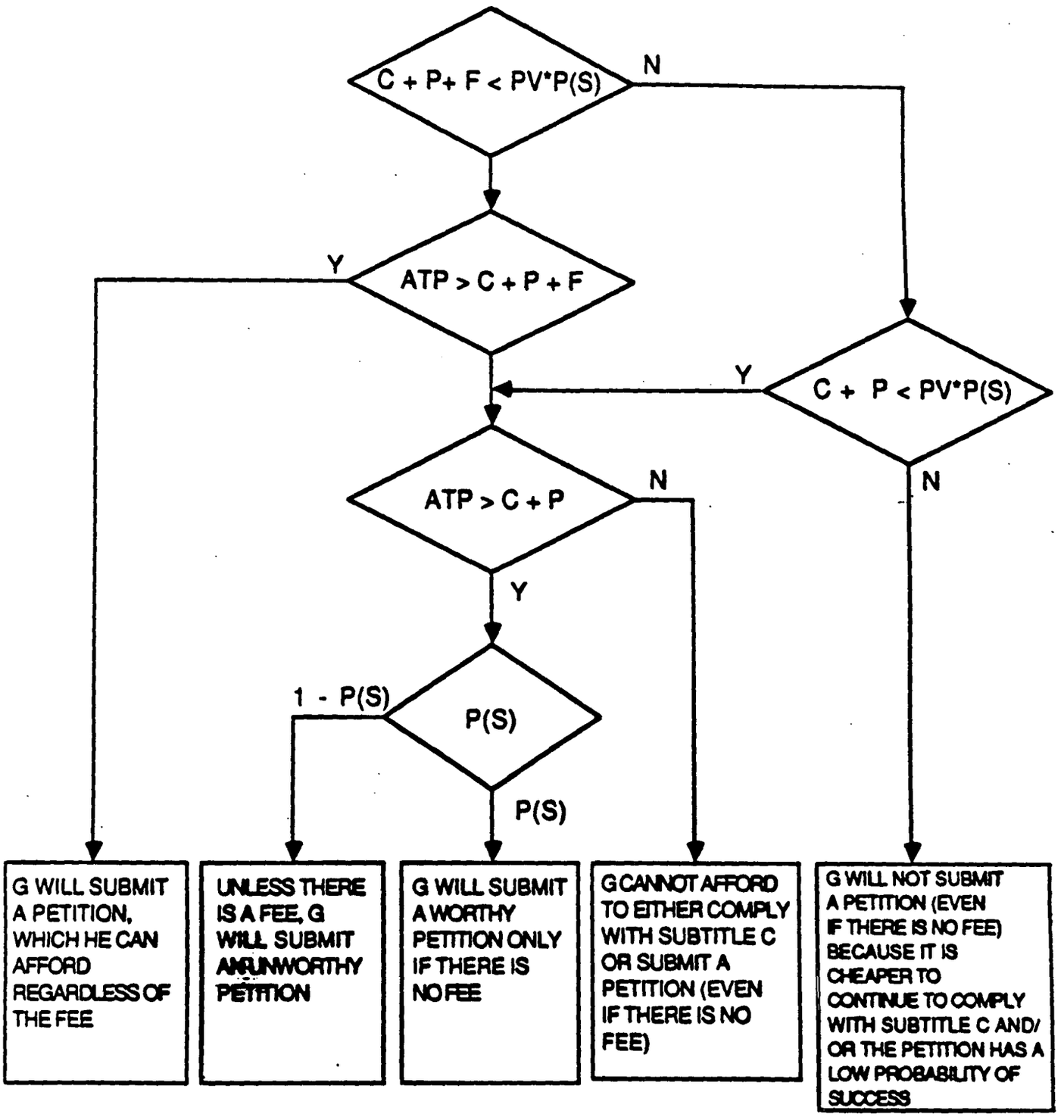
Exhibit E-1 presents a diagram of this possible modeling approach.

B. Estimating Values for the Model's Variables

As described above, the proposed model would have six variables: C, PV, P, P(S), F and ATP. The last one, ability to

EXHIBIT E -1

SUGGESTED APPROACH FOR MODELING THE AFFORDABILITY OF A RCRA DELISTING FEE



FEE HAS NO EFFECT: BOXES (1), (4) AND (5)
FEE HAS A POSITIVE EFFECT: BOX (2)
FEE HAS A NEGATIVE EFFECT: BOX (3)

EXHIBIT E-1 (CONTINUED)

SUGGESTED APPROACH FOR MODELING THE AFFORDABILITY OF A RCRA DELISTING FEE

C = THE COST OF COMPLYING WITH RCRA SUBTITLE C REQUIREMENTS UNTIL A FINAL DECISION ON THE PETITION IS ISSUED

P = THE COST OF PREPARING A DELISTING PETITION

F = THE FEE CHARGED BY EPA TO RECOVER COSTS INCURRED IN REVIEWING THE PETITION

PV = THE PRESENT VALUE OF THE FUTURE COSTS OF COMPLYING WITH RCRA SUBTITLE C REQUIREMENTS

P(S) = THE PROBABILITY OF THE PETITION'S SUCCESS, I.E., THE LIKELIHOOD THAT EPA WILL APPROVE THE PETITION

ATP = THE AMOUNT THAT A POTENTIAL PETITIONER IS ABLE TO PAY

G = THE GENERATOR, I.E., THE POTENTIAL PETITIONER

pay (ATP), is discussed in section 3. The first five are discussed below.

(1) -C represents the cost of complying with RCRA Subtitle C requirements until a final decision on the petition is issued. PV represents the present value of the future costs of complying with RCRA Subtitle C requirements. One can obtain a rough estimate for both of these variables from a review of past Regulatory Impact Analyses (RIAs).

(2) P represents the cost of preparing a petition. As noted earlier in section 5.3, generators generally spend between $15,000 and $59,000 to prepare a petition.[1]

(3) P(S) represents the probability of a petition's success, i.e., the likelihood that EPA will approve the petition. One can obtain an estimate for this variable by determining the percentage in the past. Presumably this figure has declined recently, once the additional HSWA requirements were imposed.

(4) F represents the fee charged by EPA. To obtain an upperbound estimate of the number of generators who could afford a fee if a fee were not charged, one would use the maximum value for the fee. In other words, the maximum level of the delisting fee would be calculated and used in the model. This can be done by adopting "conservative" assumptions about the level of the fee. The following would be conservative assumptions: all petition reviews include a site visit; petition quality does not improve; and the fee recovers all of the costs incurred by EPA. These are discussed further below.

First, the number of facility visits may change in the future; see, e.g., section 4.3 and appendix C. To derive an upperbound estimate of the level of the fee, one would assume that EPA visits all petitioning facilities in the future. As mentioned in section 4.3, a facility visit costs EPA an average of $33,000. In FY 87, the average cost of petition review (excluding facility visit costs) was approximately $13,300.[2]

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[1] Memorandum from Jennifer A. Bramlett, SAIC to Scott Maid, EPA, 8/20/87, "Estimated Range of Petition Preparation Costs".

[2] EPA spent approximately $2.402 million in FY 87 on delisting related activity. Of this, approximately $545,000 was spent on contractor support for site visits. Thus, EPA's total delisting costs (excluding facility visit costs) equalled approximately $1.860 million. Divided by 140 petitions, the average cost is $13,286.

Thus, with visits at all sites, the average cost would increase to approximately $46,300 (i.e., $33,000 + $13,300 = $46,300).

Second, the quality of petitions may improve in the future. As discussed in section 4.3, an hourly fee for review of incomplete petitions would encourage generators to submit more complete petitions. The better the petitions, the less costs that EPA incurs in review. The average cost of review would consequently be reduced. To derive an upperbound estimate, however, one would assume that petition quality does not improve. Thus, the maximum average cost would remain $46,300.

Third, due to administrative difficulties, EPA may not be able to recover all of its costs through a fee; see section 4.2. An upperbound estimate, however, would assume that these difficulties can be overcome and EPA would attain full cost recovery. Thus, the maximum level of the average fee would be $46,300.

As discussed throughout the paper, EPA's review costs vary widely, depending on the completeness of the petition. Thus, the average cost may vary significantly from the maximum fee that a particular petitioner might face. It is very difficult to account for this in the analysis. EPA does not have an estimate of the most expensive petition review in the past. Given this lack of information, OPPI staff suggests that a maximum fee of $100,000 be assumed. This would reflect a $33,000 cost for the facility visit and $67,000 in other costs. The first figure has some basis; EPA's contractor reported that costs for facility visits in FY 87 averaged $33,000.[3] The second figure is somewhat arbitrary. It is, however, more than five times greater than $13,300, the maximum average review cost (excluding facility visit costs). OPPI staff feels that this latter figure represents a very conservative assumption.

Finally, an issue exists regarding the likelihood that a relatively small company will incur this maximum fee. Note that this is different from the issue above, where the maximum level of the fee is estimated. According to one delisting program staffer, smaller firms are unlikely to be subject to the maximum fee.[4] Specifically, the staffer stated that based on his personal experience, it appears that small firms often submit relatively complete petitions. Review of these petitions incurs

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[3] Letter from Carolyn Bosserman, SAIC Work Assignment Manager, to Mr. Wendel Miser, EPA, dated September 23, 1987.

[4] Meeting with Scott Maid, Assistance Branch/PSPD in July 1987.

relatively fewer Agency resources. This observation appears counterintuitive, i.e., one might expect that large firms are more likely to submit complete petitions. The analysis does not incorporate this observation because it would not be a conservative assumption. In other words, a conservative assumption here would be to discount this notion, i.e., to ignore the possibility that small firms are less likely to be subject to the maximum fee. Thus, one would assume that all firms, regardless of financial size, face the maximum fee.

2. Rule Predicting Ability to Pay Certain Costs

The second part of any affordability analysis is the selection of a rule which predicts the ability of a firm to bear a certain cost. Some rules are suitable for one-time costs, others for a flow of future costs. Here, the affordability of one-time costs is being modeled. Specifically, both the petition preparation cost (P) and the fee (F) are one-time costs. C, the cost of complying with RCRA Subtitle C requirements until a final decision on the petition is issued, can also be considered a one-time cost, assuming that the time elapsed is short (e.g., a year or less). Note that the affordability of PV, which represents a flow of future costs, is not modeled. If it was, then a different ATP rule would be needed.

The Agency has already done a considerable amount of work in this area, examining different predictive formulae.[5] EPA has established the Superfund Financial Assessment System (SFAS), used to determine whether parties involved in Superfund actions can afford to pay certain costs.[6] SFAS includes an ATP rule for one-time costs. Given the lack of resources to further develop the analysis of ability-to-pay rules, OPPI staff suggests that this rule be used for any analysis of the affordability of a delisting fee.

3. Financial Information Required by the Ability to Pay Rule

The ATP rule in SFAS for one-time costs requires various bits of financial information for potential petitioners, including net income, depreciation, cash flow, etc. In general, the availability of such financial information depends on

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[5] See, e.g., "The Financial Assurance for Corrective Action Model -- Model Documentation," dated August 1986, by the Financial Responsibility Program, OSW, EPA. See particularly section 6.2.3.

[6] SFAS Technical Support Document, Industrial Economics, Inc., 5/25/82.

whether the petitioner owns or operates a facility subject to permitting, i.e., a RCRA treatment, storage or disposal facility (abbreviated TSDF). OSW's delisting program staff estimates that roughly half of the petitioners in recent years have been TSDF owners or operators.

Financial information for many TSDF owners/operators is available through the RCRA Firm-Facility Financial database (abbreviated F-3), which is maintained by an EPA contractor (ICF Inc.).[7] The F-3 database includes the 5,165 facilities defined as active TSDFs on EPA's Hazardous Waste Data Management System (HWDMS) in February 1985. However, any analysis of the affordability of the delisting fee would probably exclude the 821 TSDFs that fall in one of the following categories:

- Facilities where operations were discontinued;

- Facilities where the owner or operator filed bankruptcy;

- Facilities where the owner or operator is a non-profit organization; and

- Facilities where the owner or operator is a public institution.

The first two omitted categories are recommended because they are very unlikely to submit a delisting petition. The last two omitted categories are recommended because EPA may elect not to impose the fee on them; see section 2.3. In addition, financial data are not available for them. Thus, a total of 4,344 TSDFs (i.e., 5,165 less 821) could potentially be modeled.

According to ICF, these 4,344 TSDFs represent 1,911 immediate owners and operators. Of these, 434 are publicly-held while 1,477 are privately held. Regarding the 434 publicly-held companies, the F-3 database has actual financial data for them either through Standard and Poor's Compustat Services, Inc. or, for the smaller firms, through Dun & Bradstreet's Business Information Reports (BIRs). Regarding the 1,477 privately held companies, actual financial information was obtained from BIRs where available. If actual data were not available, financial variables were imputed, using three sources: Dun & Bradstreet Industry Norms; Robert Morris Associates Annual Statement Studies; and Ward's Directory of 49,000 Private U.S. Companies.

To summarize, financial information is easily available for the one-half of the petitioners who are TSDF owners/operators.

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[7] Much of the following discussion is lifted from Section 9.1 of the FACA model documentation, supra fn 5.

In many cases, this information represents actual firm data. In the rest, the information represents imputed financial values that are as close to the actual values as possible within the data constraints.

Financial information for the other half of the petitioners, i.e., the non-TSDF generators, is not easily available. These petitioners come from a much larger group, numbering roughly 15,000 to 35,000.[8] To simplify things, one could assume that the financial information for non-TSDF generators is generally the same as it is for TSDF owners and operators. One could then simply extrapolate the results of the analysis for TSDF owners and operators to all delisting petitioners. Alternatively, one member of the study group suggested that, in essence, a database similar to F-3 be compiled for a subset of the non-TSDF generators.[9] The subset would be the approximately 400 non-TSDF generators who have previously submitted delisting petitions.[10] Of course, this could entail a significant level of resources.

4. Conclusions

Once the three components have been specified, a model can be constructed. The model would run through the financial data for likely petitioners. After running the simulation many times, one could determine the percentage of firms which have the incentive to submit a worthy petition but could afford to do so only if no fee were imposed. Given this figure, one could then balance this factor with others in determining the overall feasibility of a delisting fee. In addition, if the percentage is significant, then EPA could consider the possibility of establishing an affordability waiver with its fee.

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[8] 1985 National Biennial Report of Hazardous Waste Generators and Treatment, Storage and Disposal Facilities Regulated Under RCRA. Report, dated January 1988, prepared by Development Planning and Research Associates for OSW.

[9] See handwritten note on memorandum, dated October 2, 1987, from Suzanne Rudzinski, Chief, Assistance Branch, PSPD to Debora C. Martin, Chief, Policy Analysis Staff, OPPI, entitled "Costs Associated with Spot Check Site Visits for the Delisting Program".

[10] In recent years, petitions have been divided evenly between non-TSDF generators and TSDF owners/operators, according to the delisting program staff. In the early years of the program, non-TSDF generators submitted the large majority of petitions. Thus, one can estimate that roughly 400 of the 700 petitions received to date have been submitted by non-TSDF generators.