United States
Environmental Protection
Agency

Office of Solid Waste
and Emergency Response
Office of Waste Programs (OS-510)

EPA

CERCLA Enforcement Policy Compendium

Volume 1

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

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Update of the CERCLA Enforcement Policy Compendium

FROM: Arthur B. Weissman, Chief AGW
Guidance and Evaluation Branch

TO: Addressees

You should have recently received the newest update to the CERCLA Enforcement Policy Compendium. This update includes all significant policies and guidances related to CERCLA enforcement issued between August, 1990 and April, 1992. Earlier volumes of the Compendium contain documents issued prior to 1990. While not exhaustive, this Compendium is intended to serve as a useful desk reference of enforcement guidance and policy.

Please replace the old index and table of contents from the Compendium with the updated index, which includes a complete listing of documents issued from 1983 to 1992.

Additional copies of the Compendium (Pub. No. PB-92-963623) are available to EPA employees from the Superfund Document Center at (202) 260-9760. The public may obtain the document by calling the National Technical Information Service, (703) 487-4650; the charge is $98/paper or $32/microfiche.

If you have any comments or questions on the Compendium, please call Nicole Veilleux of my staff at (703) 603-8939.

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Region X
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CERCLA Enforcement Branch Chiefs, Regions I-X
CERCLA Enforcement Section Chiefs, Regions I-X

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CERCLA Enforcement Policy Compendium Topical Index

POLICY	DATE	OSWER NUMBER
I. PRP Search		
A. Timing and Procedures		
Interim Guidance: Streamlining the CERCLA Settlement Decision Process (Porter/Adams)	02/12/87	9835.4
PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program (Diamond)	06/29/89	9834.3-2a
Accelerating Potentially Responsible Party Remedial Design Starts: Implementing the 30-Day Study	04/02/92	9835.4-2b*
B. PRP Search Management		
Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests (Lucero/Sniff)	01/26/84	9834.0
Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information (Lucero)	10/09/85	9834.2
C. Information Requests		
Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas (Adams)	08/25/88	9834.4-A
Transmittal of Model Consent Decree for CERCLA Section 104(e) Information Request Enforcement Actions	08/29/90	9834.14*
II. Negotiations, Settlements, and Oversight		
A. General and Special Notice		
Interim Guidance on Notice Letters, Negotiations, and Information Exchange (Porter) 53 FR 5298 February 23, 1988	10/19/87	9834.1
Waiver of Headquarters Approval for Issuance of RD/RA Special Notice Letters at the Time of ROD Signature (Longest/Diamond)	09/26/88	9834.10-1a
Model Notice Letters (Diamond)	02/07/89	9834.10
Releasing Information to PRPs at CERCLA Sites (Diamond/Unterberger)	03/01/90	9835.12
Model Information Notice Letter to Local Governments	05/07/91	9834.16*
Guidance on Preparing and Releasing Waste-in Lists and Volumetric Rankings for Information Release Under CERCLA Section 122 (e)	02/22/91	9835.16*

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** = Policies that have been superseded by later policies

CERCLA Enforcement Policy Compendium Topical Index

POLICY	DATE	OSWER NUMBER
B. RI/FS Issues		
Interim Guidance on Potentially Responsible Parties Participation in Remedial Investigations and Feasibility Studies (Porter) [Revised]	05/16/88	9835.1a
Revisions to the Interim Guidance on PRP Participation in Remedial Investigations and Feasibility Studies (Porter/Diamond)	02/07/89	9835.2a
Model Statement of Work for a Remedial Investigation and Feasibility Study Conducted by PRPs	06/02/89	9835.8
Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies, Vol. 1	07/01/91	9835.1c*
Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies, Vol. 2	07/01/91	9835.1d*
Performance of Risk Assessments in Remedial Investigation/Feasibility Studies (RI/FSs) Conducted by PRPs	08/28/90	9835.15*
Supplemental Guidance on Performing Risk Assessments in Remedial Investigation Feasibility Studies (RI/FSs) Conducted by Potentially Responsible Parties (PRPs)	07/02/91	9835.15a*
Model Statement of Work for a Remedial Investigation and Feasibility Study Conducted by Potentially Responsible Parties	07/02/91	9835.8A
Model Statement of Work for a Remedial Investigation and Feasibility Study Conducted by Potentially Responsible Parties (Annotated Copy)	07/02/91	9835.8A
C. Settlement Policy		
Interim CERCLA Settlement Policy (Thomas/Price/Habicht, 50 FR 5034 2/5/85)	12/05/84	9835.0
Guidance on Premium Payments in CERCLA Settlements (Adams and Porter)	11/17/88	9835.6
Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry (Adams and Porter)	11/18/88	9835.4-2A
Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(b) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property (Reich/Cannon)	06/06/89	9835.9

* = Policies dated after 8/14/90
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CERCLA Enforcement Policy Compendium Topical Index

POLICY	DATE	OSWER NUMBER
Interim Municipal Settlement Policy (54 FR 51071, 12/12/89)	12/06/89	9834.13
Multi-Media Settlements of Enforcement Claims (Strock)	02/06/90	9891.6
Procedures for Transmittal of CERCLA and RCRA Civil Judicial Enforcement Case Packages to Headquarters (Unterberger/Diamond)	06/12/89	9891.1-1a
Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003	06/21/89	9835.11-1
Final Model Litigation Report and Complaint for CERCLA Section 104(e) Enforcement Initiative	01/31/90	
Interim Agency Policy on Contribution Protection Clauses in CERCLA Settlements	04/10/91	*
D. Liability		
Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under CERCLA (Price)	06/13/84	9832.10
Policy for Enforcement Actions Against Transporters Under CERCLA (Lucero/Stiehl)	12/23/85	9829.0
Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2) (Blake)	07/31/87	9838.1
Statement of James Stroch before the House Subcommittee on Policy, Research & Insurance: Insurer Liability for Cleanup Costs of Hazardous Waste Sites	09/27/90	*
E. Consent Decree Procedures		
Guidance on Drafting Consent Decrees in Hazardous Waste Cases (Price/McGraw)	05/01/85	9835.2
Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees (Adams)	09/21/87	9835.2b
Covenants Not to Sue Under SARA (Adams/Porter/Habicht) (52 FR 28038, 7/27/87)	07/10/87	9834.8
Submittal of Ten-Point Settlement Analyses for CERCLA Consent Decrees (Diamond/Unterberger)	08/11/89	9835.14
Superfund Program, Model CERCLA RD/RA Consent Decree	07/08/91	*
F. Mixed Funding		
Evaluating Mixed Funding Settlements (Porter/Adams) (53 FR 8279, 3/14/88)	10/20/87	9834.9

* = Policies dated after 8/14/90
** = Policies that have been superseded by later policies

POLICY	DATE	OSWER NUMBER
Interim Policy on Mixed Funding Settlements Involving the pre-Authorization of States or Political Subdivisions (Porter/Adams)	05/27/88	9834.9a
G. De Minimis		
Interim Guidance on Settlements with De Minimis Waste Contributors (Adams/Porter) (52 FR 24333, 6/30/87)	06/19/87	9834.7
Interim Model CERCLA Sec.122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order Guidance (Reich/Lucero) (52 FR 43393, 11/12/87)	10/19/87	9834.7-1a
Methodologies for Implementation of CERCLA Section 122(g)(1)(a) De Minimis Waste Contributor Settlements (Diamond/Unterberger)	12/20/89	9834.7-1b
H. Guidelines on Preparing NBARs		
Interim Guidelines on Preparing Nonbinding Preliminary Allocations of Responsibility (Thomas) 52 FR 19919 May 28, 1987	05/16/87	9839.1
III. Section 106		
A. Administrative Orders		
Model Administrative Order on Consent for Remedial Investigation/Feasibility Study	01/30/90	9835.3-1A
FY 90 "UAO Strategy" (Clay/Strock)	02/14/90	9870.1A
Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Design/Remedial Action (Clay/Strock)	03/07/90	9833.0-1a
Model Unilateral Administrative Order for Remedial Design and Remedial Action under Section 106 of CERCLA	03/30/90	9833.0-2(b)
Issuance of Administrative Orders for Immediate Removal Actions (Thomas)	02/21/84	9833.1
Guidance on CERCLA Section 106 Judicial Actions	02/24/89	9835.7
Guidance on the Use and Issuance of Administrative Orders Under Section 106 (Price/Thomas)	09/08/83	9833.0**
Evaluation of, and Additional Guidance on, Issuance of Unilateral Administrative Orders (UAOs) for RD/RA	06/20/91	9833.2c*
Administrative Order on Consent for Remedial Investigation/Feasibility Study	07/02/91	9835.3-2A

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** = Policies that have been superseded by later policies

POLICY	DATE	OSWER NUMBER
Administrative Order on Consent for Remedial Investigation/Feasibility Study (Annotated Copy)	07/02/91	9835.3-2A
B. 106(b) Reimbursement		
Consent Orders and the Reimbursement Provision Under Section 106(b) of CERCLA (Lucero/Leifer)	06/12/87	9833.2
IV. Cost Recovery		
A. Cost Recovery Guidance		
Cost Recovery Actions under CERCLA (Price/Thomas)	08/26/83	9832.1
B. Procedures for Documenting Cost		
Preparation of Hazardous Waste Referrals (Stiehl)	07/30/85	9837.1
Written Demand for Recovery of Costs Incurred Under CERCLA	03/21/91	9832.18*
C. Cost Recovery Strategy		
Superfund Cost Recovery Strategy (Porter)	07/29/88	9832.13
Model Cost Recovery CD	03/31/91	*
D. General Cost Recovery		
Cost Recovery Referrals (Sniff)	08/03/83	9832.0
Expansion of Direct Referral of Cases to the Department of Justice (Adams)	01/14/88	9891.5A
Coordination of EPA and State Actions in Cost Recovery Negotiations and Litigation (Price/Thomas)	08/29/83	9832.2
Guidance Regarding CERCLA Enforcement Against Bankrupt Parties (Price)	05/24/84	9832.7
Small Cost Recovery Referrals (Stiehl/Lucero)	07/12/85	9832.6
Arbitration Procedures for Small Superfund Cost Recovery Claims; Final Rule (53 FR 23174, 5/30/89)	08/28/89	9832.17
Revised Hazardous Waste Bankruptcy Guidance (Hays)	05/23/86	9832.8
Policy on Recovering Indirect Costs in CERCLA Section 107 Cost Recovery Actions (Stiehl/Stanton)	06/27/86	9832.5
Cost Recovery Actions/Statute of Limitations (Lucero)	06/12/87	9832.9

* = Policies dated after 8/14/90
** = Policies that have been superseded by later policies

POLICY	DATE	OSWER NUMBER
Guidance on Drafting Decisions not to Take Cost Recovery Actions (Cannon)	06/07/88	9832.11
V. State Issues		
A. Funding State Enforcement Actions		
Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites (Porter)	04/07/88	9831.6a-6d
B. Counting State-lead Enforcement		
Counting State-lead Enforcement NPL Sites Toward the CERCLA Section 116(e) Remedial Action Start Mandate (Porter)	10/21/88	9831.8
Questions and Answers About the State Role in Remedy Selection at Non-Funded-Financed State-Lead Enforcement Sites	04/18/91	9831.9*
C. General State Guidance		
Interim Final Guidance on Preparation of Superfund Memoranda of Agreement (SMOAs) (Diamond/Longest)	05/08/89	9375.0-01
Reporting and Exchange of Information on State Enforcement Actions at National Priorities List Sites (Porter)	03/14/86	9831.2
Supporting State Attorneys General CERCLA Remedial and Enforcement Response Activities at NPL Sites (Longest/Cannon)	06/21/88	9831.7
C. General State Guidance		
EPA/State/Relationship in Enforcement Actions for Sites on the National Priorities List	10/02/84	9831.3**
VI. Other Guidance		
A. Administrative Record		
Interim Guidance on Administrative Records for Selection of CERCLA Response Actions	03/01/89	9833.3A**
Administrative Records for Decisions on Selection of CERCLA Response Actions (Lucero/Longest)	05/29/87	9833.3**
Final Guidance on Administrative Records for Selection of CERCLA Response Actions	12/03/90	9833.3A-1*
B. Community Relations		
CERCLA Community Relations Mailing List (Diamond/Longest)	02/06/89	9836.2

* = Policies dated after 8/14/90
** = Policies that have been superseded by later policies

CERCLA Enforcement Policy Compendium Topical Index

POLICY	DATE	OSWER NUMBER
Community Relations during Enforcement Activities and Development of the Administrative Record (Porter)	11/03/88	9836.0-1A
Policy Towards Owners of Residential Property at Superfund Sites	07/03/91	9834.6*
C. Entry and Access		
Entry and Continued Access Under CERCLA (Adams)	06/05/87	9829.2
D. Insurance and Indemnification		
Procedural Guidance on Treatment of Insurers under CERCLA (Price)	11/21/85	9834.5
EPA Interim Guidance on Indemnification of Superfund Response Action Contractors (Porter/Kinghorn)	10/06/87	9835.5
E. Program Management Guidance		
Integrated Timeline for Superfund Site Management (Clay/Strock)	06/11/90	9851.3
F. Federal Liens		
Guidance on Federal Superfund Liens (Adams)	09/22/87	9832.12
G. Off-Site Policy		
Revised Procedures for Implementing Off-site Response Actions (Porter)	11/13/87	9834.11
Notification of Out-of-State Shipments of Superfund Site Wastes (Canon)	09/14/89	9330.2-07
H. Penalty Policies		
Administrative Penalty Procedures Interim Final Rule (54 FR 21174, 5/16/89)	05/16/89	9841.1A
EPCRA/CERCLA Penalty Policy	06/13/90	9841.2
Revised EPA Guidance for Parallel Proceedings	06/21/89	9843.0
Interim Guidance on Use of Administrative Penalty Provisions of Section 109 of CERCLA and Section 325 of SARA (Adams)	07/16/87	9841.1**
I. Title III		
Interim Strategy for Enforcement of Title III and CERCLA Section 103 Notification Requirements	12/14/88	9841.0

* = Policies dated after 8/14/90
** = Policies that have been superseded by later policies

CERCLA Enforcement Policy Compendium Topical Index

POLICY	DATE	OSWER NUMBER
J. Releases		
Reporting Exemptions for Federally Permitted Releases of Hazardous Substances (Thomas) (53 FR 27268, 7/19/88)	07/11/88	Exempt
K. Delegations		
CERCLA Enforcement Delegations	09/13/87	9836.2
Clarification of Delegations of Authority 14-14-A, 14-14-B, and 14-14-C under CERCLA	04/04/90	9012.10-1
L. Remedial Actions		
Guidance on Remedial Actions for Superfund Sites with PCB Contamination - SMR Rec. #23	08/15/90	9835.4-01*
M. Enforcement Strategy		
Superfund Enforcement Strategy and Implementation Plan	11/03/90	9800.0*
Pre-referral Negotiation Procedures for Superfund Enforcement Cases	10/12/90	*
N. Inspector Training Requirements		
CERCLA Implementation of Inspector Training Requirements for OSCs/RPMs at the Intermediate Level in STEP and First Line Supervisors	04/03/91	9842.2*
Guidance on Applicability of EPA Order 3500.1 to CERCLA Staff	11/28/88	9842.0
CERCLA Implementation of the Training Requirements of EPA Order 3500.1 - Inspector Training	10/19/89	9842.1
O. Risk Assessment		
Endangerment Assessment Guidance (Porter)	11/22/85	9850.0-1**

* = Policies dated after 8/14/90
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CERCLA Enforcement Policy Compendium Index By Date

DATE	POLICY	OSWER NUMBER
08/03/83	Cost Recovery Referrals (Sniff)	9832.0
08/26/83	Cost Recovery Actions under CERCLA (Price/Thomas)	9832.1
08/29/83	Coordination of EPA and State Actions in Cost Recovery Negotiations and Litigation (Price/Thomas)	9832.2
09/08/83	Guidance on the Use and Issuance of Administrative Orders Under Section 106 (Price/Thomas)	9833.0**
01/26/84	Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests (Lucero/Sniff)	9834.0
02/21/84	Issuance of Administrative Orders for Immediate Removal Actions (Thomas)	9833.1
05/24/84	Guidance Regarding CERCLA Enforcement Against Bankrupt Parties (Price)	9832.7
06/13/84	Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under CERCLA (Price)	9832.10
10/02/84	EPA/State/Relationship in Enforcement Actions for Sites on the National Priorities List	9831.3**
12/05/84	Interim CERCLA Settlement Policy (Thomas/Price/Habicht, 50 FR 5034 2/5/85)	9835.0
05/01/85	Guidance on Drafting Consent Decrees in Hazardous Waste Cases (Price/McGraw)	9835.2
07/12/85	Small Cost Recovery Referrals (Stiehl/Lucero)	9832.6
07/30/85	Preparation of Hazardous Waste Referrals (Stiehl)	9837.1
10/09/85	Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information (Lucero)	9834.2
11/21/85	Procedural Guidance on Treatment of Insurers under CERCLA (Price)	9834.5
11/22/85	Endangerment Assessment Guidance (Porter)	9850.0-1**
12/23/85	Policy for Enforcement Actions Against Transporters Under CERCLA (Lucero/Stiehl)	9829.0

* = Policies dated after 8/14/90
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DATE	POLICY	OSWER NUMBER
03/14/86	Reporting and Exchange of Information on State Enforcement Actions at National Priorities List Sites (Porter)	9831.2
05/23/86	Revised Hazardous Waste Bankruptcy Guidance (Hays)	9832.8
06/27/86	Policy on Recovering Indirect Costs in CERCLA Section 107 Cost Recovery Actions (Stiehl/Stanton)	9832.5
02/12/87	Interim Guidance: Streamlining the CERCLA Settlement Decision Process (Porter/Adams)	9835.4
05/16/87	Interim Guidelines on Preparing Nonbinding Preliminary Allocations of Responsibility (Thomas) 52 FR 19919 May 28, 1987	9839.1
05/29/87	Administrative Records for Decisions on Selection of CERCLA Response Actions (Lucero/Longest)	9833.3**
06/05/87	Entry and Continued Access Under CERCLA (Adams)	9829.2
06/12/87	Consent Orders and the Reimbursement Provision Under Section 106(b) of CERCLA (Lucero/Leifer)	9833.2
06/12/87	Cost Recovery Actions/Statute of Limitations (Lucero)	9832.9
06/19/87	Interim Guidance on Settlements with De Minimis Waste Contributors (Adams/Porter) (52 FR 24333, 6/30/87)	9834.7
07/10/87	Covenants Not to Sue Under SARA (Adams/Porter/Habicht) (52 FR 28038, 7/27/87)	9834.8
07/16/87	Interim Guidance on Use of Administrative Penalty Provisions of Section 109 of CERCLA and Section 325 of SARA (Adams)	9841.1**
07/31/87	Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2) (Blake)	9838.1
09/13/87	CERCLA Enforcement Delegations	9836.2
09/21/87	Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees (Adams)	9835.2b
09/22/87	Guidance on Federal Superfund Liens (Adams)	9832.12
10/06/87	EPA Interim Guidance on Indemnification of Superfund Response Action Contractors (Porter/Kinghorn)	9835.5

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Furthering the Use of Innovative Treatment Technologies in OSWER Programs

Introduction

The Office of Solid Waste and Emergency Response (OSWER) is seeking to further the use of innovative treatment technologies to permanently clean-up contaminated sites in the Superfund, RCRA, and Underground Storage Tank (UST) programs. According to a directive from OSWER's Assistant Administrator Don Clay, "...we must invest the necessary resources and take the risks now to develop the technologies necessary to fulfill the long-term needs of our hazardous waste clean-up programs." The directive, which was signed on June 10, 1991, includes a forwarding memorandum to EPA regions that calls for technological leadership and a sense of responsible urgency to prevent expenditures in pursuing less effective or more costly remedies. This fact sheet is based on OSWER Directive 9380.0-17.

Reasonable risk-taking is encouraged in selecting innovative treatment technologies that are capable of treating contaminated soils, sludges, and ground water more effectively, less expensively, and in a manner more acceptable to the public than existing conventional methods.

"Innovative treatment technologies" are newly-developed technologies that lack sufficient full-scale application data to ensure their routine consideration for site remediation. They may be new technologies, or may already be in use for various industrial applications other than hazardous waste remediation. As such, innovative technologies are not part of standard engineering practice or the competitive market process where available alternatives are routinely presented to the government and private sector. In functional terms, OSWER labels as "innovative" those treatment technologies other than incineration and solidification/stabilization for source control, and other than pumping with conventional treatment for ground water.

Inherent risks associated with early technology use serve as very serious impediments. The directive calls on potentially responsible parties, facility owners/operators, and consulting engineers to constructively work with uncertainty to further the application of technologies that are truly innovative. The directive also calls on EPA regional and headquarters managers to support Remedial Project Managers and On-Scene Coordinators in their efforts to use new technologies.

Innovative treatment technologies should be routinely considered as an option in engineering studies where treatment is appropriate. They should not be eliminated from consideration solely because of uncertainties in their performance and cost. These technologies may be found to be cost-effective, despite the fact that their costs are greater than conventional options, after consideration of potential benefits including increased protection, superior performance, and greater community acceptance. In addition, future sites will benefit by information gained from the field experience.

The directive sets forth several initiatives and new procedures that will provide incentives for broader use of innovative technology. Some of these initiatives are directed toward potentially responsible parties and owner/operators, since these groups will be assuming a larger share of the remedial projects in the future. Other new initiatives are intended to remove impediments to the first-time use of new equipment. The directive also encourages wider application of available resources and tools and highlights some important on-going program efforts.

New Initiatives

1. Superfund Innovative Technology Start-Up Initiative

OERR will be revising its procedures for setting Remedial Action funding priorities to give more consideration to innovative technologies. Expedited funding of Fund-lead remedial design and construction projects that involve innovative treatment technologies will move the agency toward the Superfund program's goals for technology development and will provide data to support future Records of Decision (RODs).

This initiative also provides contract flexibility in the start-up phase of selected remedial and removal actions to assist vendors in establishing operations that satisfy performance standards. In an effort to remove some of the impediments to the use of new full-scale equipment, this

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initiative will provide financial support for initial start-up and shake-down prior to beginning actual remediation. Funds are not targeted at making the technology "work at any cost", but in establishing performance adequacy of the technology prior to the onset of the contracted clean-up. Contracting strategies are being considered to compensate vendors regardless of whether or not they are able to meet performance requirements for a portion of the site remediation.

2. Dual Track RI/FS Initiative (Superfund)

EPA regions may fund additional treatability studies and engineering analyses for promising treatment technologies that would otherwise be considered unproven or too early in the development process. For PRP-lead sites early in the planning process, this initiative encourages the use of treatability studies to ensure that alternative remedies are thoroughly evaluated and considered in the ROD. Even if, in a particular case, there may be some doubt as to EPA's ability to recover the costs for these additional studies, they should nonetheless be pursued because of their value to the overall program.

3. Tandem ROD Evaluation Initiative (Superfund)

Primarily applicable to PRP-lead sites (though also to some Fund-lead sites), this program will enable regional staff to rapidly evaluate the efficacy of a PRP-proposed innovative remedy that is offered in tandem with the primary one approved in the ROD. Both remedies would be part of the proposed plan. The alternate solution would be approved in the ROD on a contingent basis but would undergo further development and pilot testing during the design period of the primary technology. Tandem RODs move the process of cleanup toward closure while leaving room for PRPs with an interest in innovative technologies to pursue additional pilot tests to demonstrate an alternate approach that is both innovative and potentially cost-effective. The OSWER/ORD Technical Support Centers and the SITE Demonstration Program will provide RPMs with technical support for evaluation of PRP work. When considering a tandem ROD, the region should consult with ORD concerning the scope of effort required for the evaluation.

If, after testing and evaluation, the innovative technology is chosen for implementation but the process has caused significant delays to the schedule, the region may consider the engineering problems of making the full-scale unit operational when assessing stipulated penalties. That is, in limited cases, stipulated penalties should not be imposed if the delays are the unavoidable result of the use of an innovative process.

4. Removal Program Initiative (Superfund)

It is OSWER policy to further the use of innovative technologies through the removal program. The relatively small waste volumes and streamlined contracting procedures of the removal program provide an opportunity to complete clean-up projects and provide documentation on "lessons learned".

The potential of the removal program for these applications has not been realized because time constraints often favor excavation and off-site disposal or treatment and also because of the absence of clear legislated goals regarding the use of new technology. This directive is meant to clarify EPA's position on this issue and to encourage the use of innovative technologies for all actions, including time-critical actions, where feasible. These projects are expected to fulfill an important role in adding to our knowledge on promising new technologies.

5. RCRA Corrective Action and Closure Innovative Technology Initiative

This initiative encourages the regions to conduct treatability or technology demonstration studies at corrective action and closure sites to gain additional information on the use of innovative treatment for contaminated soil and debris.

EPA is developing best demonstrated available technology (BDAT) treatment standards for contaminated soil and debris at CERCLA and RCRA corrective action and closure sites. These sites present unique treatment problems that were not considered when developing the current BDAT standards which were based on data from the treatment of industrial process wastes. There is general agreement that wide scale use of incineration is not appropriate for soil and debris and there is a need to explore alternative approaches.

The current schedule is to promulgate a rule for the treatment of debris in May 1992 and for soil in April 1993. Prior to publication of these final rules, a site-specific treatability variance process (40 CFR 268.44 (h)) is available for contaminated soil and debris to establish an alternative standard for specified waste at individual sites. The variance process, along with applicable treatment guidance levels, is described in Superfund LDR Guide #6A (OSWER Directive 9347.3-06FS, July 1989), and is intended to be used as an interim approach until final standards are established.

The regions should work with owner/operators to select pilot-scale projects that can provide data on the capability of technologies and the treatability of different wastes. Projects should be carefully selected to maximize the utility of data and likelihood of success.

Authority for issuing site-specific variances for contaminated soil and debris has been delegated to the regions. The facili and EPA, in collaboration with the state, can implement va ances for on-site demonstrations through two mechanisms: temporary authorization under the Permit Modification Rule, or 3008(h) orders for interim-status facilities.

6. Demonstration Projects at Federal Facilities (Superfund, RCRA, and UST)

EPA is exploring the use of Federal Facilities for both site-specific technology demonstrations and as test locations for evaluation of more widely applicable technologies. Regions are encouraged to suggest innovative approaches and to be receptive to proposals for innovation from Federal Facility managers, *e.g.*, by building timing and performance flexibility into compliance agreements in acknowledgment of the uncertainties associated with innovation. Federal Facilities often have characteristics that make them desirable for applying innovative approaches: large area, isolated locations, controlled access, numerous contamination problems, and increasingly active environmental restoration programs.

The Office of Federal Facilities Enforcement (OFFE) and the Technology Innovation Office (TIO) will work with the regions to identify locations for test and evaluation activities and to develop policies and guidance to ensure that support for innovation is congruent with other program and environmental objectives.

7. Federal Technology Transfer Act

During the clean-up planning and implementation process, PRPs or owner/operators should be reminded of the opportunity to engage EPA in evaluation studies or other arrangements (at their expense) to determine whether an innovative technology would be operative in the situation they are facing or other similar situations. Under the Federal Technology Transfer Act (FTTA) of 1986, cooperative agreements related to research, development, and technology transfer will allow the PRP to reimburse EPA for facilities, support services, and staff time spent in joint evaluation of early technology treatability or pilot studies.

Since this program is conducted in the research and development arena, it offers an opportunity for non-adversarial interaction outside the regulatory context. This opportunity should be especially advantageous to (1) PRPs and owner/operators capable of early planning for technology options at a few sites and desirous of early EPA input, as well as (2) PRPs and owner/operators that will be faced with a number of similar waste sites in the future—under Superfund, RCRA Corrective Action, and the UST program—who want to develop more uniform, cost-effective technology proposals for such sites.

Implementation

The first six initiatives involve field testing new technologies that may benefit from technical assistance from ORD. ORD represents an objective third party that can easily be accessed through the existing OSWER/ORD support structure. This structure consists of five laboratories that constitute the Technical Support Centers (both for Superfund and newly established for RCRA), the Superfund Technical Assistance Response Team (START) Program, the Bioremediation Field Initiative, and the Superfund Innovative Technology Evaluation (SITE) Program. OSWER has asked ORD to give priority to requests for technical assistance under this directive.

Broader Application of Existing Policies, Available Resources, and Tools

Furthering Innovative Remediation at Leaking UST Sites

State and local UST programs have identified 100,000 confirmed leaks, and this number may triple in the next several years. Most site remediation involves pumping and treating ground water and excavation and off-site treatment of contaminated soils. Regional offices should increase their efforts to make state and local managers and staff, as well as clean-up consultants and contractors, more familiar with non-traditional but proven technologies. Headquarters will continue fostering the development of new tools and techniques and should increase its support of regional efforts to achieve broader use of improved technologies.

Further Enabling State Innovative Technology Leadership

The CERCLA core funding program provides an opportunity to assist states in establishing innovative technology advocates. Cooperative agreements with state response programs may be a vehicle to support and promote the use of innovative technologies in state CERCLA programs, with spinoff benefits for their RCRA and UST programs as well.

In addition, regions should be open to assisting states interested in furthering technology development and encourage state applications for authority for RCRA R&D permitting, permit modification, treatability exclusion, and Subpart X permitting. States may also want to work directly with Federal Facilities in developing pilot sites for innovative technologies. For the reasons discussed in the section on Federal Facilities above, these sites are often good candidates for such development projects.

Model RI/FS Work Plan and PRP Notice Letter Demand for Innovative Options

Some regions have issued special notices containing a Statement of Work and administrative order language requiring the responsible party to evaluate the use of innovative technologies at a particular site. This procedure

should receive broader use at Superfund sites where alternatives for remediation are being considered for analysis in the RI/FS and where prerequisite treatability studies are required. This requirement in the special or general notice letters will help facilitate the development and use of innovative treatment technologies by the private sector. Specific language for this approach can be developed from OWPE's guidance document entitled "Model Statement of Work for RI/FSs Conducted by PRPs" (OSWER Directive 9835.8).

Advocacy and Funding of Treatability Studies

Superfund program policy requires that treatability studies be conducted to generate data to support the implementation of treatment technologies. Funds are budgeted annually in the SCAP based on expected need. Data and reports should be sent to Glen Shaul at RREL for inclusion in the ATTIC database. The correct protocol and format for these reports is in EPA's "Guide for Conducting Treatability Studies Under CERCLA" (EPA/540/2-89/058). Oversight funding for evaluating a PRP-lead treatability study should also be requested through the SCAP budget process. Oversight of PRP-lead treatability studies may be funded through the enforcement budget. If a PRP recommends use of an innovative treatment at a site, but current treatability study data on the technology are insufficient, EPA policy allows the Agency to conduct and fund technology-specific treatability studies. Cost of these studies are recoverable under Section 107 of CERCLA.

Tracking and Expediting SITE Demonstrations

OSWER is encouraging greater participation in the SITE program in response to a recent Inspector General audit of the program that focused on delays in matching Superfund sites with technologies. ORD management has also agreed that SITE demonstration projects must be more responsive to regional needs for treatability data.

The SITE program will make the design of technology evaluation sufficiently flexible to meet the regional offices' needs for treatability studies before remedy selection is made. Based on an ORD internal management review of the SITE program, changes are underway to make the program a more integral component of regional Superfund site activities.

Existing Program Efforts

OSWER has several other ongoing efforts directed toward furthering the application of innovative alternatives. These represent important resources that should continue to be used by the UST, RCRA, and Superfund Programs.

Technical Support and Information Management

EPA maintains several computer database that may be accessed for information on treatment technologies. These databases include the Alternative Treatment Technology Information Center (ATTIC), the Cleanup Information (CLU-IN) Bulletin Board, the ROD Database, the Hazardous Waste Collection Database, and the Computerized On-Line Information System (COLIS). These systems include information on the application of innovative technologies and may be used to aid networking among OSCs and RPMs.

Technical assistance is available to Superfund and RCRA staff through ORD's Technical Support Centers and the Environmental Response Branch of OERR. Part of this effort involves networking among project managers through the Engineering and Ground Water Forums. In addition, as part of an initiative to provide direct technical support to OSCs and RPMs, the Superfund Technical Assistance Response Team (START) has been established to help evaluate the potential use of technologies.

Bioremediation Field Initiative

Begun in the fourth quarter of FY 1990, this program is intended to provide more real-time information on the field application of biotechnology for treating hazardous waste. The major focus of this initiative is to furnish direct support in evaluating full-scale cleanup operations and technical assistance for conducting treatability and pilot-scale studies.

Eliminating Contract Impediments

Under the Federal Acquisition Regulations, firms are restricted from performing both the design and construction of a project. EPA has determined that this applies only to the prime contractor responsible for the overall design, and not to the subcontractors performing treatability studies.

Innovative technology is considered a special exception from general conflict of interest guidelines. EPA will permit contractors and/or subcontractors who perform evaluation of innovative technologies for the Agency to later work for the PRPs in as many instances as possible.

Additional Information

Copies of the policy (OSWER Directive 9380.0-17) and additional copies of this fact sheet are available from:

National Technical Information Service (NTIS)
Springfield, VA 22161
Phone (703) 487-4650

Agency and State employees may obtain copies of the directive or this fact sheet from the Superfund Document Center, U. S. Environmental Protection Agency, Room 2514, 401 M Street S.W., Washington, DC 20460. The telephone number is FTS or 202/382-5628.

DATE	POLICY	OSWER NUMBER
10/19/87	Interim Guidance on Notice Letters, Negotiations, and Information Exchange (Porter) 53 FR 5298 February 23, 1988	9834.1
10/19/87	Interim Model CERCLA Sec.122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order Guidance (Reich/Lucero) (52 FR 43393, 11/12/87)	9834.7-1a
10/20/87	Evaluating Mixed Funding Settlements (Porter/Adams) (53 FR 8279, 3/14/88)	9834.9
11/13/87	Revised Procedures for Implementing Off-site Response Actions (Porter)	9834.11
01/14/88	Expansion of Direct Referral of Cases to the Department of Justice (Adams)	9891.5A
04/07/88	Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites (Porter)	9831.6a-6d
05/16/88	Interim Guidance on Potentially Responsible Parties Participation in Remedial Investigations and Feasibility Studies (Porter) [Revised]	9835.1a
05/27/88	Interim Policy on Mixed Funding Settlements Involving the pre-Authorization of States or Political Subdivisions (Porter/Adams)	9834.9a
06/07/88	Guidance on Drafting Decisions not to Take Cost Recovery Actions (Cannon)	9832.11
06/21/88	Supporting State Attorneys General CERCLA Remedial and Enforcement Response Activities at NPL Sites (Longest/Cannon)	9831.7
07/11/88	Reporting Exemptions for Federally Permitted Releases of Hazardous Substances (Thomas) (53 FR 27268, 7/19/88)	Exempt
07/29/88	Superfund Cost Recovery Strategy (Porter)	9832.13
08/25/88	Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas (Adams)	9834.4-A
09/26/88	Waiver of Headquarters Approval for Issuance of RD/RA Special Notice Letters at the Time of ROD Signature (Longest/Diamond)	9834.10-1a
10/21/88	Counting State-lead Enforcement NPL Sites Toward the CERCLA Section 116(e) Remedial Action Start Mandate (Porter)	9831.8

* = Policies dated after 8/14/90
** = Policies that are superceded

DATE	POLICY	OSWER NUMBER
11/03/88	Community Relations during Enforcement Activities and Development of the Administrative Record (Porter)	9836.0-1A
11/17/88	Guidance on Premium Payments in CERCLA Settlements (Adams and Porter)	9835.6
11/18/88	Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry (Adams and Porter)	9835.4-2A
11/28/88	Guidance on Applicability of EPA Order 3500.1 to CERCLA Staff	9842.0
12/14/88	Interim Strategy for Enforcement of Title III and CERCLA Section 103 Notification Requirements	9841.0
02/06/89	CERCLA Community Relations Mailing List (Diamond/Longest)	9836.2
02/07/89	Model Notice Letters (Diamond)	9834.10
02/07/89	Revisions to the Interim Guidance on PRP Participation in Remedial Investigations and Feasibility Studies (Porter/Diamond)	9835.2a
02/24/89	Guidance on CERCLA Section 106 Judicial Actions	9835.7
03/01/89	Interim Guidance on Administrative Records for Selection of CERCLA Response Actions	9833.3A**
05/08/89	Interim Final Guidance on Preparation of Superfund Memoranda of Agreement (SMOAs) (Diamond/Longest)	9375.0-01
05/16/89	Administrative Penalty Procedures Interim Final Rule (54 FR 21174, 5/16/89)	9841.1A
06/02/89	Model Statement of Work for a Remedial Investigation and Feasibility Study Conducted by PRPs	9835.8
06/06/89	Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(b) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property (Reich/Cannon)	9835.9
06/12/89	Procedures for Transmittal of CERCLA and RCRA Civil Judicial Enforcement Case Packages to Headquarters (Unterberger/Diamond)	9891.1-1a

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DATE	POLICY	OSWER NUMBER
06/21/89	Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003	9835.11-1
06/21/89	Revised EPA Guidance for Parallel Proceedings	9843.0
06/29/89	PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program (Diamond)	9834.3-2a
08/11/89	Submittal of Ten-Point Settlement Analyses for CERCLA Consent Decrees (Diamond/Unterberger)	9835.14
08/28/89	Arbitration Procedures for Small Superfund Cost Recovery Claims Final Rule (53 FR 23174, 5/30/89)	9832.17
09/14/89	Notification of Out-of-State Shipments of Superfund Site Wastes (Canon)	9330.2-07
10/19/89	CERCLA Implementation of the Training Requirements of EPA Order 3500.1 - Inspector Training	9842.1
12/06/89	Interim Municipal Settlement Policy (54 FR 51071, 12/12/89)	9834.13
12/20/89	Methodologies for Implementation of CERCLA Section 122(g)(1)(a) De Minimis Waste Contributor Settlements (Diamond/Unterberger)	9834.7-1b
01/30/90	Model Administrative Order on Consent for Remedial Investigation/Feasibility Study	9835.3-1A
01/31/90	Final Model Litigation Report and Complaint for CERCLA Section 104(e) Enforcement Initiative	
02/06/90	Multi-Media Settlements of Enforcement Claims (Strock)	9891.6
02/14/90	FY 90 "UAO Strategy" (Clay/Strock)	9870.1A
03/01/90	Releasing Information to PRPs at CERCLA Sites (Diamond/Unterberger)	9835.12
03/07/90	Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Design/Remedial Action (Clay/Strock)	9833.0-1a
03/30/90	Model Unilateral Administrative Order for Remedial Design and Remedial Action under Section 106 of CERCLA	9833.0-2(b)

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DATE	POLICY	OSWER NUMBER
04/04/90	Clarification of Delegations of Authority 14-14-A, 14-14-B, and 14-14-C under CERCLA	9012.10-1
06/11/90	Integrated Timeline for Superfund Site Management (Clay/Strock)	9851.3
06/13/90	EPCRA/CERCLA Penalty Policy	9841.2
08/15/90	Guidance on Remedial Actions for Superfund Sites with PCB Contamination - SMR Rec. #23	9835.4-01*
08/28/90	Performance of Risk Assessments in Remedial Investigation/Feasibility Studies (RI/FSs) Conducted by PRPs	9835.15*
08/29/90	Transmittal of Model Consent Decree for CERCLA Section 104(e) Information Request Enforcement Actions	9834.14*
09/27/90	Statement of James Stroch before the House Subcommittee on Policy, Research & Insurance: Insurer Liability for Cleanup Costs of Hazardous Waste Sites	*
10/12/90	Pre-referral Negotiation Procedures for Superfund Enforcement Cases	*
11/03/90	Superfund Enforcement Strategy and Implementation Plan	9800.0*
12/03/90	Final Guidance on Administrative Records for Selection of CERCLA Response Actions	9833.3A-1*
02/22/91	Guidance on Preparing and Releasing Waste-in Lists and Volumetric Rankings for Information Release Under CERCLA Section 122 (e)	9835.16*
03/21/91	Written Demand for Recovery of Costs Incurred Under CERCLA	9832.18*
03/31/91	Model Cost Recovery CD	*
04/03/91	CERCLA Implementation of Inspector Training Requirements for OSCs/RPMs at the Intermediate Level in STEP and First Line Supervisors	9842.2*
04/10/91	Interim Agency Policy on Contribution Protection Clauses in CERCLA Settlements	*
04/18/91	Questions and Answers About the State Role in Remedy Selection at Non-Funded-Financed State-Lead Enforcement Sites	9831.9*

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DATE	POLICY	OSWER NUMBER
05/07/91	Model Information Notice Letter to Local Governments	9834.16*
06/20/91	Evaluation of, and Additional Guidance on, Issuance of Unilateral Administrative Orders (UAOs) for RD/RA	9833.2c*
07/01/91	Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies, Vol. 1	9835.1c*
07/01/91	Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies, Vol. 2	9835.1d*
07/02/91	Supplemental Guidance on Performing Risk Assessments in Remedial Investigation Feasibility Studies (RI/FSs) Conducted by Potentially Responsible Parties (PRPs)	9835.15a*
07/02/91	Administrative Order on Consent for Remedial Investigation/Feasibility Study	9835.3-2A
07/02/91	Administrative Order on Consent for Remedial Investigation/Feasibility Study (Annotated Copy)	9835.3-2A
07/02/91	Model Statement of Work for a Remedial Investigation and Feasibility Study Conducted by Potentially Responsible Parties	9835.8A
07/02/91	Model Statement of Work for a Remedial Investigation and Feasibility Study Conducted by Potentially Responsible Parties (Annotated Copy)	9835.8A
07/03/91	Policy Towards Owners of Residential Property at Superfund Sites	9834.6*
07/08/91	Superfund Program, Model CERCLA RD/RA Consent Decree	*
04/02/92	Accelerating Potentially Responsible Party Remedial Design Starts: Implementing the 30-Day Study	9835.4-2b*

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** = Policies that are superceded

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

MAR 24 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Updates for the Enforcement Policy Compendium

FROM: John Cross, Chief
Guidance and Oversight Branch
Office of Waste Programs Enforcement

TO: Addressees

Please find enclosed the most recent updated material for the Enforcement Policy Compendium.

Title	Date	OSWER Dir. No.
Guidance on CERCLA Section 106 Judical Actions (Reich/Porter)	2/24/89	9835.7
Interim Guidance on Administrative Records for Selection of CERCLA Reponse Actions (Porter)	3/1/89	9833.3A

If you have any questions contact Gloria Bobo on my staff at (FTS) 475-6770.

Addressees:

Regional Counsels, Regions I-X
CERCLA Enforcement Branch Chiefs, Regions I-X
CERCLA Enforcement Section Chiefs, Regions I-X
Director, Waste Management Division,
Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Regions III, VI
Director, Toxic and Waste Management Division, Region IX
Director, Hazardous Waste Division, Region X

CERCLA ENFORCEMENT POLICY COMPENDIUM

VOLUME 1

1983

OSWER # 9832.0

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

3 AUG 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Cost Recovery Referrals

FROM: Kirk F. Sniff
Acting Associate Enforcement Counsel for Waste

TO: Regional Counsels,
Regions I-X

Recently, you provided my office with projections of hazardous waste civil referrals to Headquarters through the remainder of FY 1983. Included in the projected total of 27 referrals were 19 cost recovery referrals. Nearly all of these actions would involve recovery of costs associated with immediate removals.

On July 27, 1983, we met with the Department of Justice to discuss the most appropriate means for managing these expected referrals. In light of our continuing difficulties with cost documentation for existing referrals and actions, we agreed to two basic rules for handling the anticipated §107 referrals:

1. OEC-Waste will only accept referrals which include appropriate cost documentation. If documentation is inadequate, the referrals will be returned to the Regions for further development. To assist you in assessing the adequacy of your referral, I refer you to the draft guidance, "Cost Recovery Actions Under CERCLA," which was distributed to the Regional Division Directors at their national meeting on May 11 and 12, 1983, and to the attached document entitled "Partial List of Documents Needed to Support Cost Recovery." I strongly recommend that you include copies of the supporting documents in the referral package. If for some reason this is not possible, the referral package should clearly identify the specific documents which support your claims. Ultimately, this documentation will have to be provided to DOJ. If you have questions regarding documentation in your specific cases, please contact the appropriate Regional coordinator in my office.

OSWER # 9832.0

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

SEP 8 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Cost Recovery Referrals

FROM: Kirk F. Sniff
Acting Associate Enforcement Counsel for Waste

TO: OEC-W Staff

On August 3, 1983, I issued a memorandum stating several general policies regarding the processing of referrals under §107 of CERCLA. Since that time, a number of you have raised questions regarding my memorandum. This is intended to provide further clarification.

1. The memorandum states that if, for some reason, the Regions have not included copies of supporting documentation in the referral package, the referral should clearly identify the specific documents which support the claims. This identification should be in the form of a specific inventory of the supporting documents, indicating the identity, location and custodian of the documents. A general averment that documentation is "available" will not suffice.

2. The memorandum states that DOJ will only file those cost recovery claims for which there is adequate documentation. However, there may be cases where those claims which can be prosecuted immediately are not substantial when compared with the total potential action. For example, if the Region refers a case seeking recovery of $200,000 but can only document $8,000, the Headquarters attorney should seriously consider declining the referral until further documentation is provided. This decision is case-specific. However, as a general guide, you should consider whether the documented case is sufficient to stand on its own. Of course, in making your recommendation you should also consider other important factors such as the Statute of Limitations, or the need to make a protective filing (e.g., EPA proof of claim).

I hope this answers some of your questions. If you have other questions please feel free to raise them.

PARTIAL LIST OF DOCUMENTS NEEDED TO SUPPORT COST RECOVERY

1. Total Payroll expenditures for attorneys, with supporting time cards and time sheets

2. Total payroll expenditures for technical personnel, with supporting time cards and time sheets

3. Total expenditures for travel for attorneys, with supporting authorizations and vouchers.

4. Total expenditures for travel,for technical personnel, with supporting authorizations and vouchers.

5. For FIT contract expenditures: affidavit by contractor describing work done, hours spent, hourly cost, overhead calculations and total cost; vouchers from contractor to EPA requesting payment; Agency records showing authorization for Treasury to pay contractor

6. For National Lab Contract expenditures: contractor summary of samples taken at site and distributed to labs for analysis, individual and total cost of sample analyses, contractor overhead costs, name of lab conducting analyses, sample numbers, invoice numbers, total costs, copies of all invoices (types I and II), copies of bills from lab to contractor and from contractor to EPA if "SAS" samples; affidavit from EPA official verifying contents of contractor summary; copy of Agency's authorization for Treasury to pay contractor; vouchers from contractor to Agency requesting payment.

7. For expenditures by Regional Lab or ORD (e.g., aerial photography): affidavit showing nature of work and total cost, invoices, record of payment.

8. For immediate removals: contractor invoices certified by OSC; record of authorization for Treasury to pay contractor; daily contractor cost reports (rough and final); daily verification of work and costs by OSC.

9. Documentation of expenditures by TAT and any other contractors used, expenditures by other agencies, expenditures by State under Superfund contract or cooperative agreement.

COST RECOVERY ACTIONS

UNDER THE

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (CERCLA)

COST RECOVERY ACTIONS UNDER CERCLA

TABLE OF CONTENTS

I. Introduction 1

II. Assembling A Cost Recovery Action 3

III. Elements of a Cost Recovery Action 4

A. Evidence of Release or Substantial Threat of Release of a Hazardous Substance 6

B. Evidence of Responsibility of Defendant(s) . . . 9

C. Evidence that Removal or Remedial Action Taken by U.S. or State is Not Inconsistent With the National Contingency Plan 11

D. Proof of Costs of Removal or Remedial Action by the U.S. or a State 13

IV. Procedural Issues 16

A. Timing of the Cost Recovery Action 16

B. Statute of Limitations 17

C. Extent of Liability of Responsible Action . . . 18

D. The Demand Letter 20

E. Procedure in Event of Response To Demand Letter 22

1. Negotiating Teams and Procedures 23

2. Form of Settlement Agreement 26

F. Procedure In Event of No Response to Demand Letter 27

G. Maintenance and Coordination of Evidence In Event of Referral 29

V. Note on Purposes and Use of This Memorandum 31

Appendix A (Costs Recoverable Under CERCLA)

Appendix B (Model Demand Letter)

Appendix C (List of Documents)

Appendix D (Model Cost Recovery Plan)

Appendix E (Regional Superfund File Structure)

OSWER # 9832.1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

AUG 26 1983

MEMORANDUM

SUBJECT: Guidance on Pursuing Cost Recovery Actions Under CERCLA

FROM: Courtney M. Price
Special Counsel for Enforcement

Lee M. Thomas
Assistant Administrator for
Solid Waste and Emergency Response

TO: Enforcement Counsel
Regional Administrators
Regional Counsels
Associate Enforcement Counsel-Waste Division
Regional Superfund Coordinators
Air and Hazardous Substance Division Directors,
Environmental Services Directors

I. INTRODUCTION

Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides generally that past and present owners and operators of a site, and generators and transporters who contributed hazardous substances to a site, shall be liable (with certain limitations to be discussed herein) for all costs of removal or remedial action undertaken by the U.S. government, a State, or any other person, and for damages to or loss of natural resources.

While it is highly desirable to obtain removal and remedial action in the first instance by responsible parties, rather than by the Environmental Protection Agency (EPA) or a State, there are and will continue to be many cases in which the Agency will authorize the use of CERCLA funds from the Hazardous Substance

Response Trust Fund (the Fund) established by CERCLA for these actions, and thereafter attempt to recover those costs from the party or parties who are liable under Section 107 of the Act and other authorities.

Due to the possibility of cost recovery efforts in any case in which CERCLA funds are expended, the observation, documentation and preservation of critical facts and response costs is important to assure that:

* potential evidence concerning the site 1/ and responsible parties is noted and documented before response activity or the passage of time obscures or eliminates it;
* physical evidence essential at trial is collected and preserved appropriately; and
* sufficient evidence of total costs and claims paid from the Fund has been maintained and is available to support recovery by the government.

This memorandum describes essential elements which the government will probably be called upon to prove in a cost recovery action; the assembly and maintenance of a file; some examples of appropriate documentation for each element of the cause of action; procedures for processing and negotiating cost recovery claims; and the mechanics of repayment of any recovery to the Fund. This guidance must be observed by EPA employees, contractors, and, where appropriate, employees of State agencies working on a site on which CERCLA funds are expended under an

1/ The word "site" as used herein applies to any location where a release or spill has occurred, and mayhe used interchangeably with "facility" as defined in CERCLA §101(9).

EPA-State cooperative agreement, in every situation in which CERCLA funds are expended for site clean up, since each of these sites is the subject of a potential cost recovery action. The Office of Waste Programs Enforcement is preparing an additional cost documentation guidance; please contact Libby Scopino (382-4482) for assistance.

II. ASSEMBLING A COST RECOVERY ACTION

The assembly of evidence for a cost recovery action begins with the first response action taken under Section 104 of CERCLA. The filing of a cost recovery action should be presumed; accordingly the collection of relevant documentation is important. Generally, the government will pursue a cost recovery action when there is a solvent responsible party.2/ Where other government action against the responsible party is contemplated or pending, such as a judicial action under Section 7003 of RCRA or Section 106 of CERCLA to compel remedial measures at a site, a cost recovery count under Section 107 of CERCLA for removal or remedial costs can be added to the ongoing litigation.

The Regional Program office has the responsibility of collecting and maintaining the documents used as evidence in cost recovery actions. In matters which require legal opinions (such as the legal right of the Agency to enter a facility) or the preparation of legal documents, the program office should consult with and obtain the assistance of the Regional attorney or the appropriate Headquarters attorney.

2/ For a discussion of the factors to be considered in determining whether to file a cost recovery action, see Part IV.F.

III. ELEMENTS OF A COST RECOVERY ACTION

Under Section 104 of CERCLA, the U.S. or its authorized representative may take removal or remedial action at a site when, inter alia, any hazardous substance is released or there is a substantial threat of such a release into the environment, unless EPA determines that such action will be done properly by the owner or operator or by any other responsible party. The government may pursue an action under §107(a) for (1) costs of removal or remedial action incurred by the U.S. not inconsistent with the National Contingency Plan (NCP), or (2) claims paid by the Fund for costs of response incurred by a state not inconsistent with the NCP, or by other parties not inconsistent with the NCP.3/ Section 104(b) also authorizes the recovery of costs of sampling, analysis, monitoring and surveying programs, and certain other costs, including those

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3/ There may also be a claim made by trustees under Section 107(a)(4)(c) of CERCLA for damage to or loss of natural resources. However, until regulations for assessment of natural resource damages or destruction are promulgated pursuant to Section 301(c) of the Act, claims for such damages will be assessed on a case-by-case basis. The best records available on those damages should be maintained until specific guidance is developed on that subject.

for planning, legal and engineering services.4/

Therefore, to successfully pursue a cost recovery action, EPA should be prepared to introduce evidence demonstrating:

1. release of a hazardous substance or the substantial threat of such a release; and

2. the responsibility of the defendant(s); and

3(a). removal or remedial actions taken by the U.S. or the State which were not inconsistent with the NCP 5/; and/or

4. the costs of action taken by the U.S., a State, or any other person.

The financial condition of a responsible party is not an essential element of proof of the cause of action.6/ Even so, the financial condition of the responsible parties may be considered in determining the feasibility of a cost recovery action.

4/ For a list of costs which are recoverable under CERCLA, see Appendix A.
5/ Although Agency policy is to maintain evidence that its response activities are not inconsistent with the NCP, the Agency takes the position that the defendant has the burden of proof on this issue.
6/ While we do not believe that it is necessary to introduce evidence that removal and remedial action would not have been done properly by the owner or operator of a facility or by any other responsible party, it would be prudent to have available evidence of efforts by the Agency to obtain private party response action at the site. The notice letters forwarded by the Agency to potentially responsible parties and their responses are examples of such evidence.

The chief elements of a cost recovery action and the nature of evidence required to sustain them are discussed below.

A. Evidence of Release or Substantial Threat of Release of a Hazardous Substance

A release of a hazardous substance or the substantial threat of such release from a facility must be shown. The term "hazardous substance" includes inter alia, any material designated as hazardous or toxic under the Clean Water Act, Toxic Substance Control Act, or the Clean Air Act or designated as a hazardous waste under RCRA (see 40 CFR 302). The definition should be consulted since it does not include every pollutant or contaminant.7/

Appropriate documentation of evidence of a release or substantial threat of release includes field notes, photographs of the scene, statements from witnesses, statements from owners or operators, follow-up narrative reports or memoranda describing the scene or observations first hand, samples of air, soil, water or leachate discharge and laboratory analyses of the samples. Evidence

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7/ Section 104(a) of the Act authorizes the President (or his designee) to take response action whenever there is a release or threat thereof of a hazardous substance, or whenever there is a release or substantial threat of a release of "any pollutant or contaminant which may present an imminent and substantial endangerment to the public health or welfare...". However, Section 107 refers only to liability of owners, operators, transporters and generators for costs incurred in responding to releases or threats of releases of "hazardous substances". It is not clear whether those persons may also be liable under §107 for costs incurred in responding to releases or threats of releases of any pollutant or contaminant which is not a defined hazardous substance, but which may present an imminent and substantial endangerment. The government intends to hold such persons liable for those costs under both section 107 of CERCLA and the common law theory of restitution.

collected must be sufficient to demonstrate this aspect of the case.

There are three important considerations here.

First, samples, records of the owner/operator, or other evidence sufficient to establish the identity of hazardous substances involved should be collected.

Procedures similar or identical to those used by the National Enforcement Investigations Center (NEIC) 8/ should be followed, as should the requirements of Section 104(e)(1)(B), which provides for furnishing a receipt to the owner/operator for any samples taken (and a split sample, if requested). Observance of chain-of-custody procedures is necessary to demonstrate at trial that samples analyzed as hazardous substances did, in fact, originate at the site.

Collecting more data and documentation about sites than is reasonably necessary may increase total response costs to an unduly high level and delay clean-up activities and cost recovery. The number of samples collected is primarily a matter within the judgment of the Regional and Headquarters Superfund Offices, and will necessarily depend to a great extent on the site and the affected areas of the environment. These Offices should consult with the Regional Counsel prior to collecting samples. However, the Agency should generally collect only enough samples to determine (1) that a hazardous substance is present on the site; (2) that a

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8/ NEIC Policies and Procedures Manual, May, 1978 (rev., Dec. 1981), EPA Document No. 330-9-78-001-R.

release of the hazardous substance is substantially threatened or has occurred: and (3) what response is appropriate. Only unusual circumstances (e.g., to satisfy doubts over validity of previous samples, to determine whether concentrations of hazardous substances are increasing, etc.) would justify incurring significant additional costs for any additional sampling and analysis.

Samples should be taken in accordance with EPA-approved protocols and procedures developed by NEIC and contained in its Policies and Procedures Manual referred to above or similar procedures.

Second, collection of this evidence should begin immediately upon the start of any investigation into whether some response activity (including sampling and surveying) may be needed at the site in response to a release or threat of release. Passage of time or deliberate interference by other parties may literally destroy the evidence. Similarly, a long delay between the initial observation and the trial, or the initial observation and the recordation of that observation, will make testimony by witnesses about the site more difficult. Photographs of the scene before, during and after the response action are frequently helpful in preparing witnesses to testify, and in providing a visual record to the Court of conditions that prompted the response activity.

Field notebooks and the results of laboratory analysis are critical in showing the conditions that existed at the site and establishing a potential link to the defendant. Sampling and analysis should be conducted with particular concern for accuracy,

detail, completeness and quality, since these documents are likely to be subject to close scrutiny by responsible parties and the court. The NEIC has developed inspection and analysis procedures to assure high quality evidence and documentation for trial. Observance of NEIC procedures assures a consistently high quality of evidence, and should be followed by EPA employees, other federal agencies, contractors, and State agencies which have entered into an EPA cooperative agreement for response using CERCLA funds.

Third, for ease of assembling the case and presenting it for trial, the following people should be identified by name, relevant qualifications or connection to the case, and information about how to contact them in the future: 1) persons who participated in the site inspection, sampling, analysis or photography; 2) persons who may have historic or current information from personal observation, 3) people who gave or refused to give statements.

B. Evidence of Responsibility of Defendant(s)

In most cases, the liability of defendants will be demonstrated by establishing the elements in subsections (1)-(4) of §107(a). EPA personnel have a variety of techniques to gather evidence connecting the hazardous substance with the potentially responsible party or parties. For example, a deed or lease evidences the responsibility of owner or operator of the site. Less formal evidence can also be helpful in tracing responsiblity. The operator's presence at the site over a period of time will usually be noted by employees, neighbors, law enforcement officers, competitors or others close to or interested in such activities. Those observations should be recorded in signed statements or affidavits. In addition,

the activities of operators of a site may require a license or permit under State or local laws and regulations. The appropriate agencies should be consulted to determine whether they have any record of activities by an operator of the site.

The problem of linking a transporter or generator of a hazardous substance to a site is frequently a more difficult undertaking. The following detection sources may prove fruitful. Often, operators, generators, and transporters have records of business transactions. Drums located on-site may bear labels or markings with the name of a generator; these drums or labels should be preserved, if possible, or photographed, and the photographs labeled for identification and future use as possible evidence. Under certain circumstances the case development team may decide to perform a chemical analysis of the waste to assist in establishing the similarity between the wastes and a particular company's process.9/ (Information regarding parties and sites may also be obtained by use of letters issued under authority of RCRA Section 3007 and CERCLA Section 104(e)).

Again, local residents, law enforcement officials or competitors may be sources of information on transporters of material to the site or in the general vicinity. Employees or former employees of a generator or transporter may be willing to discuss the disposal practices of their employers, and if so, signed statements or affidavits, if possible, should be obtained from them.

9/ Information on the composition of waste streams associated with various industrial processes may be obtained from the Hazardous and Industrial Waste Division (WH-565), Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

C. Evidence That Removal or Remedial Action Taken By the U.S. or State Is Not Inconsistent With The National Contingency Plan

Pursuant to Section 104 of CERCLA, after information is gathered that a release has occurred or is threatened, a variety of actions may be taken by EPA or a State. Among those actions are:

(i) Investigations, monitoring, surveys, testing and other information gathering as may be necessary and appropriate to identify the existence and extent of the release or threat thereof, the amount, source and nature of the hazardous substances, and the extent of danger to public health, welfare or the environment. In addition, such planning, legal, fiscal, economic, engineering, architectural and other studies or investigations may be undertaken as necessary and appropriate to plan and direct response action;

(ii) "Removal actions", as the term is defined in Section 101(23) of CERCLA, and which includes, without limitation, security fencing, provision of alternative temporary water supplies, and temporary evacuation and housing of threatened individuals. In addition, EPA may take such other action as may be necessary to prevent, minimize or mitigate damage to public health, welfare or the environment, such as removal of materials, temporary diking and other easily accomplished actions; and

(iii) "Remedial actions", as the term is defined in Section 101(24) of CERCLA, including installation of a clay cover, dredging or excavations, collection of leachate and runoff, on-site storage, treatment or incineration, provision of alternative water supply and clean-up of released hazardous substances. Subject to some restrictions, it may also include permanent relocation of residents and business and community facilities, and off-site transportation,

storage, treatment or disposal of hazardous substances.

In a cost recovery action, two factors are important in the development and preservation of evidence regarding the appropriateness of the action taken by EPA or the state. These factors are:

A. The action was not outside what CERCLA allows.

B. The action taken must be "not inconsistent" with the NCP. Therefore, the NCP should be referred to and all persons involved in the decision-making process should be familiar with its requirements and limitations before decisions regarding actions are made 10/. Those decisions should be documented by notes, memoranda, letters and other written records maintained in the appropriate files.

Under the NCP, remedial actions must also be shown to provide a cost-effective response. A cost-effective remedy is one which, among the alternatives examined, is least costly but technologically feasible, reliable and adequately protects public health and the environment. In addition, under the Section 104 (c)(4) balancing test, the Agency should document remedial actions to refute any claims that the remedy was not cost-effective. Measures of cost-effectiveness includes the protection afforded public health, welfare and the environment by the remedy. In "immediate removal" actions it will be especially important to document the circumstances which justify the need for immediate action. As provided in section 300.65 of the National Contingency Plan, an immediate removal is appropriate when the lead Agency determines that the initiation of immediate removal action will prevent or mitigate immediate risk of harm to human life or health.

10/ The National Contingency Plan is published in 40 CFR Part 300, 47 Fed. Reg. 31180 (July 16, 1982).

Immediate removals are appropriate in such situations as: 1) human, animal, or food chain exposure to acutely toxic substances; 2) contamination of a drinking water supply; 3) fire and/or explosion; or 4) similarly acute situations.

Evidence of the cost-effectiveness of a particular remedial action may be demonstrated by the following evidence which is contained in summary form in the record of decision:

- studies showing the technical feasibility and probable cost of alternative remedial actions on the particular site;
- information that shows the degree of risk to public health, welfare and environment presented by the particular site (i.e., population threatened, media affected, toxicity of the hazardous substance involved, etc.);
- other documentation generated in consideration of the various factors required by Section 300.68 of the NCP.

All such evidence should be documented by written studies, reports, letters, memoranda, notes, minutes of meetings and any other record of the relevant bases for taking a particular remedial action.

D. Proof of Costs of Removal or Remedial Action by the U.S. or a State

Collecting evidence of costs of removal or remedial action taken on a site is likely to be a time consuming task. Documents must be obtained from a variety of participants in the cleanup activity: agencies, contractors, and others. The success of

government cost recovery actions depends upon the use of good bookkeeping and record collection techniques.

Certain costs expended on removal and remedial action are not recoverable. For example, no recovery under CERCLA is permitted where response costs resulted from application of a FIFRA-registered product (see Section 107(i)), or from a Federally-permitted release (see Section 107(j)). In borderline cases, it should be assumed that removal and remedial action costs are recoverable and records developed and maintained with this expectation.

A variety of mechanisms are available for tracking costs. While EPA prefers the uniformity of a single accounting system, the particular method of accounting may vary if it ensures accurate record keeping and preservation of all costs attributable to a particular site. To further this objective, cooperative agreements between EPA and a State, or contracts between EPA and a contractor for performance of response activity on a site, should specifically require that accounting procedures used by the State or contractor be approved by EPA.

An accounting and expense-tracking system is already in place at EPA, and should be followed closely by all EPA personnel, contractors and State agency personnel working on CERCLA-funded sites. This system generally involves the assignment of a unique accounting number to each specific site, and the charging of time, material and other expenditures to that account number. The site number is assigned by Headquarters based on a request from the Regional Office and confirmation of an approved Federal response.

In addition, activity codes have been devised under which different activities and phases of site clean-up and remedial action may be described. Questions regarding the specifics of these accounting procedures should be directed to the Financial Management Center in the Office of Emergency and Remedial Response (FTS 382-2208).

Evidence of the cleanup costs should be preserved and available for introduction into evidence. This could include such documentation as receipts for money paid for goods or services; cancelled checks; contracts and any amendments thereof; purchase orders; invoices; records of time spent, where the claim includes the value of such time; travel records and vouchers; and records of all correspondence or other communication regarding the actual costs, as well as progress reports on the work performed. The names, addresses and telephone numbers of all persons maintaining the regular business records of contractors, agencies or persons outside EPA should also be maintained for ready reference. 11/

11/ The Emergency Response Division of the Office of Solid Waste and Emergency Response of EPA is developing a field manual entitled "Cost Control Management for Superfund Removal" for immediate and planned removal actions. This manual presents a management system for On-Scene Coordinators for controlling, verifying, and documenting all costs incurred in a removal action.

IV. PROCEDURAL ISSUES

A. Timing of the Cost Recovery Proceeding

While the Office of Waste Programs Enforcement will work with the Regional Program Office in setting priorities for cost recovery, the following basic timing guidelines are offered. Cost recovery actions for expenses incurred in immediate or planned removals will normally not be initiated until after such response activity has been completed, since the time required for those activities is relatively short. However, a cost recovery action need not be delayed where the Agency establishes a multiphase response action (e.g., surface clean up, groundwater clean up). A cost recovery action can begin before completion of the last phase of response activity for costs expended to date and also for calculable future costs.

Where one stage of cleanup follows another in fairly rapid succession, cost recovery actions should be initiated after the cleanup is fully completed. In situations where there are substantial delays between phases, however, the Agency may decide to commence a recovery action at an intermediate stage. In these instances, negotiations regarding recovery of expenditures may be combined with discussions with responsibile parties over prospective cleanup activities. Generally, an action will not be filed for recovery of a remedial investigation/feasibility study or the cost of design prior to the filing of an action for recovery of construction costs.

B. Statute of Limitations

CERCLA does not contain a time limitation provision within which a cost recovery action must be brought. In the absence of a specific statutory provision, the Federal statute of limitation would apply. There is some doubt at this time as to precisely which limitation period will be applied to a cost recovery action. Limitations for actions brought by the United States for money damages are contained in 28 USC Section 2415, which distinguishes between actions based in tort or in contract. Because cost recovery actions are essentially quasi-contractual actions in the nature of restitution, a six year statute of limitations if any, should apply. However, since it is possible that a court may see CERCLA actions arising out of the tortious conduct of others, cost recovery actions should be brought within three years after the right of action accrues.

The date the cause of action accrues is also subject to debate. In United States v. The Barge Shamrock et al, 635 F.2d 1108, 1110 (4th Cir., 1980), cert. den. 102 S.Ct. 125 (1981), the Fourth Circuit held that a cost recovery action under the Federal Water Pollution Control Act arising out of an oil spill first accrued when the government completed the cleanup operation. On the other hand, a defendant might well be expected to argue that the cause of action accrues at the time funds are first expended on the site. In order to avoid argument on this point,

and to eliminate a potential bar to recovery, the Agency should attempt to commence all cost recovery action within three years of the date dollars are first expended.

C. Extent of Liability of Responsible Parties

While CERCLA Section 107(a) identifies parties who are responsible for the costs of response actions at a site, the statute does not expressly set forth the the nature of that liability. Language which imposed "strict, joint and several" liability on the responsible parties was dropped from earlier drafts in the final, compromise bill, and replaced with a definition in Section 101 of "liable" or "liability" which refers to the standard of liability which obtains under Section 311 of the Federal Water Pollution Control Act. Section ~~311 is a strict~~ liability statute. City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140. n.4 (E.D. Pa. 1982). Moreover, section 311 imposes joint and several liability, U.S. v. M/V Big Sam, 681 F.2d 432,439 (5th Cir.), on pet. for reh., 693 F.2d 451 (5th Cir. 1982).

The position of EPA is that in appropriate circumstances, joint and several liability is applicable under CERCLA. This position is supported by reference to section 311, by the legislative history of CERCLA 12/, and by Section 107(e)(2) of CERCLA, which provides that nothing in CERCLA "shall bar a cause of action that an owner or operator or any other person subject to liability under this section... has or would have by reason of subrogation or otherwise against any person."

12/ 126 Cong. Rec., S.19964 (daily ed. Nov. 24, 1980); 126 Cong. Rec., H.11707 (daily ed. Dec. 3, 1980).

The Department of Justice has interpreted this section as confirming a defendant's right of contribution against other responsible parties, which is only of value to a defendant who has been held jointly and severally liable 13/.

Joint and several liability is traditionally imposed when the actions of two or more defendants cause a single, indivisible result, (Prosser, Law of Torts, (4th ed. 1971), Sec. 52.) That determination may involve factual issues. Therefore, where two or more parties in the categories of responsible parties listed in Section 107(a) contribute hazardous substances to a facility which are being released, threaten to be released, or are contributing to the release or threat, the Agency may argue that those parties are jointly and severally liable for the costs of responding to that release or threat.

This of course does not foreclose the Agency from entering into consent decrees or other appropriate agreements with multiple responsible parties in which they agree to allocate the Agency's response costs among themselves. The Agency is primarily concerned with achieving cleanup of hazardous sites, preferably by private action, and there are many reasons why responsible parties may wish to share the costs. However, this is primarily a matter for the responsible parties, and if they cannot agree among themselves on an appropriate allocation of responsibility, EPA should proceed with legal action on a theory of joint and several liability.

13/ Letter dated December 1, 1980, from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, to Hon. James J. Florio, 126 Cong. Rec. H11788 (daily ed. Dec. 3, 1980).

D. The Demand Letter

The first formal step in the commencement of a cost recovery proceeding will be the issuance of a letter of demand from EPA to the potentially responsible party or parties for payment of costs expended on the site. A demand letter should be sent to all parties in a case who have been identified as potentially responsible (i.e., past and present owners/operators of a site and generators and transporters who contributed hazardous substances to a site), and should be issued after all response activity has been completed, or at the completion of one phase of a multi-phase response where the entire process will require an extended period of time.

Before a demand letter is sent, the potential case should be analyzed for the elements in part III above, including identification of all potentially responsible parties (including responsible individuals in corporations where appropriate) and assembly of cost information. At the time the demand letter is sent, the Agency should be able to answer reasonable questions posed by a recipient of the letter. Regional personnel should have referred the case to Headquarters (or recommended against an action) and Headquarters staff should have resolved their position on a referral so that the Government is prepared to file a complaint if the response to the demand letter is unsatisfactory.

The letter should be issued where response costs have been incurred under CERCLA, regardless of whether a decision has been

made to initiate a judicial proceeding for cost recovery. The demand letter should contain the following points:

- reference to EPA's authority to administer CERCLA and the Fund established thereunder (or reference to authority to recover costs where the response activities for which reimbursement is sought occurred prior to CERCLA);
- the location of the site;
- the presence of a hazardous substance which was released or threatened to be released;
- in general terms, the dates and types of response activity undertaken by EPA at the site;
- any notice given to the recipient prior to or during the response activity, allowing the recipient the opportunity to undertake the work or pay the expense of response;
- the total cost of the response activity 14/ broken down into general categories;

14/ The amount stated in the demand letter should be the total obligated by the Agency to be expended on the site, rather than the amount shown by Agency records to have been expended on the site at the time the letter is prepared. This is to avoid problems caused by delays in payment of response costs after a demand letter has been forwarded to the responsible party. Even so, available records should be assembled as soon as possible. Where it is expected that future costs will be paid (e.g., in the next phase of response activity), the letter should also clearly state that in addition to the sums already obligated and spent, the Agency expects to expend additional sums on the site for which claim will be made against the responsible party. Of course, in a judicial proceeding in the cost recovery action, the Agency will be required to prove the actual amounts spent from the Fund.

- a general statement that the Agency believes that the recipient is a responsible party and liable for the sum set forth;
- a demand for payment;
- a statement that the recipient of the letter should contact EPA within a specified period (normally thirty days) to discuss the account and the recipient's liability therefor;
- a warning that if recipient fails to contact the Agency within the specified time, a suit may be filed in the appropriate U.S. District Court for recovery of the claim; and
- the name, address and telephone number of a representative of the Agency who the recipient should contact. A sample demand letter is attached to this memorandum as Appendix B.

The primary responsibility for preparation of the demand letter will be in the Regional Program Office. The Regional Program Office should consult with the representatives from OWPE, Regional Counsel, and Office of Enforcement Counsel-Waste. The demand letter will be sent through the Office of Waste Programs Enforcement for the signature of the Director of OWPE unless that requirement is specifically waived. If a case is referred to DOJ, the DOJ case attorney should sign the demand letter.

E. <u>Procedure In Event of Response From Potential Defendant</u>

In many cases, the recipients of demand letters will contact the Agency and express interest in discussing their status as a responsible party. The Agency encourages such negotiations.

CERCLA money is limited; Agency cleanup activities deplete the fund and money must be recovered from the parties responsible for the release or threat of release. Therefore cost recovery through negotiation or litigation is necessary to clean up the greatest number of sites. Cost recovery should involve the coordinated efforts of knowledgeable legal and technical personnel at both the Regional and Headquarters offices as explained below.

1. Negotiating Teams and Procedures

Upon receipt of a response to the demand letter from a potentially responsible party, the contact person named in the demand letter will notify the Associate Enforcement Counsel for Waste, the Regional Counsel, the Director of OWPE and the Regional Superfund office. Each of those offices will, upon notification, identify the person who will represent it on the negotiating team. (The Department of Justice may participate in cases which are likely to result in consent decrees or litigation.)

The formulation of the Agency's position results from the collaboration of the Team. In some policy decisions the entire Team has relevant background to participate in the decision making process. However the specialized legal or technical talent on the Team should be efficiently used.

The Team has the responsibility for developing a proposed negotiating schedule. The proposed schedule should have the concurrence of the Associate Enforcement Counsel for Waste and the Director, OWPE in cases of national significance.

Some factors which should be considered in the development of this schedule are the number of potentially responsible parties who will take part in the negotiations; the nature of the potential defenses; the amount of available data linking particular parties to the site; the amount of the claim, and other related matters. Sufficient time should be allowed for the negotiation process to take place, but it is important that a deadline be established as a goal for achieving a settlement, and beyond which the negotiations will not continue, absent clear indications that a settlement is imminent. A reasonable period of time for most negotiations is 60-90 days; negotiations should not be extended without Headquarters approval. A referral should be submitted by the Region and approved by Headquarters, and a complaint should be prepared and approved by the Department of Justice, prior to the conclusion of negotiations so that an action may be filed if negotiations are not resolved by the deadline.

a. Case Team Leader. Contemporaneous with the formation of the Negotiating Team, Regional and Headquarters program managers, in consultation with OLEC, will select a program official to serve as the Case Team Leader. The Case Team Leader's function will be to:

- focus efforts to develop, in advance of negotiations, the Agency's negotiating strategy and position on issues that may arise during the course of the case;
- ensure the coordination of legal and technical staff participation on the team by scheduling and chairing regular case review sessions; and
- define the Agency's objectives in accordance with applicable Agency guidances and policies.

On occasion, the Team may be unable to develop a consensus on a cost recovery issue. When this occurs, the Case Team Leader will prepare a written explanation of the issue for resolution by the appropriate supervisory staff.

b. Lead Negotiator. Regional Counsel and Headquarters Enforcement Counsel managers, in consultation with the Director of OWPE, will select the lead Agency attorney for the case.

Although a Regional Counsel attorney will usually be designated as the lead Agency attorney, in cases of national significance or which may be precedent-setting an attorney from OEC-Waste may be selected. The extent of Headquarters involvement will be decided on a case-by-case basis by the Assistant Administrator for Enforcement, (or the Special Counsel for Enforcement until the Assistant Administrator position is established). The Department of Justice should also be consulted and invited to participate in negotiations of cases which are likely to result in a consent decree or litigatio particularly in multiparty and complex cases.

The Team's lead attorney will be responsible for conducting cost recovery negotiations. Although the attorney is primarily responsible for explaining and defending the Team's position during negotiations, he or she may request other Team members' assistance in articulating the Team's position to opposing parties.

At the initial negotiation session, the lead attorney should inform opposing parties that while the Team has authority to negotiate, any agreements are subject to the approval of Enforcement Counsel and OSWER. The opposing parties should also be advised that the Agency has established a deadline for settlement. The deadline should be disclosed tc tne responsible parties. After the deadline, the Agency will take judicial action.

2. Form of Settlement Agreement

CERCLA allows the Agency several ways the Agency could settle a cost recovery action:

- a consent decree
- an administrative order
- a memorandum of agreement.

However, as a matter of policy, the Agency has decided that a consent decree is required in most cases. A forthcoming policy will set out the requirements for using consent decrees and another one will address administrative orders.

Again, it should be pointed out that the negotiating Team is not authorized to enter into a binding agreement of any type with the responsible parties in the absence of specific authorization from the Enforcement Counsel and OSWER. Consent decrees must also be approved by the Department of Justice and the reviewing court (after a thirty day public comment period). A draft of any document which is to be the subject of negotiation should, of course, be reviewed before commencement of negotiations by appropriate supervisors of the negotiating Team at the Region and Headquarters, and any document which the negotiating Team and their supervisors believe to be acceptable for settlement should be forwarded to the Assistant Administrator for Enforcement, the Director of OWPE and the Department of Justice at the earliest possible time to allow for adequate review.

The Agency may allow some settlements in which the responsible party agrees to pay the claim in periodic payments where the party is unable to pay in a lump sum, or where there is other legitimate reason for delayed payment. Before considering installment payments,

however, the Economic Analysis Division of the Office of Policy and Resource Management (FTS 382-2764) and the Financial Management Division of the Office of Administration (FTS 382-5135) should be consulted in order to obtain a review of the financial condition of the responsible party and to determine any applicable interest charges.

Payment of cost recovery claims should be made payable to the U. S. Environmental Protection Agency and should be mailed to:

U.S. Environmental Protection Agency
Accounting Operations Office
P.O. Box 2971
Washington, D.C. 20013
Attn: Collection Officer for Superfund

The check or other form of payment should specify the name of the site at which the activity took place. The lead attorney is responsible for furnishing copies of judgments, decrees or agreements for payment of cost recovery claims as early as possible to Financial Reports and Analysis, Room 3617M, U.S. EPA, 401 M Street, Washingto D.C. 20460, for establishment of a proper account.

F. Procedure in Event of No Response to Demand Letter

If no response is received to the demand letter, a final determination must be made of whether the facts of the case justify the Agency taking further steps to pursue the cost recovery claim. A decision whether the case should be referred to DOJ should be made by the Region as well as staff at Headquarters at the time the demand letter is drafted. This decision will initially be made by the Regional Administrator, based on the recommendation of the Regional Superfund Office and the Regional Counsel.

Relevant factors to consider include:

(a) the strength of evidence connecting the potential defendant(s);

(b) the availablility and merit of any defense. Possible defenses under Section 107 of CERCLA are generally that the release and consequent response action was the result of:

(1) an act of God;

(2) an act of war; or

(3) an act or omission by an unrelated third party as to whom the owner/operator had no contractual relations and did not fail to exercise appropriate care against the foreseeable acts and omissions of that third party.

(c) the quality of release, remedy and expenditure documentation by the Agency, a state or third party;

(d) the financial ability of the potential defendant(s) to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement; and

(e) the statute of limitations.

In considering the ability of the potentially responsible party or parties to pay, the Regional Offices should make use of the Financial Assessment System, developed by the Economic Analysis Division of the Office of Policy and Resource Management and managed by NEIC, to assess the financial condition of most potentially responsible parties.

The determination of the Regional Administrator to initiate a cost recovery action shall be forwarded by a memorandum from the Regional Administrator to the Assistant Administrator for Enforcement for concurrence in the same manner as the referral of other matters for litigation. A decision not to initiate a cost recovery action must be reflected in a memorandum to OWPE. An

affirmative decision must be made by the Regional Administrator in each case in which CERCLA funds are expended, whether that decisio be to proceed or not to proceed. This is necessary because of the Agency's accountability for management of the Fund.

After OEC concurs on pursuing the cost recovery action, OEC refers the case to the Department of Justice, together with the names of the appropriate Headquarters and Regional personnel who will be involved in the case. If the Department of Justice fails to concur, the originating Regional office is advised of such non-concurrence, together with the reasons therefor, and recommendations as to whether additional information should be provided for DOJ's reconsideration. Even though a Region may recommend against pursuing a cost recovery action, the Assistant Administrator for OSWER may decide on his own initiative that such an action is warranted. This recommendation would then be sent to OEC for consideration.

G. Maintenance and Coordination of Evidence in Event of Referral

There will inevitably be logistical difficulties in maintaining and coordinating the production of the mass of data, contracts, cost records, and other evidence generated in a response activity. It is very important to provide for an orderly method of expeditiously providing that information during the course of a cost recovery action for use during case development, discovery, and trial.

Each Agency, office, contractor or other person participating in a CERCLA response activity should maintain documents related to the activity for a period of not less than six (6) years after all response activities are finished (consult Appendix C for a list of these necessary documents).15/

The Agency's Financial Management Division will maintain and periodically update the cost expenditure tracking system for each site referred to above, so that an itemization of all costs attributable to a particular site can be quickly obtained. When a determination is made that a case should be referred to the Department of Justice for filing (or, if necessary, during the time that the demand letter is being prepared or the case is being considered for referral), a request can be made of the persons, firms or agencies involved in a response activity for copies of its records. At that time, a complete file of all records involved in the particular case can be compiled and delivered to DOJ, with copies of the complete file made available to appropriate Regional and Headquarters legal and technical personnel.

15/ The period of six years is necessary because of the possibility that the claim may not accrue upon the first expenditure. Additionally the litigation may be protracted; documents must be kept for the term of the litigation.

V. Note on Purposes and Use of This Memorandum

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys and other employees of the U.S. Environmental Protection Agency. They are not intended to nor do they constitute rule-making by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action at variance with the policies or procedures contained in this memorandum, or which are not in compliance with internal office procedures that may be adopted pursuant to these materials.

We trust that this memorandum generally covers the subject of procedures to be involved in cost recovery actions under CERCLA, but if you have any questions or problems involving this subject matter, please call Russell B. Selman, Office of Legal and Enforcement Policy, at FTS 426-7503.

Appendix A

Costs Recoverable Under CERCLA

In order to identify records which must be developed and maintained for a cost recovery action, it is essential to know those costs which may be recovered from a responsible party. Various sections of CERCLA provide for recovery of certain elements of costs expended for site clean-up. We have attempted below to compile a list of those costs which are recoverable, and the sections of CERCLA which authorize recovery of those costs. This list is very general and not exclusive.

The listed costs are in general categories, using language directly from CERCLA, and a determination will necessarily have to be made in each case whether a particular expenditure is within the categories of recoverable costs. In this regard, EPA's position is that the intent of Congress was to authorize recovery of all costs directly related to clean-up of a site, and therefore the costs should be broadly construed to fall within these categories.

Cost	CERCLA Section
1. Investigations, monitoring, surveys, testing, and other information-gathering necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health, welfare or the environment.	§§104(b), 107(a)(1)(4)(A) (providing for recovery of costs for removal actions, which, as defined in §101(23) include actions taken under §104(b)).
2. Planning, legal, fiscal, economic engineering, architectural, and other studies or investigations	Same

necessary or appropriate to plan and direct response actions.

3.	Planning, legal, fiscal, economic, engineering, architectural and other services necessary to recover the cost of response actions.	same
4.	Planning, legal, fiscal, economic, engineering, architectural and other services necessary to enforce the provisions of the Act (CERCLA). (This could include costs incurred in prosecuting an immiment endangerment action under §106).	same
5.	All costs of (A) removal and (B) remedial action incurred by the U.S. Government or a State not inconsistent with the NCP. Actions for which such costs may be incurred are	§107(a)(4)(A)

(A) Removal Actions (§101(23)):

(1) the clean-up or removal of released hazardous substances from the environment;

(2) such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment;

(3) such actions as may be necessary to monitor, assess or evaluate the release or threat of release;

(4) the disposal of removed material;

(5) such other actions as may be necessary to prevent, minimize or mitigate damage to public health, welfare or the environment which may otherwise result from a release;

(6) any monitoring to assure actions performed by other parties adquately protect public health, welfare and the environment, and meet EPA criteria;

(7) specific examples contained in §101(23) (without limitation):

a. security fencing or other measures to limit access;

b. provision of alternative water supplies;

c. temporary evacuation and housing of threatened individuals

d. action taken under §104(b) of CERCLA;

e. any emergency assistance provided under the Disaster Relief Act of 1974.

(B) Remedial Actions (§101(24)):

(1) actions consistent with permanent remedy taken instead of or in addition to removal actions, to prevent or minimize the release of hazardous substances into the environment so that they do not migrate to cause substantial danger to present or future public health, welfare or the environment.

(2) Specific examples contained in §101(24) (without limitation):

(a) storage:

(b) confinement

(c) perimeter protection using dikes, trenches or ditches;

(d) clay cover;

(e) neutralization;

(f) cleanup of released hazardous substances or contaminated materials;

(g) recycling or reuse:

(h) diversion;

(i) destruction;

(j) segregation of reactive wastes

(k) dredging or excavation;

(l) repair or replacement of leaking containers;

(m) collection of leachate and runoff;

(n) on-site treatment or incineration;

(o) provision of alternative water supplies;

(p) any monitoring reasonably required to assure that such actions protect public health, welfare and the environment;

(q) costs of permanent relocation of residents, businesses and community facilities (where relocation, alone or in combination with other factors, is more cost-effective than and environmentally preferably to transportation, storage, treatment or disposal off-site of the hazardous substances).

(3) Remedial actions do <u>not</u> include:

(a) off-site transportation of hazardous substances;

(b) off-site storage, treatment or disposal of hazardous substances;

<u>unless</u> it is determined that such actions are (A) more cost-effective than other remedial actions; (B) will create new capacity to manage (in compliance with Subtitle C of RCRA) hazardous substances in addition to those at the affected site; <u>or</u> (C) are necessary to protect public health, welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of the hazardous substances.

6.	Any other necessary costs of response incurred by any other person consistent with the NCP. "Response" actions include both "removal" and "remedial" actions (§101(25). (See list of removal and remedial actions above.)	§107(a)(4)(B)
7.	Damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury destruction or loss. (See note, below)	§107(a)(4)(C)

"Natural resources" include (§101(16)):

(a) land;

(b) fish;

(c) wildlife;

(d) biota;

(e) air;

(f) water;

(g) groundwater;

(h) drinking water supplies;

(i) other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any state or local government, or any foreign government (includes resources of the Fishery Conservation and Management Act of 1976).

NOTE: CERCLA §301(c) provides for the promulgation of regulations not later than two years after enactment of the Act for the assessment of damages for injury to destruction of or loss of natural resources resulting from a release of a hazardous substance. See footnote 3 in the Memorandum for further explanation on recovery of these damages.

Appendix B

(Model Demand Letter)

XYZ Corp.
Someplace, State 00000

Re: Name, location of site

Dear Sir or Madam:

On or about _____, 198_, there were releases and threatened releases into the environment of hazardous substances [and pollutants and contaminants] from the _____ facility located at or about _____. [In addition, there were releases and threatened releases of pollutants and contaminants that may present an imminent and substantial danger to the public health or welfare.]

[On or about _____, 19__, EPA gave [oral] notice to you _____ [which was confirmed] by letter of _____, 19__, advising you regarding the referenced facility and that you are a party who may be liable for money expended by the government to take corrective action at the facility. EPA offered you the opportunity to discuss with EPA your voluntarily taking action necessary to abate any releases or threats of releases of hazardous substances [and polluants and contaminants] from the facility. You did not undertake the necessary actions.]

In accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq., [and other authorities (insert where pre CERCLA or non CERCLA expenditures)] the [State of _____, pursuant to an agreement with and funding by the (insert if State lead)] United States Environmental Protection Agency (EPA undertook response action using funds provided for such actions. The action began on or about _____ and continued to on or about _____. EPA's response action entailed the (describe generally what was done).

The cost of the response action [performed] [caused to be performed by EPA at the facility] [was] [is currently] approximately $_____. (Insert the amount obligated by the Agency to be expended on the site, not the amount actually expended according to Agency records.) [The Agency anticipates expending additional funds in the future under authority of CERCLA for additional response activity which the Agency deems appropriate to be performed at the site.] Enclosed is a statement summarizing the expenditures to date.

Information available to EPA indicates among other things that you (choose one or more, of the bracketed clauses as appropriate:) [are/were at the time of the response action the owner/operator of the facility] [were the owner/operator of the facility at the time of disposal of hazardous substances at the facility] [did, by contract, agreement or otherwise, arrange for disposal or treatment, or arranged for transport for disposal or treatment of hazardous substances [and pollutants and contaminants]at the facility [accepted hazardous substances [and pollutants and contaminants] for transport to the facility which was selected by you]. Pursuant to the provisions of Section 107(a) of CERCLA [and other authorities (insert where pollutants or contaminants involved and where other law involved)], we believe that you are liable for the payment of all costs expended on the site to the Hazardous Substance Response Trust Fund established pursuant to Section 221 of CERCLA, which is administered by EPA.

We hereby request that you [or a group of parties potentially responsible for the site] make restitution by payment of the herein stated amount plus interest [together with any sums hereafter expended by the Agency on the site pursuant to authority of CERCLA]. [The names of other potentially responsible parties receiving this request for payment are enclosed with this letter to facilitate organization among the identified parties concerning payment.] If you [or an organized group of potentially responsible parties] desire to discuss your liability with EPA, please contact the person named below in writing not later than thirty (30) days after the date of this letter. We will otherwise assume that you have declined to reimburse the Fund for the site expenditures and will subsequently pursue civil litigation against you.

Sincerely,

Contact Person:

[Name]
[Title]
[Address]

cc:: Enforcement Counsel
Regional Counsel
State Agency

Appendix C

The following pages constitute a search guide that may be used by the Regional enforcement program in gathering documentation to support a cost recovery action. The search guide format is a chart with four columns, headed as follows: "Document", "Originator", "EPA Contact" and "Regional File Location".* All of the documents listed will probably not be available in all cases, nor will each one necessarily enhance the body of evidence in every case. It must be decided on a case-by-case basis exactly which pieces of documentation should be used as supporting evidence. The search guide was meant to be an exhaustive list of documents that should be considered. It is suggested that the persons conducting the file search for supporting documentation pull out each document on the list if it is available. It can be decided at a later time which of the documents are useful as evidence given the facts of the particular case.

Please note that the search guide covers only documents that would be useful in supporting the first three elements of proof discussed in this guidance: proof of the release, link between the party and the site and consistency with the NCP. Cost documentation will be the subject of another guidance document that is currently under development.

* The fourth column, "Regional File Location", has meaning only if the Region uses the filing system described in Appendix E.

I. Evidence of a Release or the Threat of a Release

Document	Originator	EPA Contact	Probable File Location*
• Notification Record pursuant to Sec. 103(a) of CERCLA	• Owner/Operator of facility • Gov't. officials responding to the problem (Local, State or Federal)	• National Response Center (NRC)	• NCR (see page 21, #1, bullet #1)
• Notification Record pursuant to Sec. 103(c) of CERCLA • Record of notification of EPA-HQ-Emergency Response Division, EPA Regional Administrator or other EPA official	• Owner/operator of facility • Appropriate Fed. officials	• EPA-Regions • EPA-HQ-Hazardous Site Control Division • EPA-Region, OSC • EPA-R.A. • EPA-HQ-Emergency Responsible Division	• Remedial Response: Discovery/Hazard Ranking File/Regions/HQ • NRC • EPA-HQ-Emergency Response Division Removal Response File
• Compliance Investigation Report pursuant to Section 104(e) of CERCLA	• Federal/State investigator	• EPA-Region, CERCLA Enf./Compliance Project Manager • State Enforcement/Compliance Agency	• Remedial Response: Discovery/Hazard Ranking File
• Other Compliance Investigation or Inspection/Audit Reports pursuant to statutory authority (e.g., sec. 3013 of RCRA)	• Federal/State investigator	• EPA-Region, Approp. Enf./Compliance Section • State Enforcement/Compliance Agency	• Remedial Response: Discovery/Hazard Ranking File

*Unless otherwise noted, this assumes the documents are located in the Regional files and assumes the Regions are using the file structure outlined in Appendix E.

I. Evidence of a Release or the Threat of a Release (continued)

Document	Originator	EPA Contact	Probable File Location
• Notes from phone calls, correspondence, photographs, or other form of random or incidental observation	• Gov't. Officials (Local, State, Federal) • Public	• EPA-Region, Enf./ Compliance Project Manager • State Enf./ Compliance Agency • Municipal Government Office (e.g., Public Health or Police Dept.)	• Remedial Response: Discovery/ Hazard Ranking File
• Signed witness statements (describing the conditions leading up to the release and the release)	• Owner/Operator Facility • Employees or Contractors assoc. w/ facility • Federal/State Investigators • Local Officials • Public	• EPA-Region, Waste Mgt. Division Proj. Manager • State Agency	• Remedial Response: Discovery/ Hazard Ranking File

OSWER # 9832.1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

AUG 29 1983

MEMORANDUM

SUBJECT: Coordination of EPA and State Actions in CERCLA Cost Recovery Negotiations and Litigation

FROM: Courtney Price
Special Counsel for Enforcement

Lee Thomas
Assistant Administrator for
Solid Waste and Emergency Response

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Director, Office of Intergovernmental Liaison

The clean-up of hazardous waste disposal sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) involves payment of monies from the Hazardous Substance Response Fund (the Fund) created by Section 211 of CERCLA to individual States or to contractors to finance clean-up activities. In many cases, the State in which the site is located will also contribute its own funds to the site clean-up 1/. EPA and the State may thereafter negotiate with or take judicial action for recovery of the amounts expended by them against the party or parties who

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1/ Under CERCLA §104(c)(3), the State must pay or assure payment of 10 percent of the cost of remedial action and operations and maintenance at a site and at least 50 per cent of the cost of all response actions at a facility which was owned by the State or a subdivision at the time of disposal of hazardous substances.

Current Agency policy allows CERCLA funding of remedial investigation, feasibility study, and remedial design at privately owned sites without a State cost-share. Accordingly, any cost-share previously paid by the State (allowable State services, statutory credit or cash) for remedial investigations, feasibility studies, and remedial design at privately owned sites will be applied toward the State's share of the cost for remedial constructi at the site, see May 13, 1983 Memorandum from Lee M. Thomas.

are legally responsible 2/. In those cases, the question arises whether the separate negotiations or judicial actions of EPA or the State to recover their respective funds might, in some way, prejudice the other's right to recoup its monies, and if so, what actions might be taken to avoid such prejudicial effect.

It may initially appear unreasonable to conceive that either EPA or a State could take action which would interfere with the other's right to recover monies expended for site clean-up. However, the following points should be considered:

- State as Agent - EPA will frequently transfer its share of clean-up funds to the State which will, in turn, spend it on the site under the cooperative agreement with EPA. The cooperative agreement contains numerous protocols, procedures, and other standards with which the State must comply to assure the quality of the site investigation and clean-up. Because of EPA's control over these matters, adverse parties may argue that the State is EPA's agent or representative for the expenditure of the funds. This misunderstanding might be asserted as a defense to recovery of remedial costs by a potentially responsible party.

2/ Further guidance on cost recovery procedures and responsible parties is contained in a forthcoming policy entitled, "Cost Recovery Actions under CERCLA."

- Collateral Estoppel - An adverse judgment by a court in an action by either EPA or a State on the issue of recovery of funds expended on the site might be held to collaterally estop the other governmental agency from successfully bringing a subsequent action against that same party 3/.
- Insolvency of Responsible Party(s) - A settlement or judgment by EPA or the State might exhaust the available resources of the responsible party(s), leaving the other governmental agency without possibility of a recovery.

Regardless of the merits of arguments which may be made on the foregoing considerations, in the interest of promoting Federal-State relations, there are certain rights and obligations which should be clearly defined at the outset of the relationship. The Regions, in cooperation with OERR, have recognized the benefits of identifying these interests by reflecting them in the cooperative agreements. Accordingly, this memorandum does not require the Regions to adopt any new procedures or change any existing cooperative agreements. Instead this document presents the rationale for drafting cooperative agreements in the manner prescribed by OERR.

3/ See United States v. I.T.T. Ravonier, Inc., 627 F.2d 996, (9th Cir., 1980).

THE COOPERATIVE AGREEMENT

1. Negation of Agency in Cooperative Agreement

The cooperative agreement should negate the principle that the State is an agent for EPA. This is important for both governmental agencies for a number of reasons. In the cooperative agreement, EPA will necessarily require that the State observe certain standards, procedures and protocols, such as in the taking of samples, their chain-of-custody, analysis protocols, and perhaps accounting procedures. The need to specify such procedures could be argued to constitute a right to control the actions of the State, an indicia of an agency relationship. Neither EPA nor the State should wish to encourage such an argument because of the potential exposure to tort liability as well as the possibility of complicating a cost-recovery effort. Therefore, the imputation of an agency relationship between EPA and the State should be negated by appropriate language in the cooperative agreement. Suggested language for such a provision appears in the Appendix to this memorandum.

2. Requirement for Notice of Settlement or Action

The cooperative agreement between EPA and the State should contain a provision that neither will initiate a cost recovery proceeding or enter into a settlement with the responsible party except after ample written notice in advance of the execution of a settlement agreement or the filing of a suit. The provision prevents rushing by EPA and the State to obtain a judgment against

or settlement with the responsible party, thereby gaining a position of preference with respect to the assets of the responsible party.

Inclusion of such a provision in the cooperative agreement is fair to both EPA and the State, in that neither may gain an unexpected advantage to the assets of the responsible party by separate negotiations of which the other may be unaware.

Such a provision also provides a means whereby each party to the cooperative agreement may take separate independent action to protect its interests, after having given the necessary notice, if there are reasons to not engage in joint EPA-State negotiations or file suits in coordination with each other against the responsible parties. Suggested language for such a provision appears in the Appendix to this memorandum, and provides for written notice not less than 30 days in advance of settlement or initiation of a cost recovery action.

3. Requirement for Cooperation and Coordination of Cost Recovery Efforts

The cooperative agreement should also provide that EPA and the State will cooperate with each other in efforts to recover their respective shares of the costs of response activities at the facility, and will coordinate their respective activities and resources in such efforts, including the filing and coordination of litigation for the recovery of costs and the use of evidence and witnesses in such suits. This provision is desirable because

cost recovery suits will involve considerable data, documents and witnesses from both EPA, the State and their contractors, and close coordination between EPA and the State will be very important to the efficient and effective resolution of those suits. Model language for this provision also appears in the Appendix.

4. Requirement That Judicial Action Be Taken in U.S. District Court

The cooperative agreement should also provide that any suit filed by either party to the agreement against any third party for recovery of response costs to which it may be entitled, shall be brought in the U.S. District Court for the judicial district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office (§113(b)). The purpose of this provision is to avoid fragmenting the efforts of EPA and the State between Federal court (in which EPA would bring a suit), and State court (in which the State could bring a cost recovery suit under any applicable State law. See the discussion of this point in the section entitled "Pending Cases", *infra*). Model language for this provision also appears in the Appendix.

NON-JUDICIAL SETTLEMENT

In the absence of an agency relationship between EPA and the State, there is little possibility that the State could enter into a separate agreement with the responsible party (as distinguished

from a Decree or Judgment) which could affect EPA's rights against the responsible party, other than to drain off that party's assets which might be available for payment of a cost-recovery claim. In the case of a responsible party with substantial assets, a separate settlement by the State or EPA may not present a serious problem to the other party. However, assuming EPA becomes aware of an impending settlement between the State and the responsible party(s) 4/, the Agency should, before the settlement is finalized, determine the probable extent of the responsible party's financial ability to satisfy EPA's claim in addition to payment of the settlement with the State 5/.

In most cases, the responsible party will probably wish to simultaneously settle its liability with both the State and EPA. Collective negotiation and settlement procedures involving the

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4/ EPA should become aware of any impending settlement by the State with a responsible party assuming there is a provision in the cooperative agreement which requires the State to notify EPA in writing thirty days in advance of any proposed settlement, and the State complies with that agreement.

5/ A determination of the financial ability of a potentially responsible party can be made by the Financial Management Division of the Agency, or by use of a Financial Assessment System which has been developed by the Economic Analysis Division of the Office of Policy Analysis of EPA. This system will provide case-by-case, inexpensive and defensible estimates of ability-to-pay which will be useful for settlement consideration. This system requires a minimum of financial data which will usually be available from a Dun and Bradstreet report, a Moody's listing, or an audited financial statement. When that information is not available, the system will enable enforcement personnel to focus data requests to that information necessary to perform a minimum financial assessment. Any questions about this system and its uses should be directed to Kathy Summerlee, FTS 382-3077, or David Erickson, FTS 382-2764.

State, EPA, and the responsible parties should be encouraged to avoid misunderstandings and to resolve all issues at the same time. However, there will undoubtedly be circumstances under which the responsible party may believe that it would be advantageous to settle with one claimant (either EPA or the State) and not the other. It is those cases where the assets of the potentially responsible party would be substantially depleted by the settlement which could present significant problems for each claimant.

It should be recognized at the outset that, absent the proposed notice and coordination agreements discussed above, there is nothing to prevent the State or EPA from settling its claim in the absence and without the concurrence of the other. Where such a settlement would place either the State or EPA in a more advantageous position with regard to the assets of the responsible party, problems could arise which could affect intergovernmental relations. In those cases, the following options are available to EPA:

1. Should EPA determine that the State has independently entered into settlement negotiations with the responsible party, EPA should contact the appropriate State agency in an effort to establish a joint settlement effort and strategy. Simultaneously, EPA should notify the responsible party by letter (if that has not already been done as part of the Agency's cost recovery procedure), advising it of the Agency's claim, and that no other person or entity is authorized to negotiate for or

otherwise represent the Agency in respect to that claim. At the same time, the Agency should initiate an investigation into the financial resources of the responsible party to determine whether there will be sufficient assets remaining after the proposed State settlement to satisfy EPA's claim. That investigation can be carried out in the manner described in footnote 5.

2. If it is determined that the assets of the responsible party will likely be depleted or substantially impaired by a separate settlement with the State without provision being made for EPA's claim, and if efforts to establish a joint settlement effort with the State are not successful, then consideration should be given to EPA's applying to the appropriate U.S. District Court for the appointment of a receiver to operate or manage the assets of the responsible party for the benefit of all creditors of that party. This action, if taken in a timely manner, would prevent the responsible party from distributing its assets in a preferential manner.

However, the decision to attempt to forestall a State settlement with a responsible party should be made only after serious consideration of all factors involved, including:

- the amount of EPA's claim which might be prejudiced;
- the past relations between EPA and the State agency involved in the negotiations;
- the circumstances under which the State and the responsible party entered into the negotiations without the presence of EPA;

- the existence of any agreement between EPA and the State prohibiting such negotiations;
- and any other factors which might bear upon the decision.

While this action should be taken only as a last resort, the Agency's responsibility to preserve and restore the Fund may require such action. As in other such actions, a decision to seek the appointment of a receiver for the assets of a responsible party will require the concurrence of the Special Counsel to the Administrator for Enforcement.

PENDING CASES

There are a number of cases in which States have already initiated a suit against responsible parties, and EPA has contributed or intends to contribute a portion of the clean-up costs. In such cases, what is the proper forum and the best method in which to proceed?

In the absence of an agreement with EPA to the contrary, a State may, of course, proceed with an action in State court for cost recovery claims based upon any applicable State law 6/.

6/ CERCLA §107(i) provides: "Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any provision of State or Federal law, including common law, for damages, injury or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance."

States are also authorized to make claims under CERCLA for the cost of response activities which they incurred at a site. Section 107(a) of CERCLA, for example, provides for the liability of past and present owners and operators of a facility, generators, transporters and others for "all costs of removal or remedial action incurred by the United States or a State not inconsistent with the National Contingency Plan." Many other sections of CERCLA refer to the right of the States to recover for their own costs.

However, §113(b) of CERCLA provides:

> "... the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office

We interpret this provision to mean that any claim made by EPA, the State or any other person for recovery of response costs, which is based upon the provisions of CERCLA, must be brought in the appropriate U.S. District Court, and may not be asserted on behalf of EPA by a State in a State court action 7/. Obviously, any claim asserted by EPA will be based upon CERCLA and will be in U.S. District Court. Likewise, if

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7/ In addition to the restriction of §113(b), there are additional reasons why the State could not attempt collection of the Federal share of response costs. Under CERCLA §112(c)(3) and 28 USC §516, the U.S. Attorney General is required to represent EPA in these proceedings. This may not be delegated to the States, and therefore it is not possible to authorize the States to attempt collection of the Federal share of response costs in a State court proceeding, even should it be otherwise appropriate.

the State's claim against a third person for its share of the costs relies in whole or in part upon CERCLA, then it too must be brought in U.S. District Court. A State may, therefore, attempt recovery of its share of response costs in State court only under some law or theory other than CERCLA.

We also believe it highly important that EPA and the State attempt to coordinate their respective claims because:

- such actions will involve a substantial amount of technical data, documents and witnesses from both EPA and the State, and each party could derive the benefit of the other's evidence and witnesses;
- coordination would avoid the necessity of maintaining two separate proceedings which would duplicate much of the same effort and resources; and
- coordination of the claims would avoid the issue of collateral estoppel discussed earlier in this memorandum.

We believe the States will be receptive to joint or cooperative cost recovery actions with EPA for these reasons, and for the additional reason that the legal authority for the States to recover is probably much clearer under CERCLA than it may be under the laws of most States.

The following options, or some variance thereof, should therefore be followed in those cases where EPA provides CERCLA

funds under a cooperative agreement to a State which has a suit pending in State court against the responsible party:

Option I: EPA should require, as a condition of payment of the CERCLA funds to the State, that the State will, within a certain period of time (i.e., 30 days) after receipt of the funds, dismiss without prejudice all claims for recovery or reimbursement of any response costs at the site 8/ from any action then pending in State court. The provisions recommended earlier in this Memorandum for inclusion in all cooperative agreements should also be used 9/.

It is not necessary to require that a single suit for cost recovery be filed jointly by EPA and the State. It may be a more simple procedure, and avoid potential logistical problems, for each party to file its own suit separately, and then request

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8/ Note that this does not necessarily require a complete dismissal of the pending State court action. This recognizes that there may be other claims of the State involved in the case, with which the State may wish to continue in the State court proceedings, and that the existence of counterclaims by the defendant on other issues may prevent the State from effecting a complete dismissal of the case. The important point is to eliminate all cost recovery claims from the State court proceedings. Of course, if those are the only claims involved in the State case, a complete dismissal of the case would be the desired result.

9/ The Attorney General of the State should agree to or concur in this provision of the cooperative agreement, since it affects pending litigation in which the Attorney General is representing the State. Such agreement or concurrence may be limited to the particular provision requiring dismissal of the case, and may be evidenced by an endorsement to the cooperative agreement or by separate letter signed by the Attorney General or his representative.

the U.S. District Court before which they are pending to consolidate proceedings on the suits pursuant to Rule 42 of the Federal Rules of Civil Procedure.

Note also that this option does not affirmatively require that the State refile its claim in Federal court, but only that if the claim is refiled, it will be in Federal court. The requirement for cooperation and coordination between EPA and the State will also apply to and encourage joint negotiations with the responsible parties before filing of a suit in Federal court, as well as to subsequent litigation in Federal court.

Option II: It is conceivable that a State may wish to continue to pursue its cost recovery claim in State court, or may not wish to coordinate its efforts with EPA. In such event, EPA should not, even if it could, attempt to require it to do otherwise. However, because collateral estoppel could be raised against EPA by the responsible party(s) in event of an unfavorable result in State court proceedings, EPA should, as a condition of payment of the CERCLA funds, require that the State, within a specified time, dismiss without prejudice or omit from any action then pending or which it may subsequently file in State court any claim for recovery of response costs which in the opinion of EPA, are or may be based upon CERCLA, or any law, regulation or authority other than that which may exist under the laws of that State 10/.

10/ See comment at footnote 9.

EPA should strongly urge the States with which it enters into cooperate agreements to accept Option I, since it will result in much greater effectiveness and cost-efficiency in recovery actions. Option II should be adopted only after all efforts to persuade the State have failed.

Note on Purpose and Use of this Memorandum

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys and other employees of the U.S. Environmental Protection Agency. They are not intended to nor do they constitute rule-making by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action at varience with the policies or procedures contained in this memorandum, or which are not in compliance with internal office procedures that may be adopted pursuant to these materials.

We recognize that this memorandum contains subject matter which relates to sensitive areas of the Federal-State relationship. Nothing contained herein is intended to imply bad faith or improper motive on the part of any State or agency thereof, and no such interpretation or construction of any provision herein should be made. This memorandum attempts to recognize that in the normal course of EPA-State relations, occasions arise in which the interests of EPA and the State may not be identical, and it is our intent to anticipate and

prepare for such occasions so that they can be approached in a rational, planned manner to minimize further potential impact on the relationship.

If you have any questions or problems concerning any matter contained herein, please call Russell B. Selman at FTS 426-7503.

Attachment

APPENDIX

Under CERCLA, both EPA and affected States can institute enforcement actions against and/or negotiations with parties responsible for priority waste sites. When this occurs, a settlement or legal action by either party could potentially impede or even negate the claims of the other for recovery of funds expended at the site. Obligations, rights, and procedures for litigation must be defined as early as possible in the working relationship between EPA and the State to avoid this eventuality. Therefore, provisions concerning cost recovery should be in the Cooperative Agreement application. Specific provisions that address different enforcement conditions are presented below. These provisions should be reviewed, discussed with the RSPO, and included in the application, as appropriate. Please refer to the text of the Memorandum for guidance on the use of these provisions.

1. Disclaimer of Agency Relationship

Nothing contained in this Agreement shall be construed to create, either expressly or by implicaation, the relationship of agency between EPA and the State. Any standards, procedures or protocols prescribed in this Agreement to be followed by the State during the performance of its obligations under this Agreement are for assurance of the quality of the final product of the actions contemplated by this Agreement, and do not constitute a right to control the actions of the State. EPA (including its employees and contractors) is not authorized to represent or act on behalf of the State in any matter relating to the subject matter of this Agreement, and the State (including its employees and contractors) is not authorized to represent or act on behalf of EPA in any matter related to the subject matter of this Agreement. Neither EPA nor the State shall be liable for the contracts, acts, errors or omissions of the agents, employees or contractors of the other party entered into, committed or performed with respect to or in the performance of this Agreement.

2. Notice of Intent to Settle or Initiate Proceedings

EPA and the State agree that, with respect to the claims that each may be entitled to assert against any third person (herein referred to as the "responsible party", whether one or more) for reimbursement of any services, materials, monies or other thing of value expended by EPA or the State for response activity at site described herein, neither EPA nor the State will enter into a settlement with or initiate a judicial or administrative proceeding against a responsible party for the

recovery of such sums except after having given notice in writing to the other party to this Agreement not less than thirty (30) days in advance of the date of the proposed settlement or commencement of the proposed judicial or administrative proceedings. Neither party to this Agreement shall attempt to negotiate for nor collect reimbursement of any response costs on behalf of the other party, and authority to do so is hereby expressly negated and denied.

3. Cooperation and Coordination in Cost Recovery Efforts

EPA and the State agree that they will cooperate and coordinate in efforts to recover their respective costs of response actions taken at the site described herein, including the negotiation of settlement and the filing and management of any judicial actions against potential third parties. This shall include coordination in the use of evidence and witnesses available to each in the preparation and presentation of any cost recovery action, excepting any documents or information which may be confidential under the provisions of any applicable State or Federal law or regulation.

4. Judicial Action in U.S. District Court

EPA and the State agree that judicial action taken by either party against a potentially responsible party pursuant to CERCLA for recovery of any sums expended in response actions at the site described herein shall be filed in the United States District Court for the judicial district in which the site described in this Agreement is located, or in such other judicial district of the United States District Courts as may be authorized by section 113 of CERCLA, and agreed to in writing by the parties of this Agreement.

5. Litigation Under CERCLA Sections 106 and 107

The award of this Agreement does not constitute a waiver of EPA's right to bring an action against any person or persons for liability under sections 106 or 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or any other statutory provision or common law.

6. Sharing Recovered Funds with EPA

Any recovery achieved by the State pursuant to settlement, judgment or consent decree or any action against any of the responsible parties will be shared with EPA in proportion to EPA's contribution to the site cleanup under CERCLA.

7. Dismissal By State of Pending Cost Recovery Action - Option

The State does hereby agree that it will, not later than thirty (30) days after the date of this Agreement, cause to be dismissed, without prejudice to any subsequent refiling, any and all claims of the State (or any Agency thereof) in the case of "(State or Agency) v. (defendant), now pending in the (Circuit, Chancery, etc.) Court of _____, Docket No. _____, for recovery of any services, materials, monies or other thing of value expended or to be expended on the site described in this Agreement. Any subsequent refiling of said claims by the State or any agency thereof will be in accordance with the provisions of this Agreement.

(See comment at footnote 9 of Memorandum regarding State Attorney General concurrence with this provision.)

8. Dismissal By State of Pending Cost Recovery Action - Option II

The State does hereby agree that it will, not later than thirty (30) days after the date of this Agreement, cause to be dismissed, without prejudice to any subsequent refiling, any and all claims of the State (or any Agency thereof) in the case of "(State or Agency) v. (defendant), now pending in the Docket No. _____, for recovery of any services, materials, monies or other thing of value expended or to be expended on the site described in this Agreement which are based or rely, in whole or in part, upon the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Any subsequent refiling of said claims by the State will be in accordance with the provisions of this Agreement.

(See comment at footnote 9 of Memorandum regarding State Attorney General concurrence with this provision.)

9. Emergency Response Action

It may in the course of conducting the remedial activities covered by the Cooperative Agreement, become necessary to initiate emergency response actions at the site. The Cooperative Agreement application should contain a provision acknowledging this eventuality and dealing with the effect any such emergency actions will have upon the remedial project. The provision below, or its equivalent, may be used in the application for this purpose:

> Any emergency response activities conducted pursuant to the National Contingency Plan, 40 CFR section 300.65, shall not be restricted by the terms of this Agreement. EPA and the State may jointly suspend or modify the remedial activities in the SOW of this Agreement during and subsequent to necessary emergency response actions.

GUIDANCE MEMORANDUM

ON

USE AND ISSUANCE OF ADMINISTRATIVE ORDERS

UNDER

SECTION 106(a)

OF CERCLA

TABLE OF CONTENTS

I. Introduction 1

II. Requirements for Issuance and Scope of §106(a) Administrative Orders. 4

A. Necessity for "Determination" 5

B. Necessity for Actual or Threatened Release of Hazardous Substance 6

C. Necessity that Release or Threat of Release be From a Facility 7

D. Necessity for Existence of Imminent and Substantial Endangerment 8

E. Notice to Affected States 9

III. Persons to Whom an Order May Be Issued. 10

IV. Criteria for Issuance of §106 Orders. 11

A. Responsible Parties' Financial Status 12

B. Number of Responsible Parties Subject to the Order 13

C. Specificity of the Necessary Response Action. . 14

D. Agency's Readiness to Litigate the Merits of the Order. 16

E. Competing Considerations. 16

V. Orders Relating to Removals and Remedial Actions. . 17

A. Immediate Removals. 17

B. Planned Removals and Remedial Actions 19

VI. Procedures for Issuance of §106 Orders. 20

A. Planned Removals and Remedial Actions 21

B. Immediate Removals. 21

VII. Opportunity to Confer 22

A. Planned Removals and Remedial Actions 22

B. Emergency Situations. 23

C. Conference Procedures 23

D. Modification, Revocation or Stay of the Order 24

VIII. Procedure if Order Not Obeyed 25

IX. Note on Purpose and Use of This Memorandum. 26

Appendix A: Notification Letter
Appendix B: Sample §106(a) Administrative Order

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460

MEMORANDUM

SUBJECT: Guidance Memorandum on Use and Issuance of Administrative Orders Under §106(a) of CERCLA

FROM: Lee M. Thomas
Acting Assistant Administrator for Solid Waste and Emergency Response

Courtney M. Price
Special Counsel for Enforcement

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Air and Waste Management Division Directors Regions I-X
Regional Superfund Coordinators
Director, Office of Waste Programs Enforcement
Director, Office of Emergency and Remedial Response
Associate Enforcement Counsel, Waste Division

I. Introduction

The administrative order authority which the Environmental Protection Agency (EPA) exercises under §106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and Executive Order 12316 is one of the most potent administrative remedies available to the Agency under any existing environmental statute.

Section 106(a) of CERCLA authorizes the issuance of "such orders as may be necessary to protect public health and welfare and the environment," after notice to the affected state, upon a determination that "there may be an imminent and substantial

endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." A fine not exceeding $5,000 per day may be imposed for willful violation, failure or refusal to comply with a §106(a) Order (Order), and punitive damages of up to three times the cost of clean-up of the site may be imposed under §107(c)(3) for failure, without sufficient cause, to properly provide removal or remedial action pursuant to such an Order. In view of the magnitude of these penalties, the Agency expects that the regulated community will comply with administrative Orders. At the same time, the Agency's obligation is to ensure that Orders are properly issued.

It is the current policy of EPA that, whenever possible, parties who have caused or contributed to a release or a threat of a release of hazardous substances at a site should rectify the problems at the site. This action is necessary to ensure that the Agency efficiently manages the limited funds available under CERCLA and to ensure that the maximum number of sites are addressed.

Accordingly, after the Agency discovers a site and in advance of completing a Remedial Investigation and Feasibility Study (RI/FS), (and has conducted an endangerment assessment, or their equivalent), responsible parties normally will be sent a notice letter requesting them to clean up the site. Following completion of the feasibility study, the Agency normally engages in discussions with

responsible parties in an attempt to obtain promptly the agreement of such parties to voluntarily undertake the necessary response actions. If the discussions are successful, the terms of the agreement will be embodied in a judicial consent decree or a §106 administrative consent Order.

In circumstances where the Agency wishes to compel a responsible party to undertake the response actions, including instances where no settlement can be reached, the Agency will consider issuing a unilateral §106 Order in accordance with this guidance.

The administrative enforcement authority is an important component of the Agency's enforcement program authorized under CERCLA. This guidance is being issued to assist the regional offices in developing and maintaining an effective CERCLA administrative enforcement program. The effectiveness of the program will be enhanced as site remedies are implemented by Respondents in compliance with administrative orders, and as enforcement of Orders with which Respondents are not in compliance is successfully and expeditiously pursued by EPA. The Agency will aggressively defend judicial challenges to Orders and enforce instances of non-compliance to validate the CERCLA administrative enforcement program. Regional offices should issue Orders consistent with the criteria and procedures contained in this guidance to ensure the legal sufficiency of the program.

The §106 administrative order authority provides strong incentives for Respondents to undertake expeditiously response actions deemed necessary by EPA to ensure protection of public health or

welfare or the environment. Therefore, Regional offices are urge to consider the use of unilateral CERCLA administrative orders in every case where compelling enforcement authority is necessary. Criteria are provided herein to assist regional offices in determining whether Orders are appropriate in any case. It is essential that a balanced CERCLA enforcement program is implemented by EPA, combining administrative and judicial enforcement authorites, to ensure protection of health and the environment from the hazards of releases or threats of releases of hazardous substances.

II. Requirements for Issuance and Scope of Section 106 CERCLA Orders

A comparison of §106(a) and §7003 of the Resource Conservation and Recovery Act (RCRA) reveals similarities in the two sections, and therefore many of the criteria for issuance of a §7003 Order also apply to §106 Orders.1/ In many situations, either Order would be appropriate. Where the hazardous substances are also "hazardous waste" under RCRA, the Order should cite the authority of both sections.

Section 106(a) of CERCLA provides as follows:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened

1/ Guidance on the use of RCRA §7003 administrative orders may be found in a memorandum entitled, "Issuance of Administrative Orders under Section 7003 of the Resource Conservation and Recovery Act" dated September 11, 1981.

> release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat... The President may also, after notice to the affected State, take such action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.2/

In order for an Order to be issued, the following legal pre-requisites must be met:

A. Necessity for a Determination Based Upon Evidence

A determination must be made that, because of a release or threat of a release, an imminent and substantial endangerment may exist. This determination will depend upon documentary, testimonial, and physical evidence obtained through investigations and inspections. Other information concerning the nature of the threat posed by a site may already be contained in Agency files, such as data generated pursuant to §103 of CERCLA or the permit and notification sections of RCRA. The Order, therefore, must include a finding that an imminent and substantial endangerment may exist, in order to ensure that this statutory requirement is met. (See sample order, Appendix B, Finding No. 7).

2/ The President has delegated his authority under this Section to the Administrator of EPA and the U.S. Coast Guard by Executive Order No. 12316 dated August 24, 1981. EPA and the Coast Guard have entered into a Memorandum of Agreement dated October 9, 1981, that all site-related releases in the Coast Guard's jurisdictional areas (coastal zones, Great Lakes, ports and harbors) shall be the responsibility of EPA.

3. Endangerment of Not Al on Threatened Release of Hazardous Substance

Section 106 requires that the imminent and substantial endangerment be caused by "an actual or threatened release 3/ of a hazardous substance" from a facility. A "hazardous substance" is defined in Section 101(14) of CERCLA, and is generally any substance, waste or pollutant designated pursuant to Sections 307(a) and 311(b)(2)(A) of the Clean Water Act, Section 3001 of RCRA, Section 112 of the Clean Air Act, Section 7 of TSCA, or Section 102 of CERCLA. (Crude oil, fractions thereof, natural gas, and liquefied natural gas are exempted from statutory coverage.)

Whether a release from a facility is "actual" or "threatened" primarily depends upon temporal considerations. Actual releases should be observable in some form, either visually or through analysis showing contaminants present in samples of soil, water or air. A "threat" of a release, on the other hand, involves releases which have yet to occur or have yet to find their way into the environment. A bulging tank containing a hazardous substance in which pressure has built up, and a surface impoundment

3/ A "Release" is defined in CERCLA §101(22) as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, ejecting, escaping, leaching, dumping or disposing into the environment," with certain specific exemptions (e.g. release solely in work place; engine exhaust; release of certain nuclear material; and normal application of fertilizer).

which is about to overflow because of heavy rainfall, present obvious threats of a release. A threat is also presented by corroding or leaking drums containing incompatible wastes mingled in a common area. Accordingly, the determination of whether a "threat" of a release warrants issuance of an Order is a judgment decision to be made on a case-by-case basis.

The nature of both the hazardous substances present at the site and the release or threat of release should be set forth as findings in the order, together with the bases for such findings.

C. Necessity That Release or Threat of Release be From a Facility

The release or threat of release must be from a "facility," which is defined in CERCLA §101(9) as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publically owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel (a watercraft or other contrivance used, or capable of being used, as a means of transportation on water).

This definition of "facility" includes on-shore or off-shore sites, including land transportation facilities, from which releases or threats might originate. The Order must specify the physical location that is the source of the release.

D. Necessity for Existence of Imminent and Substantial Endangerment

Evidence presented to support the issuance of a §106(a) order must show "that there may be an imminent and substantial endangerment" to public health or welfare or the environment.

The words "may be" indicate that Congress established a standard of proof that does not require a certainty. The evidence need not demonstrate that an imminent and substantial endangerment to public health or the environment definitely exists. Instead, an Order may be issued if there is sound reason to believe that such an endangerment may exist.

Evidence of actual harm is not required. As the Court stated in Ethyl Corp. v. EPA, construing an endangerment provision in the Clean Air Act:

> The meaning of "endanger" is not disputed. Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need over occur. (541 F.2d 1 at 13, footnotes omitted, original emphasis, D.C. Cir., cert. den. 426 U.S. 941 (1976).)

It should also be noted while the risk of harm must be imminent in order for the Agency to act under §106, the harm itself need not be. (See the legislative history to the "imminent and substantial endangerment" provision of §1431 of the Safe Drinking Water Act, H. Rpt. 93-1185 at 35-36.) For example, EPA could act if there exists a likelihood that contaminants might be introduced into a water supply which could cause damage after a period of latency. One must judge the risk or

likelihood of the harm by examining the factual circumstances, including, but not limited to: 1) nature and amount of the hazardous substance involved; 2) the potential for exposure of humans or the environment to the substance, and 3) the known or suspected effect of the substance on humans or that part of the environment subject to exposure to the substance.

Legal analyses of the concept of imminent and substantial endangerment can also be found in Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975); U.S. v. Vertac Chemical Co. et al, 489 F.Supp. 870 (E.D. Ark. 1980); U.S. v. Solvents Recovery Service, 496 F. Supp. 1127 (D. Conn. 1980); U.S. v. Midwest Solvent Recovery, 484 F. Supp. 138 (N.D. Ind. 1980); U.S. v. Diamond Shamrock Corp., 17 E.R. 1329, (N.D. Ohio 1981); U.S. v. Price, 688 F. 2d 204 (3rd Cir. 1982); U.S. v. Reilly Tar and Chemical Corp., 546 F. Supp 1100 (D. Minn. 1982).

The nature of the endangerment and the basis for the finding of an imminent and substantial endangerment must be set forth in the Order. The link between the endangerment and the relief mandated by the Order should also be evident.

E. Notice to Affected States

Finally, before an Order may be issued, the "affected state" must be given notice of the Agency's intention to issue the Order.

The Agency is not held to a statutory period of time for notice. Normally, written notification to the state should precede federal action by at least one week. Circumstances

may arise, however, where rapid response at a site is necessary. In such cases, issuance of an Order may follow an abbreviated notice period or even a telephone call made by EPA to the Director of the agency responsible for environmental protection in the affected state. Written confirmation must follow such telephone notice.

As indicated above, the notification should be directed to the Director of the state agency having jurisdiction over hazardous waste matters. A suggested form for a notification letter is attached to this memorandum as Appendix A. This form also provides the format for oral notice.

An "affected state" is interpreted to be the state where the facility is located from which the discharge is being released or threatens to be released, and in which the response activity required by the proposed order will be taken. In some cases, this may involve more than one state, such as where the facility is located near the border of a state and the hazardous substances have migrated from the facility located in one state into another state(s). In those cases, all of the states in which the hazardous substances are found and in which response activity may be performed pursuant to the order should be notified.

III. Persons To Whom an Order May Be Issued

Section 106 does not specify any person or persons to whom an Order may be issued, but permits the issuance of "such orders

as may be necessary..." Section 104(a), however, refers to the "owner or operator" or "other responsible party" as the persons to whom the Agency could look to determine whether clean-up of a site will be done properly before expending CERCLA funds. Section 107(a), designating those who shall be liable for response costs, specifies present owners and operators of a facility, persons who were owners and operators at the time of disposal of a hazardous substance, and generators and certain transporters who, according to available evidence, contributed hazardous substances to the facility. It follows that those same persons could be recipients of an Order issued under Section 106(a), (see U.S. v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill. 1982). In addition, in appropriate cases, it may be possible to issue orders to parties other than those listed in Section 107(a), if actions by such parties are necessary to protect the public or the environment.

IV. Criteria for Issuance of §106 Orders

Other parts of this guidance document examine the legal requirements for issuing an Order. This section's purpose is to list specific factors which favor the use of Orders over other possible enforcement responses. These factors include:

- Responsible parties' financial status
- Number of potentially responsible parties
- Certainty of the necessary response action
- Agency's readiness to litigate the merits of the Order

The theme common to these factors is that Orders should be issued in those situations in which compliance with the terms of the Order is feasible, i.e., where the Respondents are in a position to perform the ordered response actions within specified time periods. This does not mean EPA must make a pre-issuance determination that Respondents will comply with an Order, but rather that compliance is practicable. If the Agency does not anticipate compliance with an Order it is considering issuing, the use of the Order may serve only to delay direct injunctive action under §106 or the initiation of Fund-financed response. On the other hand, the Agency may wish to issue an Order in any situation where the needed response action and the liability therefor are clear and straight-forward, so that refusal to comply with the terms of the Order would not, in all probability, be with "sufficient cause" (CERCLA §107(c)(3)). Such refusal would render the Respondent liable for civil penalties or punitive damages in the event of federal cleanup.

A. Responsible Parties' Financial Status

Before an administrative order requiring remedial work is issued, the Agency should assess, to the extent possible, whether the responsible party has sufficient financial resources to comply with the Order. Financial information is available from several sources:

- Agency files contain financial information collected as part of the identification of parties responsible for the hazards posed

by sites on the National Priorities List.

- The Securities and Exchange Commission (SEC) requires publicly traded companies to submit detailed financial statements. This information is publicly available. (Consult NEIC'S manual entitled "Identifying Responsible Parties" for additional information on obtaining SEC files.
- Responsible parties may submit financial information to the Agency during discussions or negotiations held prior to the issuance of an Order.

In addition, NEIC can provide further information on Respondents' financial status.

B. Number of Responsible Parties Subject to the Order

For two primary reasons, the success of Orders for remedial action is enhanced where there are relatively few responsible parties.

1) Coordination of Response Action

An Order issued to multiple Respondents who are jointly and severally liable generally will not allocate individual clean up responsibilities.4/ Instead, the Order will require the same response action to be conducted by each responsible party. Multiple parties must organize and coordinate their response to ensure compliance with the Order's requirements. Thus, compliance with Orders may depend upon group agreement

4/ However, the Agency may issue an Order to a Respondent requiring a response to a discrete, separable aspect of the hazard at a site, notwithstanding the existence of other responsible parties or other less divisible problem areas.

on each member's share of the response cost. In a large group of responsible parties, it may be difficult for the group to develop a consensus on individual liability and perform response activities as quickly as necessary to abate imminent hazard conditions at a site. Accordingly, issuing Orders to all responsible parties may not be appropriate where there are a large number of parties who are unlikely to agree on a concerted response. Instead, the Agency will pursue judicial remedies or consider issuing Orders to a selected subset of responsible parties.

Even in situations where Orders are issued to a large number of parties, Agency policy, which should be reflected in the terms of the Order, is that each Respondent is individually liable for compliance with the Order's requirements. Individual liability also extends to penalties and punitive damages imposed by CERCLA for failure to comply with the Order.

2) Supervision

After an Order is issued, the Agency conducts compliance monitoring at the site to ensure that responsible parties comply with the terms of the Order. Although no maximum number of responsible parties can be specified as optimum, it is clear that the Agency's oversight responsibility is most effectively accomplished where there are a limited number of responsible parties.

C. Specificity of the Necessary Response Action

In order to minimize the potential for confusion between Respondents and the Agency concerning the required response action, Orders should be used in situations where the nature of the required response action has been relatively precisely

identified. Orders are normally better suited to mandating discrete tasks such as drum removals rather than less exact actions such as planning. Otherwise it may be difficult for the Agency to supervise compliance activities, and for responsible parties to reach agreement on a compliance plan. In most cases, information sufficient to describe the required response actions will be generated by the RI/FS.

An Order should contain the following elements (see Appendix B):

- The steps the Respondent must take to comply with the Order;
- The effective date of the Order;
- A mandatory time-table for completion of remedial work; and, where appropriate,
- A statement to the effect that other actions or orders may follow.

Specific remedial action Orders benefit both the Agency and responsible parties. Responsible parties are provided clearly defined compliance standards which will facilitate agreement among the responsible parties on a remedial plan. If the responsible parties then determine that the remedial work is best accomplished by a third party contractor, the Order provides a basis for their contract negotiations.

Specific Orders benefit the Agency by reducing the difficulty of supervision and judicial enforcement. In noncompliance situations, the Agency may seek to enforce an Order in court. A specific Order provides the court with Agency-articulated standards by which to judge the responsible party's non-compliance with its terms. Therefore, EPA should make every effort to clearly articulate the response activities required by an Order.

D. Agency's Readiness to Litigate the Merits of the Order

After the Agency issues an Order, the respondent may seek judicial review to stay the Order. Respondents may challenge their liability or the appropriateness of the remedy specified in the Order. On the other hand, the Agency may promptly seek to enforce the Order in court. In light of these possibilities, the Agency must be ready to defend the Order in court at the time it is issued. This means that the site problem, the reasonableness of the required response, evidence of liability, and the Agency's response to issues raised by the recipient must be thoroughly documented, and that the documentation be organized and easily retrievable. The documentation will constitute the administrative record for any litigation.

E. Competing Considerations

The absence of the factors listed above may argue in favor of pursuing a judicial or Fund-financed, rather than an administrative, remedy. For example, EPA should not normally issue an

order if the necessary response actions have not been clearly identified. In addition, Agency enforcement personnel should strongly consider the judicial course of action if:

- the responsible parties have violated provisions in several environmental statutes;
- the opportunity for public comment on the terms of a settlement agreement warrants the use of a judicial consent decree, (where there is a 30-day comment period before the decree is finalized) 5/; and
- there is a need for long term court oversight of a settlement agreement, (such as in cases where an agreement calls for separately enforceable response milestones prior to completion of the cleanup).

V. Orders Relating to Removals and Remedial Actions

Guidance on conducting removal actions issued by the Office of Emergency and Remedial Response (OERR) divides the statutory concept of removals into "immediate" and "planned" removals.

A. Immediate Removals

Immediate removal actions are to be taken only if a response is needed within a relatively short time frame to prevent or mitigate significant harm to human health or the

5/ However, it should be noted that the Agency is exploring mechanisms which provide for public comment on both unilateral and consent administrative Orders. Guidance on this matter will be provided at a later date.

environment, and such action will not otherwise be provided on a timely basis.

Orders may be used to compel various immediate removal measures, including:

1. Suspension of activities which aggravate an existing release or substantial threat of a release (e.g., active use of a storage tank judged by the OSC to be in imminent danger of failure).
2. Suspension of activities which interfere with Federal removal actions (e.g., plant traffic in area of cleanup).
3. Movement or non-movement of a transport vehicle (railway tank car, tank truck, tank vessel) which is the source of a release or substantial threat of a release.
4. Measures to limit access, such as fencing.
5. Use of readily available equipment, owned by the responsible party, to contain or remove a release during the initial stages of a response before the OSC is able to obtain comparable equipment from other sources.
6. Dikings; construction of berms; or removal of the hazardous substance to an approved facility.

(This list illustrates various uses for an Order; it is not an exclusive compendium.)

Section 106(a) Orders, both in immediate and non-immediate situations, must contain a statement notifying the party of EPA's authority and the liability that may be incurred by failure to comply. As specifically as possible the Order prescribes the response activity and sets the date for its completion. To ensure enforceability of the Order, EPA should not undertake its own CERCLA-funded response activity during the period of time given to the party to respond, unless (i) such CERCLA-funded response activity becomes necessary due to the immmediacy of the release or threat of release or (ii) the Respondent formally and unequivocally states an unwillingness to comply with the Order. In the event the party undertakes response activity, the OSC should remain on-site to ensure that the work is being conducted in accordance with the Order.

B. Planned Removals and Remedial Actions

Planned removal situations are those that allow several days or weeks to execute the response. Remedial actions, on the other hand, are generally those intended to provide a permanent resolution to the release and require a longer time and more expensive efforts to implement.

As in the case of immediate removals, an Order is available to compel response measures routinely taken during planned removal and remedial actions. "Removal activity" includes assessment programs to evaluate the nature of the problem, and removal of

material from the site. "Remedial actions" are those consistent with a permanent remedy, and include such activity as capping the area, trenching, and provision of an alternate water supply.6/ EPA's position is that any activity that the Government might undertake at a site - from planning and studies to complete cleanup-could be ordered pursuant to §106(a). Of course, the issuance of more than one Order may be necessary if the cleanup is performed in stages, or if additional responsible parties become known to EPA who should participate in the cleanup.

VI. Procedures for Issuance of §106(a) Orders.

CERCLA designates the President as the primary official responsible for taking response and enforcement action under the Act. The authority to issue administrative orders under §106(a) has been delegated to the Administrator of EPA by Executive Order No. 12316, and redelegated by the Administrator to the Regional Administrators and the Assistant Administrator for Solid Waste and Emergency Response (AA-OSWER). The RAs and the AA-OSWER must consult with the Associate Administrator for Legal and Enforcement Counsel (AA-OLEC) prior to exercising this authority, and the RAs must obtain advance concurrence from the AA-OSWER. (See Delegations Manual: 14-14.) The AA-OLEC has

6/ See §101(23) of CERCLA for definition of "remove" or "removal", and §101(24) of CERCLA for definition of "remedy" or "remedial action". Those definitions contain detailed examples of the types of activities that fall within these categories.

redelegated the consultation authority to the Associate Enforcement Counsel-Waste and the Regional Counsels. The AA OSWER has redelegated his advance concurrence authority to the Director, Office of Waste Programs Enforcement (OWPE). The Office of Waste Programs Enforcement will develop and issue criteria in separate guidance which will be used to evaluate circumstances under which this advance concurrence requirement will be waived on a Region by Region basis. Regional offices are expected to develop strong administrative enforcement programs, on an expeditious schedule, which will permit them to initiate and issue legally and technically adequate administrative orders with only prior notice to Headquarters.

A. Planned Removals and Remedial Actions

For planned removals and remedial actions, Orders are drafted by the Regional program office with the cooperation of the Regional Counsel's office. The draft Order is forwarded to the Office of Waste Programs Enforcement for review and concurrence. The Regional Administrators will usually issue the Order and provide prior notice of the action to the state.

B. Immediate Removals

For those Orders which require emergency or quick handling, usually in response to situations warranting an immediate removal, the following approval sequence will be used:

The Regional Administrator first must determine whether to issue an Order based on communication with the OSC and consultation with Regional Counsel. The Region then prepares an order with any supporting information and electronically

transmits the material to the Office of Waste Programs Enforcement for review and concurrence. Notification to the State of our intent to issue the Order should be accomplished orally, and followed up by formal written notice.

VII. Opportunity to Confer

Agency policy is to offer parties to whom EPA has issued a unilateral §106 Order an opportunity to confer with the Agency concerning the appropriateness of its terms and its applicability to the recipient. The conference will help EPA ensure that it has based its Order on complete and accurate information and help EPA and Respondents reach a common understanding of how the Order should be implemented or modified. The procedures for exercising this option are communicated to respondents through the text of the Order itself. (See sample Order, page 4 of Appendix B.)

A. Planned Removals and Remedial Actions

Each Order will specify a date when the Order becomes effective. For actions other than immediate removals, the effective date should ordinarily be twenty calendar days from the day the Order is received by the Respondent. Certain Orders, such as those requiring that long term remedial actions be taken, may warrant a more extensive examination of the facts. In such cases, the Order may specify an effective date more than twenty days removed to permit the Respondent an opportunity to discuss the Order with the Agency beyond that accorded by the procedures set forth in Subpart C below.

If the Respondent seeks to confer with the Agency about the Order, the Respondent must provide written notification to the EPA official listed in the Order within ten calendar days of the date of receipt. The conference should be scheduled and held as soon thereafter as practicable, but prior to twenty days from the date the Order was received by the Respondent.

B. Emergency Situations

The applicable time periods for the effective date and for requesting a conference may be shortened, (e.g., to 72 and 48 hours respectively), or the conference procedures may be eliminated entirely, if the immediacy of the hazard posed by a site and other surrounding circumstances so warrant. In the former situation, the Order should permit the Respondent to request a conference orally, later followed by written notification.

C. Conference Procedures

The conference will normally be held at the appropriate EPA Regional office and will be presided over by the Regional Administrator's designee. However, other arrangements may be agreed to for the sake of convenience to the parties. At the conference, EPA should be prepared to provide the Respondent with information sufficient to explain the basis for the Order and to promote constructive discussions. The Respondent will have the opportunity to ask questions and present its views through legal counsel or technical advisors. The schedule and agenda for the conference will be left to the discretion of the EPA official leading the conference, as long as the Respondent

receives a reasonable opportunity to address relevant issues.

Following the conference, a written summary of the proceeding must be prepared, signed by the Agency official who presided over the conference. The written statement should contain:

- A statement of the date(s) and attendees of any conference(s) held; and
- A description of the major inquiries made and views offered by the Respondent contesting the terms of the Order.

In addition, the presiding official must prepare a statement which addresses the significant arguments raised by the Respondent and which recommends whether and how the Order should be modified, together with the reasons therefor.

D. Modification, Revocation, or Stay of the Order

Based upon a review of the file upon which the Order initially was based, any probative information or argument proffered by the Respondent following receipt of the Order, and the recommendation of the presiding official, the issuing official may modify or revoke the Order. Any modification to the Order must be communicated to the Respondent as part of a copy of a written statement containing the elements listed in Subpart C above. The original should be kept in the Agency files along with the evidence supporting the order, copies of written documents offered in rebuttal by the Respondent during the conference, and a copy of the request for a conference.

The issuing official may also stay the effective date of the Order if the conference process could not be completed

within the specified time period. Before substantially modifying or revoking an Order, the issuing official must consult with the appropriate Headquarters or Regional counsel and obtain the advance concurrence of the Director, OWPE.

VIII. Procedure If Order Is Not Obeyed

In the event the party to whom the Order is issued does not comply with its terms, the Agency must quickly decide whether to attempt to enforce the Order by referring the case to the Department of Justice for filing of a suit to force compliance, or whether to undertake cleanup of the site by use of CERCLA funds, and then file suit against the party for reimbursement of the costs expended plus statutory penalties for failure to comply with the Order.

The determination of which action to pursue depends on the type of response action to be taken. Obviously, if an immediate removal action is required by the hazard at the site, EPA will clean up the site and attempt recovery of costs and penalties in a subsequent recovery action. The same course of action applies to a planned removal where the removal action must be quickly undertaken and cannot await the filing of a suit. However, planned removal or remedial responses which require an extended period of time to perform, and in which initiation of action may be delayed for a brief period without jeopardizing human health and the environment, may allow sufficient time for the filing of a suit to enforce the Order, or at least that portion of the Order which calls for the planned removal or

remedial action to be taken.

Other factors which may enter into this determination include the strength of evidence and the financial ability of the party to perform the desired response activity. The decision of which option to pursue is initially to be made by the Regional Administrator, in the same manner and using the same procedures as previously prescribed for any other enforcement action. The Regional Administrator's recommendation is then forwarded to Headquarters for action.

IX. Note on Purpose and Use of This Memorandum

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys and other employees of the U.S. Environmental Protection Agency. They are not intended to nor do they constitute rule-making by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action which is at variance with the policies or procedures contained in this memorandum, or which is not in compliance with internal office procedures that may be adopted pursuant to these materials.

Attached to this memorandum as Appendices A and B are

- A sample letter to a state providing notification of the Agency's intent to issue a §106 Order; and
- A sample Order.

If you have any questions or problems concerning any matter contained herein, please call the Director, OWPE, (382-4814), or Russell B. Salman (426-7503) or Steve Leifer (382-4818) of the Office of Legal and Enforcement Policy.

Attachments

Appendix A

STATE NOTIFICATION LETTER

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. Jones
State Agency
Division of Environmental Control

Dear Mr. Jones:

Enclosed for your information is a copy of an order [stamped "DRAFT" and "CONFIDENTIAL"] that the Agency intends to issue on or after [date], to the XYZ Company, pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (42 USC 9606). The order requires certain activities to be taken at the company's site located at [location]. Please refer to the enclosed copy of the proposed order for the specific actions required of the company and the time within which such actions must be taken. If you have any comments or questions concerning the order, please contact [EPA official] at [office].

Sincerely yours,

Assistant Administrator for
Solid Waste and Emergency Response

[or]

Regional Administrator

[or their designees]

Enclosure

cc: Honorable J. Smith, Governor

Appendix B

SAMPLE ORDER

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In The Matter Of (Name of Person, Firm or Corporation) Proceeding Under Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 USC Section 9606(a))	)	Docket No._____

ORDER

The following Order is issued on this date to (insert name and address of person, firm or corporation, along with facility name or place of business if the Respondent is not the owner or operator) ("Respondent(s)"), pursuant to §106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (42 USC 9606(a)), by authority delegated to the undersigned by the Administrator of the United States Environmental Protection Agency (EPA). Notice of the issuance of this Order has heretofore been given to the State of _____ .

There is an imminent and substantial endangerment to the public health and welfare and the environment due to a (threat of a release)(release) of (a) hazardous substance(s) as defined in §101(14) of CERCLA (42 USC 9601(14)), from the following location (the "Facility"):

(insert legal description, if known;
otherwise, use street or route address)

This order directs you to undertake action to protect the public and the environment from this endangerment.

FINDINGS AND CONCLUSIONS

1. (Choose one or more of 1A through 1E, as appropriate under the factual situation of the case. Do not include headings.)

1A. [(Present Owner)- Respondent is now, and has been since _____, 19___, the (owner)(and/operator) of the Facility, as determined from (source of information)].

1B. [(Former owner/operator) - Respondent was, from _____, 19___, until _____, 19___, the (owner)(and/operator) of the Facility, as determined from (source of information). During that time hazardous substances, including those described herein, were disposed of at the facility. Respondent sold or otherwise transferred and conveyed the Facility to _____ on _____, 19___, according to (property records)].

1C. [(Generator) - Respondent (disposed of) (arranged, by contract or agreement, for the disposal or transport for disposal) of hazardous substances at the Facility as determined from (source)].

1D. [(Transporter) - Respondent chose to accept hazardous substances for transport to, and disposal at, the Facility as determined from (source)].

1E. [(Other Party) (Insert reasons why ordered actions are necessary to facilitate the abatement of the hazard, prevent the aggravation of the hazard, or otherwise protect the public health and welfare and/or the environment.)]

2. (Describe the nature of the facility.)

3. On or about the _____ day of _____, 19___, an inspection of the Facility was conducted by ___(names)_____, (a) duly authorized representative(s) of (EPA, State agency). At the time of that inspection, the inspectors observed the following conditions existing at the Facility:

A. Approximately 1000 drums of liquid, semi-solid and solid material, which were leaking, without covers and in various stages of corrosion, rusting and other deterioration, located directly on the ground. Material leaking from said drums was observed running approximately 25 yards across the site into Crystal Creek, which adjoins the Facility, and which is a tributary of Pristine River, a navigable water. According to records at the Facility, materials contained in the drums include:

(describe hazardous substances)

B. An area in the Facility (the "Landfill area") of approximately four (4) acres in size, without vegetation, from which leachate was

observed flowing approximately forty (40) yards into Crystal Creek. Vegetation had been killed in the area of the leachate. According to records at the Facility, the following hazardous substances had been placed in the Landfill area:

(list hazardous substances- then continue with the following)

At the time of the inspection, _____ samples of the drummed waste, samples of the leachate from the Landfill area, and _____ samples of (soil, surface water, groundwater, air, etc.) were obtained by the inspector(s).

4. An analysis of the samples taken at the time of the inspection disclosed the presence at the Facility of the following substances in the concentrations set forth:

(list hazardous substances and concentrations confirmed by analysis - then continue with following sentence)

These substances are "hazardous substances" as defined in §101(14) of CERCLA, and are subject to the terms and provisions of that Act.

5. The hazardous substances described above are treated or disposed of at the Facility in such manner that they (are being) (threaten to be) released and discharged from the Facility into the (soil, groundwater, surface water, air, etc.) and other parts of the environment.

6. (Describe population or environment at risk and route of exposure). Exposure to said hazardous substances may cause illness, disease, death or other harmful effects to plant and animal life and humans.

7. The (release) (and/or) (threat of release) of said hazardous substances may present an imminent and substantial endangerment to public health and welfare and the environment.

8. In order to protect human health and welfare and the environment, it is necessary that action be taken to contain and terminate the (release) (and/or) (threat of release) of hazardous substances from the Facility into the environment.

ORDER

Based upon the foregoing determinations and Findings of Fact, it is hereby ordered and Directed that:

(NOTE - the Respondent may be ordered to undertake any response activity that may be required to protect public health, welfare and the environment, including, but not limited to, those actions which the government is authorized to carry out under CERCLA.)

(Insert here the response actions which EPA directs the Respondent to take at the site. Each activity, (i.e., redrumming of waste, construction of fencing, levees, submission of plans for installation of monitoring wells, etc.), and the date for compliance with each activity, should be listed separately.)

(Insert a statement to the effect that other orders or action may follow.)

EFFECTIVE DATE - OPPORTUNITY TO CONFER

This Order is effective on the twentieth calendar day following receipt thereof by Respondent, and all times for performance of response activities shall be calculated from that date. (Note: For immediate removal situations, the effective date will be considerably abbreviated.)

You may, within ten calendar days after receipt of this Order, request in writing a conference with (Official) to discuss this Order and its applicability to you. (Note: For immediate removal situations, the time for requesting a hearing will be abbreviated. In addition, the Respondent should be informed that he or she may make an oral request for a conference, to be followed up by written notice within two to three days.)

At any conference held pursuant to your request, you may appear in person and by attorney or other representatives for the purpose of presenting any objections, defenses or contentions which you may have regarding this Order. If you desire such a conference, please contact (name, title, address and telephone number of EPA contact) within the time set forth above for requesting a conference.

PENALTIES FOR NON-COMPLIANCE

Respondent is advised that willful violation or failure or refusal to comply with this Order, or any portion thereof, may subject you under Section 109 of CERCLA, (42 U.S.C. §9609), to a civil penalty of not more than $5000 for each day in which such violation occurs or such failure to comply continues. Failure to comply with this Order, or any portion thereof, without sufficient cause, may subject you under §107(c)(3) of CERCLA, (42 U.S.C. §9607(c)(3)), to liability for punitive damages in an amount up to three times the amount of any costs incurred by the government as a result of your failure to take proper action.

WITNESS my hand in the City of _____, State of _____, as (title of authorized EPA issuing official), on this _____ day of _____, 19___.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: _____

1984

OSWER # 9834.0

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

JAN 26 1984

MEMORANDUM

SUBJECT: Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests

FROM: Gene A. Lucero, Director Gene A. Lucero
Office of Waste Programs Enforcement

Kirk F. Sniff
Associate Enforcement Counsel for Waste
Office of Enforcement and Compliance Monitoring

TO: Directors, Waste Management Division, Regions I, V
Director, Office of Emergency & Remedial Response, Region II
Director, Hazardous Waste Management Division, Region III
Directors, Air & Waste Management Division, Regions IV, VI, VII, VIII
Director, Toxics & Waste Management Division, Region IX
Director, Air & Waste Division, Region X
Regional Counsels - Regions I - X

PURPOSE

This memorandum states the policy of EPA for responding to requests under the Freedom of Information Act (FOIA) for the names of potentially responsible parties (PRPs) at CERCLA sites.

II. BACKGROUND

On March 30, 1983, EPA issued guidance on releasing the identities of potentially responsible parties under CERCLA. This guidance provided for case-by-case review and discretionary disclosure of the identities of PRPs in certain limited circumstances. In general, before the March 30 guidance, EPA did not release the names of PRPs in response to FOIA requests.

On June 28, 1983, the Federal District Court for the District of Columbia decided in Cohen v. EPA that EPA had not met its burden of establishing that disclosing the identities of PRPs would harm the Agency's enforcement efforts. The case involved EPA's decision to withhold the identities of potentially responsible parties as provided by FOIA exemptions under 5 U.S.C. §§552(b)7(A), 7(C), and 5.

The court granted the plaintiff's motion for summary judgment on finding that:

1. For Exemption 7(A) -- notice letters are investigatory records compiled for law enforcement purposes, but EPA did not establish that disclosure of the notice letters would harm the investigation;

2. For Exemption 7(C) -- the identities of the PRPs who received notice letters does not fall into the category of a protected privacy interest; and

3. For Exemption 5 -- notice letters are not predecisional documents.

III. POLICY

As a result of the Cohen decision and the Administrator's policy of conducting business in a more open atmosphere, and in light of the resource demands involved in case-by-case review of the names of notice letter recipients, the March 30, 1983, guidance has been reevaluated. The new guidance is set forth below.

1. In response to a FOIA request, EPA will release the names of PRPs who have received notice letters about a CERCLA site.

2. An exception to the policy of disclosing the names of PRPs who received notice letters may be made only when EPA determines that disclosure of a particular name will cause such interference with an ongoing enforcement proceeding that discretionary disclosure is clearly unwarranted. If EPA decides to withhold the name of a PRP who received a notice letter, EPA must support the conclusion that disclosure will cause substantial harm to the law enforcement proceeding in writing with concurrence by the Regional Counsel. The written documentation may not consist of general statements; it must include the particular facts relating to the specific PRP and site that led to the conclusion to withhold.

3. The names of parties who have not yet received notice letters may be predecisional and therefore exempt from disclosure under Exemption 5 of the FOIA. These names also may be exempt as investigatory records under Exemption 7(A). However, in its discretion EPA may release this material.

4. Although EPA usually will release the names of PRPs only in response to FOIA requests, the Agency may elect to release the information on its own initiative in appropriate circumstances.

5. Disclosure of the names of PRPs and the names of sites does not constitute a waiver of EPA's right to withhold other information developed for an enforcement action that EPA determines is exempt from disclosure. Even if information is exempt from disclosure under Exemption 2, 5, or 7 of FOIA, EPA has discretion

to release the information; however, EPA may exercise its discretion to release the information only after the appropriate Regional Counsel reviews the information to ensure that disclosure will not interfere with an enforcement action.

IV. PROCEDURES TO IMPLEMENT POLICY

EPA Headquarters or a Regional Office should follow the procedure below to respond to a FOIA request for the names of PRPs or other information about a CERCLA site.

1. Quality assure the list of PRPs regularly and particularly before sending notice letters to PRPs for a site. Perform an in depth quality assurance of PRP lists every 6 months. Headquarters will hold Regional Offices accountable for inadequate quality assurance of PRP information.

2. Immediately notify Headquarters whenever a Regional Office decides, in accordance with the guidance in Item III.2 above, that disclosing the name of a PRP will cause substantial harm to an enforcement effort. Regional Offices also should notify Headquarters if withholding a name is no longer required.

3. If additional information is requested about a PRP or a site, consult with the Regional Counsel for a decision on whether disclosure will interfere with enforcement at the site.

4. Submit the list of names, or names and information, to the requester with a brief explanation of how EPA defines PRP for purposes of sending notice letters.

5. Include with the list of names the following disclaimer:

> This list represents EPA's preliminary findings on the identities of potentially responsible parties. EPA makes no assertions that parties on this list are liable for any hazard or contamination at any CERCLA site.

6. Use the term "potentially responsible party" in responses to FOIA requests if none of the parties named in a notice letter has been found liable by a court.

V. FIRST RESPONSE TO FOIA REQUESTS

Ten working days after the date of this policy, Headquarters will respond to the current backlog of requests for all PRP names with the quality assured list.

Any Regional Office that intends to withhold any PRP names, as provided by Item III.2 above, must have completed the required documentation and notified Headquarters before the FOIA response date. If you have any questions about this policy, contact Susan Cary Watkins (FTS 382-2032).

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

OSWER# 9833.1

FEB 21 1984

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Issuance of Administrative Orders for Immediate Removal Actions

FROM: Lee M. Thomas
Assistant Administrator

TO: Regional Administrators, Regions I-X
Air & Waste Management Division Directors
Regions III, IV, VI, VII, VIII, X
Waste Management Division Directors, Regions I, V
Director, Office of Emergency and Remedial Response, Region II
Toxics and Waste Management Division Director, Region IX
Environmental Services Division Directors, Regions I - X
Regional Counsel, Regions I - X

This memorandum sets forth guidance on issuing Administrative Orders for immediate removal actions under CERCLA. This guidance should be used in conjunction with the recently issued Guidance Memorandum on Use and Issuance of Administrative Orders under Section 106(a) of CERCLA dated September 8, 1983.

Since becoming the Assistant Administrator, OSWER, I have sought to implement a "balanced" CERCLA program which uses both the administrative and civil judicial enforcement provisions of the Act--as well as the Fund--to secure clean up of hazardous waste sites. One of my primary enforcement goals is to increase the use of Administrative Orders for immediate removals. Orders are particularly useful in immediate removal situations, since they can be issued quickly, can require discrete segments of work (e.g., surface cleanup) and carry the threat of additional damages and penalties in the event of non-compliance.

We estimate that Administrative Orders may be appropriate for a significant percentage of immediate removal situations. Increased resources will be provided to the Regions, and I expect the Regions to devote resources to accomplishing this goal of increased Administrative Orders for removals.

In addition, the Regions must develop a satisfactory organizational structure if the Administrative Order program is to succeed. The organization of enforcement personnel varies among the Regions. The majority of the Regions keep their "remedial" and "removal" personnel in different divisions. Since CERCLA enforcement has (until now) concentrated heavily on remedial sites, most regional technical enforcement personnel have been assigned to the remedial response units (generally, the Air and

Hazardous Material Divisions). Personnel responsible for immediate and planned removals have usually been assigned to the Environmental Services Division which, as a general rule, has not been assigned enforcement personnel.

Obviously, the ability of a Region to implement this new policy requires both close coordination among the immediate response staff and their colleagues in the technical enforcement and regional counsel offices and an organizational structure capable of developing and issuing quality orders. Regions that do not currently dedicate technical enforcement staff to their immediate removal program should assure that appropriate personnel are in place in the technical enforcement office to implement this policy and to handle the workload.

I. BACKGROUND

CERCLA identifies two types of response actions for which the Fund can be used: removal actions and remedial actions. The National Contingency Plan (NCP) further refines the former category into "immediate" and "planned" removals and describes the process and procedures for proceeding with these forms of response. (See Federal Register 31180; July 16, 1982). Please refer to the attached appendix for an outline of the relevant CERCLA and NCP provisions regarding removal activity, Administrative Orders and enforcement.

Because of the large number of sites which pose a health hazard, the Office of Emergency and Remedial Response (OERR) defines the category of immediate removals according to the immediacy and severity of the hazard to the public health or environment. These categories establish a guide for the purpose of assessing the length of time within which the Agency must respond to the event. Agency response to situations which require immediate response (e.g., threats of fire, explosion or spills) normally takes place in a matter of hours or one or two days at the most; Agency response to other situations (e.g., rusting barrels that have not yet begun to leak, holding ponds that may overflow with the advent of the rainy season) normally takes place during a period which may range from a week to a month.

This guidance is most applicable to the latter situation; i.e., the Regions should consider issuing Administrative Orders in situations when there is at least one week between the time the On-Scene Coordinator (OSC) determines that an immediate removal is warranted and the time that actual on-site response must begin.

Administrative Orders are a useful enforcement tool in these types of immediate removals situations, for the following reasons. First, they encourage private party response, particularly since it

is OSWER policy to meet, if at all possible, with responsible parties after the Order is issued if a meeting is requested. The results of an OWPE analysis of 49 completed immediate removals indicate that the elapsed time between the request for funds and the start of site response ranged from eight days to more than three weeks for 24 of the sites. This clearly indicates that there is time to issue Administrative Orders in appropriate situations, and the process described in this memorandum can be implemented in as little time as a week, if necessary. Second, removals require discrete units of work (e.g., barrel or contaminated soil removal) which makes responsible party compliance and Agency compliance monitoring easier. Third, the costs of immediate removals are generally moderate; this increases the probability of private party compliance.

In the event of non-compliance with an Administrative Order, the Agency is prepared to quickly initiate a Fund-financed response and seek fines/treble damages from the responsible parties. Since the treble damages will be based on the Fund dollars expended, these situations are particularly amenable to establishing treble damage claims, which the Agency will seek to recover in its §107 cost recovery actions. (The average obligation for 110 prior immediate removals undertaken by the Agency was approximately $275,000). Issuance of Administrative Orders for these situations also may improve the equitable position of the Agency in subsequent cost recovery cases.

II. CRITERIA FOR ISSUING ADMINISTRATIVE ORDERS

First, of course, the Agency must meet the legal threshold that an imminent and substantial endangerment to public health or the environment may exist.[1] Information which can be used and evaluated by the OSC or his supervisor to make this determination include:

1. Notification in accordance with CERCLA §103 (a), (b) or (c)
2. Investigations by government authorities conducted pursuant to CERCLA §104 (e) or other statutory authority.

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[1]The Agency must be able to properly document and justify both its assertion that an immediate and significant risk of harm to human life or health or to the environment exists and its choice of the ultimate response action at a site in order to be able to oppose a challenge to the Order and to successfully litigate any subsequent cost recovery action. Adequate documentation consists of photographs, samples, monitoring or other documented site analysis. The Agency should follow chain of custody procedures to maintain the integrity of samples taken at the site. Please refer to the Cost Recovery Guidance, issued August 26, 1983 for more detailed guidance. The Revised Superfund Removal Guidance to be issued in late February 1984 will also provide additional guidance on immediate removal assessments.

3. Notification of a release by a federal or state permit holder when required by the permit.
4. Inventory efforts or random/incidental observation by government agencies or the public.

If the facts reach the legal thresholds of CERCLA §106, several policy criteria for deciding whether to issue an Order for an immediate removal should be considered. The first of these is the amount of time available before site response must begin. This determination will usually be made by the OSC. An Order may be appropriate if there is a minimum of one week available for issuing the Order and meeting with the recipients (see further below) between the time of the decision to seek funds for the immediate removal and the initiation of on-site response. (Of course if an order can be issued in less than a week the Regions are not bound by the "one week minimum". However, the Regions should always attempt to have 48 - 72 hours available for the recipients to request and conduct a conference.)

A second policy criterion is the number of potential recipients of the Order and their financial viability. There should be a "manageable" number of responsible parties and they should be collectively capable of undertaking site response. The Regions will use their best judgement to decide what constitutes a "manageable" number of responsible parties and assess the capability of the parties to undertake the response for any individual immediate removal situation. (For a more lengthy discussion of criteria to consider when issuing an Administrative Order, please refer to the Administrative Order guidance.) When there is a large number of potentially responsible parties, Orders need not be issued to all of the parties. In this type of situation the Region should issue the Orders only to those parties most likely to comply. The Region, however, is not precluded from issuing Orders to all the parties if it so desires.

These criteria are to be used as general guidelines for determining whether an Administrative Order should be issued for an immediate removal. The varying factual circumstances presented in any potential removal action mandate that each Region conduct this necessary factual analysis to decide the appropriateness of an Order.

III. PROCESS FOR ISSUING ADMINISTRATIVE ORDERS

The timely development and issuance of Administrative Orders for immediate removals will require effective coordination among the OSC, technical enforcement personnel and the legal counsel in both the Regions and Headquarters. OSWER will not dictate how the Regions must organize or adjust personnel in order to accomplish this task, but it will expect the Regions to have a system in place which is capable of implementing an administrative order program for immediate removals.

The procedures for developing and issuing orders follow:

The decision by the OSC or his superior to request funds for an immediate removal also triggers the process for deciding whether to issue an Administrative Order.

The OSC will inform the technical enforcement branch (or other appropriate enforcement personnel if no separate branch exists) and the Regional Counsel that a request for a Fund-financed immediate removal is being developed. Appropriate personnel in OERR and OWPE should also be informed of this action. While the OSC and his staff prepare the 10-point document,[2] technical enforcement personnel and the Regional Counsel should begin to identify responsible parties and assess their financial ability to conduct site cleanup.

The OSC or the Regional Counsel will attempt to orally contact (with written follow-up) potentially responsible parties in order to secure private-party response in lieu of the Fund. While previous Agency policy was to proceed with Fund-financed response if the responsible parties refused to act, the Agency will now issue administrative orders in appropriate circumstances before initiating Fund action, so long as the site does not pose an unreasonable risk of harm to the public health, welfare or the environment.

Regardless of whether a responsible party agrees or not to undertake the removal, development of the 10-point document should proceed as usual. However, the OSC and technical enforcement staff (in consultation with the Regional Counsel) shall apply the criteria outlined in Part A (above) to recommend to the Regional Administrator whether to issue an Administrative Order. The decision to issue the order rests with the Regional Administrator, subject to the current delegations.

If the Regional Administrator decides to issue an Administrative Order, the Order will be drafted by technical enforcement personnel with the advice of the Regional Counsel. The technical information contained in the 10-point document will normally provide the basis for the Order's "Findings of Fact" while the Agency's intended response actions will serve as the remedy the recipient is required to implement.

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[2] Requests for less than $250,000 can be approved by the Regional Administrator while requests for more than $250,000 require the approval of OERR. (It is anticipated that within the month, the Regional Administrators will be delegated the authority to obligate up to $1 million for removal actions.) The ten point document itself must justify its cost estimates and be consistent with the NCP. With the issuance of the Revised Superfund Removal Guidance, the 10 point document will become an Action Memorandum.

Since Administrative Orders will normally be issued in situations in which site response is not required for at least one week, OSWER policy is to provide recipients when possible an opportunity to meet with Agency personnel to discuss the terms of the Order and the means for compliance. Therefore, the Order should include the following provisions:[3]

1. A statement of the imminent and substantial danger pursuant to §106 of CERCLA and the risk of harm under §300.65 of the NCP.
2. A statement of the authority of the issuing official (normally the Regional Administrator) to issue the Order and why the recipient is liable under §107.
3. The steps the recipient must take to comply with the order, (following the provisions of the ten-point document in order to be as specific as possible).
4. A mandatory timetable for performing and completing the response. (The timetable should include at least one short term interim deadline so the Agency will have the ability if necessary, to demonstrate non-compliance before the project completion date.)
5. A provision informing the recipient that his duty to obey the terms of the order takes effect 72 hours after he receives the order.
6. A provision informing the recipient that he may orally contact the Agency to request a conference on the Order. The recipient must follow up his oral request in writing.
7. A provision specifying a date certain by which responses (either oral or written) to the Order must be received.
8. A provision which states that EPA reserves the right to undertake the action if emergency circumstances dictate such action and that such action in no way relieves the parties of responsibility for the costs of such actions.
9. A provision which requires: proper chain of custody procedures to be followed for any testing and sampling, adequate recordkeeping of activities (so records may be used as evidence in any future enforcement case), cooperation from employees of any contractor who engages in site activity, and availability of such employees to the U.S. in preparation and trial of a subsequent enforcement case.

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[3] Refer to the general Administrative Order Guidance for examples of model orders and conference procedures.

Under a separate delegations memorandum to the Regions, the concurrence requirement will be waived for all Administrative Orders for immediate removals with obligations of $1,000,000 or less. Within two weeks of issuance of the Order, the Regions are to send a copy of the final Order to OWPE.

As a matter of policy, in order to increase the likelihood of compliance, the Agency encourages the convening of a conference with the recipients of an Administrative Order. Since Administrative Orders will generally be issued for immediate removal situations which do not require response in less than one week, the Agency will normally attempt to hold a meeting with the recipient, if requested by the recipient. The conference should be convened on an expedited basis (e.g., within 72 hours after the Order is issued) if the recipient orally requests the conference. However, the Agency retains the right to "waive" a conference if immediate response is warranted because of deteriorating conditions at the site. The Regional Administrator shall have the authority to decide whether to eliminate the conference prior to or following the issuance of the Administrative Order. If the Regional Administrator waives the opportunity for a personal conference, a regional representative, must at least give the parties an opportunity to be heard by telephone before the effective date of the Order. In general, conferences concerning removal actions should be used to clarify the requirements of the Order rather than as an opportunity to negotiate the requirements.

The Agency must create a good administrative record of its meetings with the recipient of an Order for either enforcement of the Order or cost recovery after a Fund-financed cleanup. The Agency participants should prepare a written summary of the conference containing:

1. The date and participants.
2. A summary of the significant issues raised and arguments/ data used by the recipient to contest the Order.
3. The result of the conference (e.g. agreements reached with the recipient, indication from the recipient of an unwillingness to comply with the Order)

The presiding official, (designated by the Regional Administrator) must also prepare a statement which addresses any significant arguments raised by the recipient and recommends whether any modifications to the Order are warranted. (See the September 8, 1983 Administrative Order Guidance for a complete discussion of the procedures and "ground rules" for conducting the conference and the time frames for holding them.)

If the recipient agrees to undertake the stipulated response measures, the agreement may be in the form of a Consent Order. The OSC will monitor compliance with the Order and recommend additional enforcement action if the terms of the Consent Order are breached. If the recipient does not agree to undertake the measures contained in the Order, the Agency will generally not refer a case to the Department of Justice to force compliance because of the time constraints presented by the emergency. Rather, the Fund will be used for site response and the recipient(s) will be sued for cost recovery--including punitive damages in appropriate cases.

IV. USE OF THE FUND WHILE THE ADMINISTRATIVE ORDER IS BEING ISSUED

Normally, once an Order has been deemed appropriate for an immediate removal situation, the CERCLA Fund shall not be used to undertake a federally-funded immediate removal during the time period in which the Agency develops the Order, issues it to the responsible party, and conducts the conference.

However, if site conditions deteriorate-- presenting a corresponding increase in the threat that the site presents-- the Fund can be used for response while the Administrative Order process continues. In such instances, the Regional Administrator can approve the use of Funds below $250K and request the Assistant Administrator, OSWER, to release funds if the response work will be greater than $250K.[4] The Administrative Order process should continue since the parties may undertake site response at the next convenient break in activity.

Thus, if there are deteriorating conditions at the site, the OSC should continue all steps necessary for undertaking a Fund-financed response while the Order is being developed. The 10-point document should be prepared and receive the concurrence of all officials up through the Regional Administrator or the Director, OERR.

However, no actual obligation of Funds for site response will normally occur until after the Order has been issued and the conference has been held. Since the Order will only be issued in situations where an immediate response can be delayed, there will normally be time to see the Administrative Order process through to conclusion. The conference must be held within the time period specified in the Order (which will correspond to the time the Agency has before the response activity needs to begin). Since

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[4] If deteriorating conditions require the Fund to respond while the Order is still being issued, OSWER assumes that the Fund will take all response actions necessary at the site (e.g., remove all barrels, not merely those that may be about to leak).

the timing of the obligation will vary according to the estimated time needed to mobilize equipment and personnel, the OSC should work closely with the technical enforcement and Regional Counsel staff during the drafting of the Order to assure that the time period established for issuing the Order is synchronized with the time requirements for site response.

If the conference does not result in private party response--or if changing conditions at the site require accelerated response--the Fund-financed immediate removal will take place. If Fund-financed activity does begin, the Order may be written to require the potentially responsible parties to undertake site activity at the next convenient break point in activity. If the parties still fail to undertake the site response activity, enforcement efforts will emphasize cost recovery with the additional imposition of fines/penalties as appropriate.

V. COST RECOVERY

The Agency will normally not initiate a civil action in the event of non-compliance with an Order but instead will seek to recover costs and damages after a Fund-financed response. Therefore, while enforcement personnel are carrying out the Administrative Order process, they should also be aware of the requirements for a successful cost recovery action. They must be able to document the following factors (some of which are the same ones necessary for the issuance of the Administrative Order itself).

1. The need for the immediate removal (evidence of an imminent and substantial endangerment or threat of endangerment to public health, welfare or the environment)
2. Liability of the responsible parties (evidence to support the contention that the parties meet the liability standard of §107)
3. Proof that the Fund-financed response activity was "not inconsistent" with the requirements of the NCP.
4. Documentation of all eligible costs for site-specific Fund expenditures.

Enforcement personnel must assure sufficient documentation of these factors from the period in which the 10-point document is developed and Funds are obligated through the actual clean up of the site. These cost recovery requirements must be met regardless of whether there will be a simple cost recovery action (if no Administrative Order is issued) or an action for response costs plus damages (if the Order is not complied with). The Agency must assure that evidence is preserved for any subsequent enforcement action. Proper chain of custody procedures must be used for any

sampling or testing, and adequate records of site activity must be kept. Employees of any contractor used for site activity must cooperate with and be made available to the U.S. in preparation and trial of any subsequent enforcement action. Enforcement, program and legal offices should work together throughout the case development.

VI. FOLLOW-UP

This guidance represents a substantial departure from prior practice, and I expect that it will take some time to implement. For these reasons, I will be reviewing all immediate removals referred to Headquarters for compliance with this guidance. In addition, for immediate removals under $250,000, I will ask the Directors, OWPE and OERR to review the compliance with this guidance quarterly, and to advise me accordingly.

Appendix

cc: Gene Lucero, OWPE
William Hedeman, OERR
Kirk Sniff, OECM
Dan Berry, OGC

APPENDIX

Authority/Requirements/Enforcement of Administrative Orders for Removal Actions under CERCLA

Under §106(a) of CERCLA:

If, EPA, acting on behalf of the President:

determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of

an actual or threatened release of a hazardous substance from a facility

may, after notice to the affected state,

issue such orders as may be necessary to protect public health and welfare and the environment.

Under §106(b) of CERCLA:

EPA may take action in the appropriate U.S. district court, against any person who willfully violates or fails or refuses to comply with any Order issued under §106(a), to enforce such order and

may fine such person not more than $5,000 for each day such violations occur or such failure to comply continues.

Under §107(c)(3) of CERCLA:

Any person who is liable for a release or threat of release of a hazardous substance that:

fails without sufficient cause to properly provide removal action upon order of the President pursuant to §106

may be liable to the United States for punitive damages in an amount at least equal to and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

Civil action may be commenced against any such person to recover the punitive damages. These punitive damages shall be in addition to any costs recovered from such person pursuant to §112(c).

Any monies received in punitive damages shall be deposited in the Fund.

National Contingency Plan Requirements for Immediate Removals

Under §300.65 of the NCP:

Immediate Removal action is appropriate when the lead agency determines that:

the initiation of the removal action will prevent or mitigate immediate and significant risk of harm to human life or health or to the environment from such situations as:

1. Human, animal, or food chain exposure to acutely toxic substances
2. Contamination of drinking water supply
3. Fire and/or explosion
4. Similarly acute situations

Immediate removal action may include but are not limited to:

1. Collecting and analyzing samples to determine the source and dispersion of the hazardous substance
2. Providing alternative water supplies
3. Installing security fencing or other measures to limit access
4. Controlling the source of the release
5. Measuring and sampling
6. Moving hazardous substances off-site for storage, destruction, treatment or disposal
7. Placing physical barriers to deter the spread of the release
8. Controlling the water discharge from an upstream impoundment
9. Recommending to the appropriate authorities the evacuation of threatened individuals
10. Using chemicals and other materials in accordance with Supart H to restrain the spread of the substance and mitigate its effects
11. Executing damage control or salvage operations

9832.7

INFORMATION REGARDING CERCLA ENFORCEMENT AGAINST BANKRUPT PARTIES

9832.7

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

MAY 24 1984

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance Regarding CERCLA Enforcement Against Bankrupt Parties

FROM: Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Regional Administrators, I-X
Regional Counsels, I-X
Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response

The attached guidance has been developed to assist the Regions in developing CERCLA enforcement actions against bankrupt parties. The guidance is intended to encourage aggressive enforcement against insolvent parties and insure national consistency in current and future bankruptcy cases brought by the Agency.

The guidance provides: 1) an overview and summary of the Bankruptcy Reform Act and existing bankruptcy case law; 2) a discussion of enforcement theories available to the Agency to pursue insolvent parties under CERCLA; and 3) references to current bankruptcy pleadings and appeals filed by the Agency.

Pages 24 and 25 of the attached guidance describe referral procedures for a proof of claim in bankruptcy. A bankruptcy referral will ordinarily be processed in the same way as other hazardous waste referrals. However, expedited Headquarters and DOJ concurrence and abbreviated referral packages may be necessary and acceptable if required to meet deadlines in bankruptcy cases.

If you or your staff have any further questions regarding CERCLA enforcement against bankrupt parties, please contact Kirk Sniff at (FTS) 382-3050 or Heidi Hughes at (FTS) 382-3109.

Attachment

TABLE OF CONTENTS

PAGE

I. INTRODUCTION..... 1

A. Scope and Duration of the Problem..... 1
B. When to Proceed Against a Bankrupt Party..... 2

1. Probability of Recovering the Cost Litigation..... 2

2. Deterrence of Frivolous or Fraudulent Bankruptcy Filings..... 3

II. THE BANKRUPTCY CODE: An Overview..... 4

A. Organization of the Code..... 4
B. Voluntary vs. Involuntary Bankruptcy..... 5

III. CERCLA AND BANKRUPTCY ACTIONS..... 6

A. Proceedings in District Court or Bankruptcy Court..... 6

B. Cost Recovery Under Section 107 of CERCLA..... 11

1. Distribution of Assets..... 12

(a) Secured Creditors..... 12
(b) Priority Structure..... 13

2. Theories of Recovery Beneficial to the United States..... 15

(a) Administrative Costs..... 15
(b) Recovery Under Section 506(c) of the Code..... 17
(b) Equitable Liens..... 18
(d) Restitution..... 18

C. Other Matters in Bankruptcy and Insolvency Cases..... 19

1. Abandonment of Property..... 19

2. State Involvency Laws..... 23

IV. PROCEDURES 24

A. Rules of Bankruptcy Procedure 24

B. Filing Proof of Claims 25

C. Pleadings 27

D. Appeals 27

E. Federal Bankruptcy Court Jurisdiction 28

V. THEORIES OF INDIVIDUAL LIABILITY 30

A. Personal Involvement in Acts and Omissions 31

B. Piercing the Corporate Veil 33

C. Personal Jurisdiction in Cases Involving Corporate Officers or Shareholders 35

VI. INDEX OF RESOURCES 36

PLEADINGS 36

Proofs of Claim 36
Other Briefs and Motions 36

ORDERS 37

RESOURCES 38

RULES 38

I. INTRODUCTION

A. Scope and Duration of the Problem

The U.S. E.P.A. is charged with the duty of managing and replenishing the limited Superfund to the greatest extent possible. While our enforcement activities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) will generally be directed against solvent parties, there have been and will continue to be times when a responsible party declares bankruptcy.

This memorandum sets forth enforcement options for dealing with bankrupt parties. It includes guidance on when to proceed against bankrupt parties. It also discusses the theories and procedures for recovering cleanup costs from bankrupt parties under both federal bankruptcy law and common law theories of recovery. Finally, it is intended to serve as a bankruptcy information clearinghouse, listing materials available from OECM-Waste on bankruptcy and related subjects.

In the long run, the requirements of the Resource Conservation and Recovery Act (RCRA), particularly the closure and financial requirements, should insure the orderly closure of storage or disposal facilities. Nonetheless, this will not always occur. Thus, while the purpose of this memorandum is to aid the EPA official enforcing CERCLA, much of it will be relevant to future efforts by EPA to require bankrupt owner-operators of storage or disposal facilities, generators, and transporters to contribute as much as

possible to the cleanup of the hazardous conditions they have created.

B. When to Proceed against a Bankrupt Party

In making the determination of when to proceed against bankrupt parties the Regions should balance the likelihood of recovering assets from the estate of the insolvent party against the extent of Agency resources required to prosecute bankrupt parties. The Regions should also evaluate the effect that pursuing parties who have filed bankruptcy will have in deterring future frivolous or fraudulent bankruptcy claims.

1. Probability of Recovering the Cost Litigation

Two questions should be answered by the Regions to determine the efficient use of enforcement resources and the extent to which the Agency should pursue bankrupt parties in CERCLA actions.

The first question to answer in determining whether to proceed against a bankrupt party is related to the scope of the case: Are there other solvent parties in the case? If so, CERCLA's purposes may be served by proceeding against them alone. In general, actions against bankrupt parties such as generators lacking assets should not be undertaken when there are other solvent parties.

The second question that must be answered by the Regions relates to the value of the case: Are there assets in the estate of the bankrupt party? The Assistant United States Attorney in the District where the Bankrupty Court sits may be able to send

copies of the case docket to an EPA attorney.[1/] Depending on the stage of proceedings, the docket may include an itemization of assets. It may be pointless to proceed if there are few assets. The position of the other creditors should also be considered.

In general, EPA and the Department of Justice should maximize its use of attorney resources by pursuing bankrupt responsible parties when there appear to be assets in the estate, and there are either few secured creditors with relatively limited claims or some basis exists for recovering funds from the estate despite the presence of secured creditors.[2/]

2. Deterrence of Frivolous or Fraudulent Bankruptcy Filings

On occasion, EPA may elect to pursue a bankrupt responsible party even when it appears unlikely that we will recover sizeable amounts from the Bankruptcy Court. The Regions should pursue bankruptcy actions where the case may serve as a deterrent to other parties who would otherwise consider escaping liability through a declaration

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1/ The most common form of bankruptcy is liquidation under Chapter 7 of the Bankruptcy Reform Act of 1978 (11 U.S.C. §101 et seq.) (hereinafter cited as "the Bankruptcy Code"). However, several CERCLA cases have involved responsible parties in Chapter 11 reorganization (see United States, et al. v. Johns Manville Sales Corporation, et al., Civil No. 81-299-D). The distinctions between a Chapter 7 liquidation and a Chapter 11 reorganization are discussed infra. Unless otherwise stated the discussion in this memorandum concerns Chapter 7 liquidation proceedings.

2/ This evaluation should be documented in the case referral package prepared by the Region. The Department of Justice has requested that all bankruptcy referrals include a "quick look" financial assessment of the potential defendant's assets (i.e. a summary of assets listed in the bankruptcy papers, a Dunn and Bradstreet report, etc.)

of insolvency. For instance, through the prosecution of bankrupt parties the Agency could provide an effective deterrent to under-financed "fly-by-night" companies who see bankruptcy as a way to avoid their liabilities to the federal government. Similarly, it is important that responsible parties are treated equitably. For example, in a case involving a bankrupt site owner/operator whose actions contributed significantly to the waste condition, EPA could pursue the bankrupt site owner to further the enforcement policy goal of treating responsible parties even-handedly and equitably.

II. THE BANKRUPTCY CODE: An Overview

A. Organization of the Code

The Bankruptcy Reform Act of 1978 (11 U.S.C. § 101 et seq. (1978)) replaced and liberalized the Act of 1898 (11 U.S.C. § 1 et seq. (1898)). The new act, commonly called the Bankruptcy Code, consists of eight chapters. Those relevant to EPA claims are: Chapters 1, General Provisions; 3, Case Administration; 5, Creditors, and Debtor, and the Estate; 7, Liquidation; and 11, Reorganization.

Chapters 1, 3, and 5 set forth definitions and procedures common to all bankruptcies. The provisions of Chapters 7 and 11 set forth the specific procedures for liquidations and reorganizations. Under a Chapter 7 "straight bankruptcy" or "liquidation," a debtor is granted a discharge of all debts but must liquidate all assets. A Chapter 7 bankruptcy is administered by a trustee appointed by the Bankruptcy Court. Under Chapter 11, there is no liquidation of assets. Rather the goal of this chapter is to

reorganize the obligations of the debtor in order to give the debtor a "fresh start" in carrying out his business. The debtor and his creditors must arrive at a reorganization plan whereby a share of the debts is paid to the different classes of creditors on a schedule. The debtor normally administers the reorganization.

B. Voluntary vs. Involuntary Bankruptcy

Under either Chapter 7 or 11, the debtor himself may initiate a voluntary action.3/ The debtor does not have to be insolvent4/ and no formal adjudication of bankruptcy is required in voluntary cases. An order for relief is automatically entered by the Bankruptcy Court in a voluntary case.

An involuntary petition under Chapter 7 or 11 may be filed against most debtors by certain creditors. The debtor may contest the petition, however, and the issue of whether the debtor is or is not insolvent will then be adjudicated. The Bankruptcy Court will only enter an order for relief if the debtor is not generally paying his debts as they become due, or if a custodian, within the last 120 days before the filing of the petition, has taken possession of or has been appointed by the Court to take charge of substantially all of the debtor's property.5/

3/ 11 U.S.C. § 109(b).

4/ Insolvency in bankruptcy law is a term of art derived from common law. If a corporation or individual claims insolvency under the common law of a State (as opposed to filing under the federal Bankruptcy Code), he is generally only deemed insolvent if he is not paying his debts as they become due and if a receiver or other custodian has been appointed by the Court to take charge of his property.

5/ 11 U.S.C. §303(h)

III. CERCLA AND BANKRUPTCY ACTIONS

Section 101 of the Bankruptcy Code defines "creditor" as:

> (A) [an] entity that has a claim against the debtor that arose at the time of or before the order for relief [dismissal decision of Bankruptcy Court which follows the approval of the trustee's Final Report] concerning the debtor ...

Under section 101 of the 1978 Act, a "claim" is a:

> (A) right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right ... is reduced to judgment, fixed, contingent, matured, unmatured, disputed, secured, or unsecured.

The statute clearly states that a claim need not be premised on a civil action or a final judgment; it is sufficient if the claim is based on a simple right to payment as a result of work completed and cost incurred. Thus, the United States need not have received a judgment under CERCLA before making a claim against a bankrupt party. It is enough that the United States has a right to payment or an injunctive claim. The United States' right to payment can be based upon CERCLA Sections 107 and/or 104, or other authorities. Thus, the United States can proceed to file a claim in Bankruptcy Court.

A. Proceedings in District Court or Bankruptcy Court.

An important question that must be resolved in each case is whether to initiate proceedings in District Court or Bankruptcy

Court. An ordinary creditor must proceed in Bankruptcy Court because under the automatic stay provision (Section 362 of the Bankruptcy Code, 11 U.S.C. §362(a)), the filing of a Chapter 7 or Chapter 11 petition operates as an automatic stay of any proceedings against the debtor. The stay halts the following:

> (1) the commencement or continuation ... of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case ...
>
> (3) any act to obtain possession of property of the estate or of property from the estate;
>
> (4) any act to create, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case ...;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case ...; and,
>
> (7) the setoff of any debt owing to the debtor ...

In a number of situations, however, the filing of a petition does not operate as a stay, including (Section 363(b)):

> (4) ... the commencement or continuation of an action ... by a governmental unit to enforce such governmental unit's policy or regulatory power;
>
> (5) ... the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

The purpose of these exceptions, as articulated in the House Report accompanying the Bankruptcy Code, is to permit governmental authorities to pursue actions to protect public health and safety[6] and to allow governmental units to sue or continue suit against a debtor to abate violations of environmental protection laws.[7]

The exception in Section 362(b)(4), as interpreted by the government, is broad. It matters not what is sought: The government may commence or continue any police or regulatory action. This includes actions for money (CERCLA §107) and actions for injunctive relief (CERCLA §106).[8] At the stage of seeking to execute any

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6/ H.R. Rep. No. 95-595 95th Cong., 2d sess. 343 (1978); 95 Cong. Rec. H 11092 (Sept. 28, 1978)

7/ H.R. Rep. No. 95-595. at 343. See also; In re Bay Bridge Inn., Inc. v. New York State Liquor Authority, 94 F.2d 555 (2d Cir. 1938); In re Colonial Tavern v. Charles L. Byrne, 420 F. Supp. 44 (D. Mass. 1976) and In re Dolly Madison, 504 F.2d. 499 (3d. Cir. 1974) [held: a bankruptcy court should not interfere with governmental regulatory programs]; Aaron, Bankruptcy Stays for Environmental Regulation: Harvest of Commerical Timber as an Introduction to a Clash of Policies, 12 Envt'l. Law 1, 5-8 (1981) Bankruptcy Law - When is a Governmental Unit's Action to Enforce its Policy or Regulatory Power Exempt from the Automatic Stay Provisions of Section 362?, 9 Fla. Univ. L. Rev. 369, 380 (1981). See: 11 U.S.C. §362(c)-(g) for the conditions under which the automatic stay remains in effect and other rules applicable to obtaining relief from the stay.

8/ A motion to overcome the stay should generally be filed in Bankruptcy Court before proceeding in District Court. (See Pleadings section, infra.) A recent opinion in which a Bankruptcy Judge discussed -- and rejected -- holding a citizens' group in contempt for failing to overcome the stay is In Re Revere Copper and Brass, Inc., 29 B.R. 584 (Bkrtcy.N.W., 1983). When the government proceeds in District Court, a timely proof of claim should also be filed in Bankruptcy Court (see page 24 infra) When a Regional attorney wishes to pursue in District Court a cost recovery judgment againt a bankrupt party, it is particularly important that this strategy be discussed with appropriate EPA H/Q and DOJ attorneys before referral of a case.

judgment that may be obtained, the government should be prepared to argue that enforcement of the judgment is a continuation of the governmental unit's enforcement of its regulatory power. Thus the Bankruptcy Code read in conjunction with CERCLA and other authorities allows the United States to seek an order from Federal District Court requiring the Bankruptcy Court to order the debtor in possession or trustee to use assets of the bankrupt to abate a hazardous condition or to reimburse the government for its expenditures.

In two recent cases, the courts rejected the government's view of the exceptions. In United States v. Johns Manville 9/, the District Court in New Hampshire denied EPA's motion to vacate an Order issued by the Bankruptcy Court in New York staying all proceedings in an EPA enforcement action against Manville. The opinion characterized the government's action for injunctive relief as tantamount to an action for a money judgment. Since Section 362(b)(5) of the Code prohibits enforcement of a money judgment, the Court held that the injunctive relief sought by the government did not fall within the parameters of the bankruptcy stay exemption. The Court noted that if the government had instead sought an injunction to prevent active, on-going disposal rather than cleanup of an existing hazard, such an action would not have been stayed by the bankruptcy filing. In our view, the District Court

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9/ No. 81-229-D (D.N.H. decided Nov. 15, 1982).

erred.[10] The Agency has proceeded with CERCLA response activities at the Johns Manville sites.

In In Re Kovacs,[11] Ohio was stayed from proceeding in State Court in its efforts to enforce an injunction requiring Kovacs to clean up a hazardous waste site. Kovacs, a corporate officer and operator of the Chem-Dyne site, had declared bankruptcy. The Sixth Circuit, affirming the District Court and Bankruptcy Court decisions, held that Ohio, in proceeding to enforce the injunction in State Court was actually seeking a money judgment. The Supreme Court granted the State of Ohio's petition for a writ of certiorari on January 24, 1983. The Supreme Court vacated the judgment and remanded the case to the Sixth Circuit to consider the issue of mootness. The Supreme Court has accepted certiorari for a second time in the Kovacs II case.[12] The issue presented in Kovacs II is whether a bankrupt defendants may rely on the discharge provisions of the Bankruptcy code to void an injunction which requires him to cleanup a hazardous waste facility. In January 1984, the United States filed an amicus curiae brief in

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10/ The government took the position that the Johns Manville District Court erred, in a motion to dismiss in AM International v. United States, Case No. 82-B04922 (N.D. Ill. Bkrtcy Ct.) (CERCLA §106 Action).

11/ 681 F.2d 454 (6th Cir. 1982).

12/ State of Ohio v. Kovacs (Kovacs II), 717 F.2d 984 (6th Cir., 1983) (cert. granted, Sp. Ct. No. 83-1020).

the Kovacs II case stating that the case has national implication for environmental enforcement under the Clean Water, RCRA, and CERCLA and further the states that the 6th Circuit decision "obviously encourages polluters to abuse the Bankruptcy Code and defy state and federal environmental protection." 13/

B. Cost Recovery under Section 107 of CERCLA

The United States should be prepared at the time of filing of a proof of claim in Bankruptcy Court to prove that its claim should be allowed by the court. That is, if the agency has spent (or will spend) 14/ money at a site under the provisions of CERCLA 104, and wishes to recoup such expenditures under CERCLA Section 107, the United States will have to demonstrate to the Bankruptcy Court that the estate is in fact liable for such expenses under Section 107.15/

Therefore, when the United States files a proof of claim with the Bankruptcy Court, Department of Justice and EPA attorneys

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13/ Id., Memorandum for the United States as amicus curiae supporting petitioner (January, 1984).

14/ In the case where the Agency has not spent Superfund money at the site but where we intend to conduct a fund-financed response action, the United States can file a proof of claim for an "open account." The proof of claim would indicate that the claim is founded on an open account which will become due upon the completion of the abatement actions by EPA.

15/ A usual commercial claim of a creditor is established by the existence of a receipt or invoice indicating that the debtor received goods or services which he contracted to receive. When EPA has performed work on a site, however, there has been no agreement to perform such work between EPA and the bankrupt party. Therefore, we must be prepared to prove Section 107 liability in order to prove our claim.

should be prepared to prove all elements of a Section 107 cost recovery action. The case must be referred to the Department of Justice in the normal way, although there may be situations when a referral by telephone may be necessary. See Procedures, infra.

1. Distribution of Assets

(a) Secured Creditors

The claims of secured creditors are satisfied fully before assets are distributed to any unsecured creditors, including creditors claiming administrative expenses. The justification for this treatment of secured creditors is statutory (11 U.S.C. §§507, 726). A valid lien is a right to repayment, created by agreement, which exists independently of bankruptcy laws. As such, it is a charge against assets which must be met before distribution to unsecured creditors.[16/] For example, a bank that has made a loan to the owner of a facility that is secured by a lien on the heavy equipment will receive "off the top" the amount representing the value of the heavy equipment or the equipment itself before distribution of assets to unsecured creditors in order of their priority under Section 507 of the Code.

16/ 3 Collier on Bankruptcy, Para 507.02 507-12.6 (15th Ed. 1981).

In Chapter 7 proceedings, secured creditors will recover before unsecured creditors, including EPA, unless the Bankruptcy Court is persuaded by our arguments to jump our claims ahead of all others.17/ In Chapter 11 proceedings, the government should be prepared to play an active role in working out the terms of a reorganization plan with the various classes of creditors which provides for eventual repayment of our cleanup expenditures. The classes of creditors that have secured interests will have the greatest leverage in negotiation of a plan.

(b) Priority Structure

Section 507 of the Code sets up the priority structure for satisfaction of unsecured claims.18/ Payments to the unsecured creditors are generally made on a pro rata basis. Ten, fifteen or twenty cents to the dollar is common, depending on the assets remaining in the estate. The following expenses and claims have priority in the following order under Section 507(a):

1. First, administrative expenses ... and any fees and charges assessed against the estate ...

17/ §507(b) establishes a "Super Priority" which would require the Agency to have priority over every other claim allowable. Under §507(b) EPA would have to prove (1) that EPA has a claim (for administrative expenses) and (2) that this claim is protected by a lien on the debtor's property (mechanics lien or prejudgment lien) and (3) that the stay has prevented use of the property (clean up). See Motion for Allowance of Administrative Expenses, In Re Triangle Chemicals Inc., Case No. 80-00993-HS-7.

18/ 11 U.S.C. 507(a)

2. Second, unsecured claims allowed under Section 502(f) of this title. [regarding certain claims arising in involuntary cases]
3. Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay.
4. Fourth, allowed unsecured claims for contributions to employee benefit plans.
5. Fifth, allowed unsecured claims of individuals, to the extent of $900...
6. Sixth, allowed [certain] unsecured [tax or penalty fee] claims of governmental units ...

Claims by the United States are classified as sixth priority claims or general unsecured creditors. Because government claims are so low in the priority line, attorneys for the government should be prepared to argue that our claims should be given greater preference, based on one of the theories described below.

Congress is currently considering a bill 19/ intended to give claimants under RCRA or Superfund a priority in bankruptcy proceedings superior to all other creditors, whether their claims are secured or unsecured. Four states have already enacted

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19/ H.R. 2767 sponsored by Rep. Florio.

similar provisions in their own environmental laws.20/

2. Theories of Recovery Beneficial to the United States

(a) Administrative Costs

The proof of claims filed by the United States have asserted that cleanup expenditures should be considered administrative expenses of preserving the estate of the bankrupt, thus deserving to be satisfied as top priority claims. While there is little caselaw on point, one case provides support for this theory. In Ottenheimer v. Whitaker 21/, the Court upheld the decision of the Bankruptcy Court which required the trustee to expend sums of money as administrative costs in order to remove a hazardous nuisance. The condition was created when the bankrupt party abandoned several barges in Baltimore Harbor. The Court

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20/ Massachusetts oil and Hazardous Materials Release Prevention and Response Act, Mass. Gen. Laws. Ch. 21E; New Hampshire Solid and Hazardous Waste Management Act, N.H. Rev. Stat. Ann. Ch. 147-B: 10; New Jersey Spill Compensation and Control Act, 58 N.J. Stat. Ann. §10-23.11f (1981). Colorado has also enacted superlien legislation. For a dismissal of these statutes and the pending federal legislation see "Superlien 'Solutions' to Hazardous Waste: Bankruptcy Conflicts" ABA Environmental Law Newsletter, winter 83/84.

21/ Ottenheimer v. Whitaker, 198 F. 2d 289 (3rd Cir. 1952) was decided under the Bankruptcy Act of 1898, 30 Stat. 544, which has been replaced by the current Bankruptcy Reform Act of 1978, 92 Stat. 2549 (codified at 11 U.S.C.). See also, In re Lewis Jones, Inc. 1 Bankr. Ct. Dec. 277 (Bk. Ct. E.D. Pa. 1974) for the proposition that the bankruptcy court is under a duty to protect the public interest and may order a Trustee to take action to protect such interest. Various memoranda supporting filed proofs of claim contain further caselaw and arguments. These are available from OECM-Waste.

reasoned that obstruction of the Harbor would conflict with the purposes of the Rivers and Harbor Act.

In its opinion the court stated, "The judge-made rule [allowing abandonment] must give way when it comes into conflict with a statute enacted in order to ensure the safety of navigation; for we are not dealing with a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed upon an owner of vessels by an Act of Congress in the public interest."22/

The United States has argued, by analogy, that expenditures made by EPA in the public interest under the authority of CERCLA should be reimbursed as administrative expenses. This public interest argument should stress the importance of recovering money to replenish the fund to clean up additional sites. Therefore, in a CERCLA case, as in Ottenheimer, an Act of Congress enacted for the public health and welfare should take priority over the usual bankruptcy distribution order.

In a recent ruling from the bench in a case entitled In re T.P. Long, in the U.S. Bankruptcy Court for the Northern District of Ohio, held that the trustee is liable to EPA for cleanup costs at a hazardous waste site.23/ While the Judge did not specifically state that the Government's cleanup expenses were "administrative expenses" for bankruptcy purposes, the written order is expected to elaborate on the ruling from the bench.

22/ Id. at 290.

23/ In Re T.P. Long Chemical Co., Inc., Case No. 581-906 (N.D. Ohio, Bkrtcy. Eastern District, April 5, 1984).

The United States is expeced to file briefs on the question of priority for reimbursement as between the secured interest holder and the government.

(b) Recovery Under Section 506(c) of the Code

This subsection states: "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." (11 U.S.C. § 506(c)). In a situation involving real property securing a loan made by a bank or savings and loan, cleanup costs that preserved the property would presumably benefit the lender and would be recoverable. This would allow the Agency to object to any liquidation of the real property.

The language of Section 506(c) states, however, that the trustee rather than the government can recover. The government could deal with this by specifically requesting the trustee's ratification of EPA cleanup plans or obtaining from the trustee an agreement to seek reimbursement under 506(b).24/

24/ See Robinson v. Dickey, 36 F. 2d 147 (lienholders did not object to water being pumped out of mines for safety reasons and were liable for expenditures). First Western Savings & Loan Association v. Anderson, 252 F. 2d 544; Miners Savings Bank of Pittston, Pa. v. Joyce, 97 F.2d 973.

(c) Equitable Liens

It has also been suggested by the Civil Division of the Department of Justice that, depending on the facts of the situation, the United States could argue that expenditures of funds for cleanup create an equitable lien on the property. Such a lien would create an implied contract for reimbursement of EPA as a secured creditor. State law on equitable liens should be researched if this theory is attempted. It may be of limited use since State law may only allow for imposition of an equitable lien in situations involving a fraudulent conveyance of real property. State law may also require the trustee to have requested cleanup of the property, or at least agreed to it.25/

(d) Restitution

Equitable restitution of the United States has been approved by the court in cases in which the United States acted to alleviate a potential health hazard. In Wyandotte Transportation Co. v. United States 26/, the Coast Guard unloaded a barge loaded with liquid chlorine gas that the defendant had refused to unload promptly. The Supreme Court required reimbursement of costs incurred by the United States. The Court noted that denial of reimbursement would have financially penalized the United States

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25/ For a discussion of State Law on "Mechanics Lien Statutes as an Enforcement Tool in CERCLA Cost Recovery Actions." See memo from R. Schaefer to A.J. Barnes and C.M. Price dated January 11, 1984.

26/ Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967).

for acting expeditiously to protect public health and safety, while unjustly enriching the defendant.

The Wyandotte case has been invoked in proof of claims filed by the United States as a basis for recovery of CERCLA costs that the government has incurred. In a recent order issued in United States v. Northeastern Pharmaceutical and Chemical Co., Inc., et al. (NEPACCO) 27/, the court stated that restitution was available under §7003 of RCRA because the bankruptcy action was an action in equity. United States v. Reserve Mining 28/ also lends support to a claim based on restitution. In that case, the Court held that when the United States is seeking reimbursement for alleviating a potential public health hazard caused by one who is in violation of a federal statute, reimbursement may be granted under the Court's equitable powers.

C. Other Matters In Bankruptcy and Insolvency Cases

1. Abandonment of Property

... any bankruptcy case, the trustee may choose to petition the Court to allow abandonment of some or all of the assets of the estate on the grounds that care of the assets by the trustee would be excessively burdensome to the estate. 29/ The rationale for

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27/ United States v. Northeastern Pharmaceutical and Chemical Co., Inc., et al. (NEPACCO) (September 30, 1983, W. Dist. Missouri S.W. Div.).

28/ United States v. Reserve Mining, 408 F. Supp. 1212, (D. Minn. 1976).

29/ 11 U.S.C. § 554.

permitting abandonment was articulated in In re Ira Haupt & Co.:

> ...[T]he courts have always recognized that a Trustee is under no duty to retain the Title to a piece of property or a cause of action that is so heavily encumbered, or so costly, in preserving or securing, that it does not promise any benefit to the funds available for distribution.30/

The United States will oppose abandonment in certain circumstances because the procedure may allow the estate to avoid liability for on-going environmental obligations and may allow the trustee to rid the estate of an asset in which the United States may ultimately have an interest, (based on equitable lien, restitution or administrative expenses). For example, if contaminated property is abandoned by the trustee, the property reverts back to the secured creditor and the Agency may have no claim against the nonbankrupt party after clean up. Accordingly, the United States should normally take the position that abandonment is only permissible when public health and safety obligations (statutory or otherwise) are met, and when a third party will not recover a windfall from EPA's clean up actions. Abandonment may be preferred prior to clean up if the property will revert to a viable party whom EPA may pursue for contribution to the clean up.

The position of the United States is supported by the reasoning of the Ottenheimer v. Whitaker case, 31/ and by In Re Lewis Jones,

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30/ In re Ira Haupt & Co., 398 F.2d 607 (2d Cir. 1968).

31/ Supra, note 13.

Inc. 32/ In the Ottenheimer case, the Court refused to allow the trustee to abandon assets that created a hazardous condition. Rather, the Court required the trustee to use assets of the estate to remove from Baltimore Harbor several barges belonging to the debtor that might have otherwise obstructed the Harbor.

In In Re Lewis Jones, Inc., the Court reiterated the Ottenheimer position and held that the bankruptcy trustee could not simply abandon the property. Instead, the trustee was required to repair various steam pipes and manhole covers to protect public health and safety. The Court in Ottenheimer had held that abandonment of the debtor's barges by the trustee would conflict with the Rivers and Harbors Act. The Court in In Re Lewis Jones went a step further, stating that "even absent the violation of a state or federal act, the public interest must be protected by the Bankruptcy Court." 33/

The law on abandonment under the Code is unsettled. In the recent bankruptcy case, In Re Quanta Resources, 34/ the New Jersey District Court affirmed the Bankruptcy Court's ruling allowing abandonment of a hazardous waste site over the objection of the City of New York and the State of New York. The Court allowed the company to abandon a hazardous waste site on grounds that the

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32/ Id.

33/ In Re Lewis Jones, supra at 280.

34/ In Re Quanta Resources Corp., _____ F. Supp. _____, No. 82-3524 (D.N.J. Jan 24, 1983) Appeal Pending No. 83-5142 (3d Cir.).

property was burdensome to the estate. At the site, there were 500,000 gallons of waste oil, sludge and hazardous waste stored in 52 tanks and about 70,000 gallons of waste oil contaminated by PCBs.[35] While Quanta had previously signed a consent order with the N.Y. Department of Environmental Conservation to clean up the site, the Bankruptcy Court's favorable ruling on abandonment effectively nullified the order.

New York City and State had asserted that the holdings in Ottenheimer and Lewis Jones required that the Court deny the trustee's petition to abandon and allocate assets in the estate to be used for site cleanup rather than distribution to creditors. The Court rejected this argument, pointing out that the two cases were decided before passage of the 1978 Bankruptcy Act. Before the Act, the Court noted, abandonment was allowable under judge-made rule. Section 554 of the Bankruptcy Code, however, provided specific statutory authority for the abandonment of burdensome property. This authority, the Court stated, was not conditioned by Congress upon a finding that abandonment does not harm the public interest.[36]

The Court was similarly unpersuaded by New York's argument that §959(b) of the United States Judicial Code, (28 U.S.C. Section

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35/ Hazardous Waste Litigation Reporter, (July 6, 1982) at 2,646.

36/ Id. at 3,671 and 3,672.

9872.7

959(b)) prohibited abandonment. Section 959(b) provides that the trustee shall "manage and operate" property in his possession according to valid laws. The Court found that this provision did not apply to the trustee in a Chapter 7 context, but only to receivers and trustees involved in business operations rather than in distribution of an estate.

2. State Insolvency Laws

States can enact insolvency laws that affect bankrupt parties as long as the substance of those laws does not overlap with the Federal Bankruptcy Reform Act's jurisdiction. The United States Constitution gives Congress the power to establish uniform laws on bankruptcy 37/ but does not prevent states from passing valid laws on insolvency. To the extent there is no conflict between a state's insolvency law and the federal bankruptcy law, the state law remains in operation.38/ .

The United States may benefit from being a creditor in state insolvency proceedings in appropriate situations. Under 31 U.S.C. §191 (1979), debts to the United States are given top priority in state insolvency proceedings. The top priority for government debts does not create a lien on the debtor's property in favor of the federal government. At a minimum, however, it gives the government a right of priority over all unsecured creditors to

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37/ U.S. CONST art I, §8 cl 4.

38/ In re Wisconsin Builders Supply Co., 239 F.2d 649 (7th Cir. 1956), Cert. denied 353 U.S. 965 (1958).

payment out of the property in the hands of the debtor's assignees or other representatives under the conditions specified in the statute.39/

IV. PROCEDURES

A. Rules of Bankruptcy Procedure

The Supreme Court, advised by the Judicial Conference of the United States, has the authority to promulgate rules governing cases under the new Bankruptcy Code.40/ The Advisory Committee on Bankruptcy Rules was duly appointed by Chief Justice Burger to draft rules. The Committee was nearing completion of work on the Proposed Rules when the decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co. cast doubt on the Code and the Proposed Rules. Thus, no new rules have yet been promulgated.

The existing rules were summed up in a Bankruptcy Monograph drafted by the Office of the Attorney General:

> "Until ... rules of practice and procedure are approved, at least two different sets of rules must be consulted. First, there are the "Suggested Interim Bankruptcy Rules" prepared by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States which were published

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39/ Bramwell v. United States Fidelity & Co., 269 U.S. 483 (1926). The United States could also argue that satisfaction of CERCLA-based claims precedes consensual liens, such as mortgages. The question appears to be open. Collier, at any rate, expresses the view that whether consensual liens come ahead of the Government's §191 priority has not been finally and authoritatively determined. Vol. 6A Collier, §913[2] p. 246.

40/ Under Public Law 95-598 §248, Congress conferred this power on the Supreme Court, amending the grant of rule-making power set forth in 28 U.S.C. §2075 to include the new Title 11 Bankruptcy Code.

> in August 1979 as 'guidelines' that could be adopted as local rules. The interim rules have been adopted in many districts, albeit with occasional variations.... Local district court rules apply in some jurisdictions. Some bankruptcy courts have adopted numerous local rules in addition to, or in lieu of, these interim rules. Second, if a point of procedure is not covered by the applicable local rules, consult the Bankruptcy Rules in effect under the Bankruptcy Act of 1889."41/

Government attorneys involved in bankruptcy cases will find rules and all forms (such as proof of claim forms) in Collier on Bankruptcy (15th ed. 1981).

B. Filing Proofs of Claim

To have standing as a creditor, the United States must file a proof of claim form which states the name of the claimant; the amount of the debt or claim; the ground of liability; the date the claim became due or will become due under an open account theory, see footnote 10 supra; and, the nature of the claim (secured or general, unsecured).42/

The filing of proofs of claims or interests is explained in Section 501 of the Bankruptcy Code.43/ In a liquidation case under Chapter 7, a claim ordinarily must be filed within six months after the first date set for the first meeting of creditors.44/ Claims base

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41/ Bankruptcy Monograph dated November 22, 1982, prepared by the Office of the Assistant Attorney General, Civil Division, for use of U.S. Attorneys, at pp. 6, 7.

42/ See, Bankruptcy Rules, Proof of Claim official forms. Proof of claims filed so far have included brief affidavits from the On-Scene Coordinator stating amounts spent and describing the nature of the work done as well as copies of bills submitted to EPA by contractors.

43/ 11 U.S.C. 1, 501.

44/ 3 Collier on Bankruptcy Para. 501.02[2] (15th ed. 1979).

on administrative expenses can be filed any time before the Court has granted the debtor a discharge of debts. It is more difficult to determine when to file a proof of claim in a Chapter 11 reorganization because while the filing is required prior to the Court's acceptance of the reorganization plan, there is no mechanism for determining when that acceptance will take place. A proof of claim should be filed immediately, with telephone concurrence by EPA HQ (OECM and OWPE) and DOJ, if there is any reason to believe that a reorganization may be about to be concluded.

Section 502 of the Code governs the allowance of claims or interests; a claim is deemed allowed "unless a party in interest ... objects."45/ In most cases, the proof of claim should be included in the litigation referral package sent to OECM which will then be sent to the Department of Justice and signed by the Assistant Attorney General for Land and Natural Resources or his delegate. The Department of Justice must be involved in the filing of a proof of claim in Bankruptcy Court.46/ As stated above, special procedures may be available in emergency situations in which the government would otherwise miss filing deadlines. Headquarters and DOJ should be contacted.

45/ 11 U.S.C. § 506(a).See also (b)-(j) [Procedure after objection].

46/ See, fn 1, page 3 supra for referral documentation that the Department of Justice has requested regarding the financial status of responsible parties.

C. Pleadings

See the attached Index of Resources for a listing of proofs of claim and other pleadings that EPA has filed so far.

One problem area involves the issue of whether or not the United States should file a motion to overcome the stay in Bankruptcy Court before proceeding to seek injunctive relief in District Court. Arguably, the statute is clear on its face and no special motion is necessary for continued exercise of our regulatory powers. Nonetheless, Bankruptcy Courts have held attorneys in contempt for failing to overcome the stay. It is recommended, therefore, that a motion to overcome the stay be filed with Bankruptcy Court when the government seeks injunctive relief from a bankrupt party in District Court.

D. Appeals

Bankruptcy appeals are heard by appellate panels of three bankruptcy judges appointed to the circuit counsel, on election of the circuit.47/ If this procedure is not available, appeals are to the District Courts.48/ EPA and the Land and Natural Resources Division of DOJ will involve the Appellate Staff of the Land and Natural Resources Division in appeals from decisions of a Bankruptcy Court and in filing of amicus briefs on bankruptcy issues related to hazardous waste site cleanup.

47/ 28 U.S.C. § 160

48/ 28 U.S.C. § 1334

E. Federal Bankruptcy Court Jurisdiction

The jurisdiction of Bankruptcy Courts has been in a confused state since the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 49/ The Court held unconstitutional the grant of power in the Bankruptcy Reform Act (28 U.S.C. 1471(b)(c)) that gave Bankruptcy Courts jurisdiction over all "civil proceedings arising under title 11 [of the U.S. Code, Bankruptcy] or arising in or related to cases under title 11." 50/ This broad jurisdictional grant to the Bankruptcy Courts was deemed unconstitutional because bankruptcy judges do not have the protection conferred by Article III of the U.S. Constitution (i.e. lifetime tenure subject to removal only by impeachment and irreducible compensation). It is unclear what effect the decision in Northern Pipeline will have on the type of cases that can be brought in Bankruptcy Court until Congress legislates a solution. At the least, however, it is clear that the traditional state common-law actions (commonly called "Marathon claims" by bankruptcy practitioners) may no longer be litigated in Bankruptcy Court absent the consent of the litigants. 51/

49/ ____U.S.____, 102 S. Ct. 2858 (1982).

50/ 28 U.S.C. 1471(b)(c).

51/ Cook, New Bankruptcy Quandary Could Be Easily Solved, Legal Times, Sept. 6, 1982 at 10 Col. 1.

9832,7

In reaction to Congress' failure to enact legislation that would rectify the constitutional infirmity of the Code, the Administrative Office of the United States Courts, Washington, D.C., formulated model rules to be used as interim measures by the United States Circuit Courts.52/ The cover explanation circulated with the rules summarized the main points as follows:

> Under the model rule, all bankruptcy matters are initially referred to a bankruptcy judge. [Section b(1) of the Rule]. In proceedings not involving a final judgment on a Marathon claim, the bankruptcy judge may enter orders and judgments that become effective immediately, subject to district court review if requested by a party. [Section (c)(2).] With respect to final judgments in Marathon claims, the bankruptcy judge prepares recommended findings and conclusions and a proposed judgment. [Section (c)(3.)] A district judge then reviews the recommendation and enters a judgment. [Section (c)(5)]. Where circumstances require, an order or judgment entered by a bankruptcy judge will be confirmed by a district judge even if no objection is filed.53/

Because the United States claims are based on federal rather than state law, the provisions are not directly relevant to our claims. Nonetheless, the Rules do appear to allow the government [illegible] experiment with options for seeking relief in the Bankruptcy Court. For example, the United States can move the District Court to "withdraw the reference to the bankruptcy judge."54/ If

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52/ See: Memorandum from William E. Foley (Dir. Admin Officer of U.S. Courts) to Judges, Clerks U.S. Court System Regarding Continued Operation of the Bankruptcy Court System after Dec. 24, 1982 in the Absence of Congressional Action.

53/ Id.

54/ §1471(d) grants Bankruptcy Judges the authority to refuse jurisdiction.

such a motion were granted, the District Court could retain the entire matter, refer part of it back to the bankruptcy judge or refer the entire matter back to the bankruptcy judge. The government should also make a simultaneous motion to overcome the stay. If, however, an action in Bankruptcy Court has already been initiated, the government may file a motion to stay the bankruptcy matter in order to proceed in District Court.55/

V. THEORIES OF INDIVIDUAL LIABILITY

The government anticipates situations in which individuals responsible for the creation of hazardous waste site conditions are financially solvent even though the corporate owners and operators are bankrupt. In such a case, the United States may choose to ignore the estate in bankruptcy and pursue the responsible individuals -- as individuals -- directly, or the United States could pursue both the assets of the bankrupt corporation and the appropriate individuals.56/

55/ These procedural recommendations were made informally in conversations with staff members of the U.S. Administrative Courts. Perhaps reflecting the current confusion in the bankruptcy court system, one staff attorney stated that CERCLA actions appeared to present unusual subject matter that a District Court would wish to hear itself in light of Northern Pipeline; the other staff attorney discouraged EPA from attempting to be heard by District Court, stating that business was proceeding as usual in bankruptcy courts.

56/ For a general discussion of individual liability, see Guidance Memo "Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA)" from Courtney M. Price to Regional Counsels due to be issued June 1984.

A. Personal Involvement in Acts and Omissions

The scope of personal liability of corporate officers is broad. A corporate officer, director, or agent is liable for torts he commits regardless of whether he acted on his own behalf or to benefit the corporation, regardless of whether he personally benefited from the commission of the tort and regardless of whether the corporation is also liable. He is also liable for the torts of the corporation and of other directors, officers or agents if he failed to exercise reasonable care.57/

The liability of corporate officers is generally limited to situations in which the corporate defendant has knowledge or responsibility for tortious acts being committed within his area of responsibility. A general duty of supervision may be an insufficient basis for liability.58/

The United States plans to make use of this theory of liability in pursuing, in certain cases, the assets of individuals involved with corporations that have declared bankruptcy. The fact patterns of these particular cases seem well-suited to the law. They involve situations in which hazardous waste treatment or disposal operations

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57/ See: 19 C.J.S. Corporations §§845, 850 (1940). Accord: U.S. v. Hess, 41 F. Supp. 197, (S.D. N.Y. 1983). See also: Miller v. Muscarelle, 1970 A. 2d (N.J. Super., 1961); Donsco Inc. v. Casper Corp., 587 F. 2d. 609 (3d Cir. 1978); Patyman v. Howey, 340 Mo. 11, 100 S.W. 2d. 851, 856 (1963). Singleton v. Armor Velvet Corp., 4 P. 2d 223 (cal. App). See also Brief in U.S. v. Mahler (M.D. Pa.) drafted by Michael Steinberg, Attorney, Environmental Defense Section, DOJ. (April 1, 1983) for a discussion of personal liability.

58/ Martin v. Wood, 400 F. 2d 310 (3d. Cir. 1968).

were directed by employees of corporations that later declared corporate bankruptcy and abandoned the facilities, leaving public nuisance conditions essentially of their own creation.

In fact, EPA and the Department of Justice have already used this legal theory successfully. In one RCRA Section 7003 case, the United States argued that this Section imposes personal liability on corporate officers. The Court denied defendant's motion to dismiss, stating:

> "In Missouri, a corporate officer who participates in the commission of a tort may be held personally liable for any resulting damage. Patyman v. Howey, 100 S.W. 2d 851, 856 (Mo. 1936). 'A contrary rule would enable a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his representative character, even though the corporation might be insolvent or irresponsible.' 19 Am. Jur. 2d § 1382 at 77.59/

In addition to theories of individual tort liability, CERCLA explicitly allows individuals to be held liable for cleaning up hazardous waste sites. Section 107 of CERCLA clearly permits imposition of strict liability upon broad classes of persons including an individual owner or operator, any person who at the time of disposal of any hazardous substance owned or operated any facility, persons who arranged for disposal and persons who accepted for transport hazardous substances.60/ The Act defines "person" as, inter alia, "an individual."61/ One purpose of the corporate

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59/ U.S. v. North Eastern Pharmaceutical & Chemical Co., Inc. et al., (NEPACCO) No. 80-5066-CV-SW (Western Dist. Mo. 1981). A later NEPACCO decision based a determination of liability on §107 of CERCLA. (see discussion infra)

60/ CERCLA §107(a)(1)(2), (3)(4)

61/ CERCLA § 101(21).

structure is to insulate shareholders from liability. There is, however, no insulation from liability -- no corporate veil to pierce -- when officers or agents of a corporation commit tortious acts or participate personally in the commission of torts.

B. Piercing the Corporate Veil

By piercing the corporate veil, the United States may be able to establish the individual liability of shareholders for torts committed by the corporation. The case law tends to uphold protection of the corporate form. Courts will, however, make exceptions to this rule when shareholders have commingled individual and corporate affairs so that the corporation appears to be no more than the "alter ego" of the individual shareholder.

Federal courts have relied on the following factual tests in determining when to pierce the corporate veil: 1) Is the corporation undercapitalized for its purposes? 2) Does the corporation observe corporate formalities? 3) Does the corporation pay dividends? 4) Is the corporation solvent? 5) Have the dominant shareholders siphoned corporate funds? 6) Does the situation present an element of "fundamental unfairness"?[62/] Courts have refused to pierce the veil absent a showing of fundamental unfairness.[63/] However,

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62/ United States v. Pisani, 646 F.2d. 83, 88 (3d. Cir. 1981).

63/ DeWitt Trucking Brokers v. W. Ray Fleming Fruit Company, 540 F. 2d 681, 687 (4th Cir. 1976).

fraud need not be shown if federal law governs a case.64/ The general rule applied by federal courts to cases involving federal statutes is that the individuals may be held liable in the interest of public convenience, fairness and equity. The specific statutory directives of CERCLA support a federal law. In addition, the language of CERCLA establishes liability for individuals who owned, operated or otherwise controlled activities at hazardous waste sites.65/

Fact situations faced by the United States involving hazardous waste disposal or treatment operations should prove appropriate for piercing the veil. In many cases, the United States is finding that CERCLA problems have been created by corporations that have been mismanaged and undercapitalized for the purpose of handling hazardous waste. Moreover, in some cases, the same individual shareholder/directors have dissolved and reformed essentially the same hazardous waste operations several times, an indication that the corporate form is being used as a shield and "alter ego" for individuals.

64/ United States v. Normandy House Nursing Home, 428 F.Supp.421, 424 (D. Mass. 1977). The government will want to argue that federal law applies to piercing the veil. U.S. v. Kimbell Foods, 440 U.S. 715 (1979), holds that application of State law should not frustrate the objectives of federal statutes. In the Pisani case, supra, at 87, the Third Circuit stated, "We believe it is undesirable to let the rights of the United States change whenever State courts issue new decisions on piercing the corporate veil."

65/ See, pages 7-9, Guidance Memo "Liability of Corporate Officers" fn 49 supra.

C. Personal Jurisdiction in Cases Involving Corporate Officers or Shareholders

If the United States proceeds to initiate action against individual corporate officers or shareholders, the government should anticipate that defendants may raise the defense of improper jurisdiction or service of process if they reside outside the state where the CERCLA site is. For example, in U.S. v. North Eastern Pharmaceutical & Chemical Co., Inc., et al. (NEPACCO)[66/], defendants alleged that, as Connecticut residents, they were not subject to extraterritorial service of process under Missouri rules of civil procedure. They argued that since their acts in directing the disposal of hazardous waste in Missouri occurred not as their individual acts but as the corporate acts of NEPACCO, they could not be subject to extraterritorial service of process as defined in the Missouri rules.

The Court rejected this argument as overly technical and affirmed that it had valid personal jurisdiction over the defendants. [illegible], however, points to the need for attorneys to research state law regarding personal jurisdiction and service of process. Referrals to the Department of Justice should include anticipated defenses related to personal jurisdiction.

66/ Order No. 5066-CV-SW, (June 11, 1981, W. Dist. Missouri, SW Div.)

VI. INDEX OF RESOURCES

These materials can be sent to EPA Regional attorneys on request. Because OECM-Waste does not have the resource capability to reproduce and send numerous copies, mailings will be limited to one copy per region of each document listed.

PLEADINGS

Proofs of Claim

In the Matter of Aidex Corp., Case No. 79-0-111, APPLICATION FOR PAYMENT OF FUNDS HELD IN TRUST BY THE CLERK OF THE COURT FOR CLEAN UP OF HAZARDOUS WASTE SITE CONDITION.

U.S. v. Jack L. Neal and Geraldine Fave Neal (Globe), Case No. 83-00198, COMPLAINT FOR DECLARATORY JUDGMENT AND APPLICATION FOR ORDER FOR REIMBURSEMENT OF COSTS INCURRED BY THE U.S. IN RESPONSE TO A HAZARDOUS SITE CONDITION.

In re Liquid Disposal Inc., Case No 82-01846, APPLICATION FOR ORDER FOR REIMBURSEMENT OF COSTS INCURRED BY THE UNITED STATES TO CLEAN UP A HAZARDOUS SITE CONDITION and accompanying affidavit and invoices. (Eastern Dist., MI)

In re Triangle Chemicals, Inc., Case No. 80-00993-HS-7, plus APPLICATION FOR ORDER FOR REIMBURSEMENT etc. and affidavit. (Southern Dist., TX)

In re Crystal Chemical Company, Case No. 81-02901-HB-4, plus UNITED STATES MEMORANDUM IN SUPPORT OF PROOF OF CLAIM. (Southern Dist., TX)

Other Briefs and Motions

In the Matter of Aidex Corp., Case No. 79-0-111, MOTION TO VACATE AUTOMATIC STAY, and accompanying MEMORANDUM IN SUPPORT OF MOTION TO VACATE AUTOMATIC STAY and accompanying court order granting motion. (West Dist., NE)

In re Crystal Chemical Company, Debtor, Case No. 81-02901-HB-4, OBJECTION TO PROPOSED GRANT OF REPLACEMENT LIEN AND TO PROPOSED DISCHARGE OF LIEN and accompanying court order granting motion. (Southern Dist., TX)

State of Ohio, Petitioner v. William Lee Kovacs, ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, Brief for the United States as Amicus Curiae. (Brief supporting appeal of Ohio to the Supreme Court).

In re Triangle Chemicals, Inc., Case No. 80-00993 HS-7 MOTION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSES AND PROPOSED ORDER REQUIRING TRUSTEE TO PAY EPA's EXPENSES. Filed Aug. 22, 1983.

In the Matter of Quanta Resources Corp., Debtor, State of New York and City of New York, Appellants, v. Thomas J. O'Neill, as Trustee, Appellee, (QUANTA hereafter) Appeal from the District Court for the District of New Jersey, Brief of Appellants. (U.S. Court of Appeals for the Third Circuit, No. 83-5142).

QUANTA, Brief of the Commonwealth of Pennsylvania and State of New Jersey, Amici Curiae. (U.S. Court of Appeals for the Third Circuit, No. 83-5142).

In Re A.M. International, Inc., Case No. 82-B-04922, Defendant's (United States') Reply Memorandum in Support of Defendant's Motion to Dismiss.

State of Ohio v. Kovacs (Kovacs II), 717 F.2d 984 (6th Cir., 1983)

ORDERS

United States of America, et al. v. Johns Manville Sales Corporation, et al., Civil No. 81-299-D. Order of the District Court denying United States and New Hampshire motion to vacate the automatic stay. (Nov. 15, 1982; U.S. District Ct., N.H)

State of Ohio v. William Lee Kovacs, No. 81-3320. Decision affirmed District Court and Bankruptcy Court decisions that Kovacs was entitled to protection of automatic stay. (June 16, 1982, U.S. Court of Appeals, Sixth Circuit)

United States of America v. North Eastern Pharmaceutical and Chemical Co., Inc., et al., No. 80-5066-CV-SW. Decision denying defendants' motion to dismiss for lack of personal jurisdiction. (June 11, 1981; Western District of Missouri, S. Western Division)

Universal Metal Stamping, Inc. v. Pennco Machinery, Inc., Bankruptcy No. 81-01262K. Bankruptcy Court held that automatic stay does not stay a separate suit against the bankrupt's "sister" corporation. (December 7, 1981; Eastern District, Pennsylvania)

RESOURCES

Bankruptcy Monograph conveyed to U.S. Attorneys Offices November 22, 1982. Summary of bankruptcy law and procedure.

EPA Guidance Manual: Pursuing RCRA Subpart H Interests ICF. (February, 1983)

Brief in U.S. v. Mahler (M.D. Pa.) drafted by Michael Steinberg, Attorney, Environmental Defense Section, DOJ (April 1, 1983). Discusses personal liability of corporate officers.

RULES

Memorandum from William E. Foley, Director of the Administrative Office of the United States Courts on CONTINUED OPERATION OF THE BANKRUPTCY COURT SYSTEM AFTER DECEMBER 24, 1982, IN THE ABSENCE OF CONGRESSIONAL ACTION (the "Emergency Rules" or "Interim Rules"), (December 3, 1982).

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

JUN 13 1984

OSWER # 9832.10

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Liability of Corporate Shareholders and Successor Corporations For Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

FROM: Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Assistant Administrator for Solid Waste and Emergency Response
Associate Enforcement Counsel for Waste
Regional Administrators
Regional Counsels

Introduction

The following enforcement memorandum, which was prepared in cooperation with the Office of General Counsel, identifies legal principles bearing on the extent to which corporate shareholders and successor corporations may be held liable for response costs that arise as a result of a release of a hazardous substance from an abandoned hazardous waste facility. In the discussion section pertaining to each part, the memorandum reviews the law on the subject from established traditional jurisprudence to current evolving standards. Although general rules of liability are delineated, these principles must be carefully applied to the unique fact pattern of any given case.

I. THE LIABILITY OF CORPORATE SHAREHOLDERS UNDER CERCLA

Background

Normally, it is the corporate entity that will be held accountable for cleanup costs under CERCLA. In certain

instances, however, EPA may want to extend liability to include corporate shareholders. This may arise, for example, where a corporation, which had owned or operated a waste disposal site at the time of the contamination, is no longer in business. The situation may also occur if a corporation is still in existence, but does not have sufficient assets to reimburse the fund for cleanup costs. There are two additional policy reasons for extending liability to corporate shareholders. First, this type of action would promote corporate responsibility for those shareholders who in fact control the corporate decisicn-making process; it would also deter other shareholders in similar situations from acting irresponsibly. Second, the establishment of shareholder liability would aid the negotiation process and motivate responsible parties toward settlement.

Traditional corporation law favors preserving the corporate entity, thereby insulating shareholders from corporate liability. Nevertheless, as will be discussed below, there are exceptions to this general principle that would allow a court to disregard corporate form and impose liability under CERCLA on individual shareholders.

Issue

What is the extent of liability for a corporate shareholder under CERCLA for response costs that arise as a result of a release of a hazardous substance from an abandoned hazardous waste facility?

Summary

The question of whether EPA can hold a shareholder of a corporation liable under CERCLA is a decision that must turn on the unique facts specific to given situation. Generally, however, in the interests of public convenience, fairness, and equity, EPA may disregard the corporate entity when the shareholder controlled or directed the activities of a corporate hazardous waste generator, transporter, or facility.

Discussion

Section 107(a)(2) of CERCLA provides that any owner or operator of a facility which releases a hazardous substance shall be liable for all necessary response costs resulting from such a release. Section 101(20)(A)(iii) of CERCLA clearly states that the term "owner or operator" as applied to abandoned facilities includes "any person who owned, operated, or otherwise

controlled activities at such facility immediately prior to such abandonment" (emphasis added).

In addition, Sections 107(a)(3) and 107(a)(4) of CERCLA impose liability for response costs on any person who arranged for the disposal or treatment of a hazardous substance (the generator), as well as any person who accepted a hazardous substance for transport to the disposal or treatment facility (the transporter).

The term "person" is def[illegible] in CERCLA Section 101(21) as, inter alia, an individual, firm, corporation, association, partnership, or commercial entity. A shareholder may exist as any of the forms mentioned in Section 101(21). Therefore, a shareholder may be considered a person under CERCLA and, consequently, held liable for response costs incurred as a result of a release of a hazardous substance from a CERCLA facility if the shareholder:

- Owned, operated, or otherwise controlled activities at such facility immediately prior to abandonment [CERCLA Section 107(a)(2); Section 101(20)(A)(iii)];
- Arranged for the disposal or treatment (or arranged with a transporter for the disposal or treatment) of the hazardous substance [CERCLA Section 107(a)(3)]; or
- Accepted the hazardous substance for transport to the disposal or treatment facility selected by such person [CERCLA Section 107(a)(4)].

Notwithstanding CERCLA's statutory language, courts normally seek to preserve the corporate form and thus maintain the principle of limited liability for its shareholders. 1/ In fact, fundamental "to the theory of corporation law is the concept that a corporation is a legal separate entity, a legal being having an existence separate and distinct from

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1/ See Pardo v. Wilson Line of Washington, Inc., 414 F.2d 1145, 1149 (D.C. Cir. 1969); Krivo Industrial Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), modified per curiam, 490 F.2d 916 (5th Cir. 1974); Homan and Crimen, Inc. v. Harris, 626 F.2d 1201, 1208 (5th Cir. 1980).

that of its owners." 2/. This concept permits corporate shareholders "to limit their personal liability to the extent of their investment." 3/ Thus, although a shareholder may be considered a "person" under CERCLA (and therefore subject to the Act's liability provisions), the application of corporate law would tend to shield the shareholder from such liability.

Nevertheless, a court may find that the statutory language itself is sufficient to impose shareholder liability notwithstanding corporation law. 4/ Alternatively, to establish shareholder liability, a court may find that the general principles of corporation law apply but, nonetheless, set aside the limited liability principle through the application of the equitable doctrine of "piercing the corporate veil."

Simply stated, the doctrine of piercing the corporate veil refers to the process of disregarding the corporate

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2/ Krivo Industrial Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), modified per curiam, 490 F.2d 916 (5th Cir. 1974).

3/ Id.

4/ See United States v. Northeastern Pharmaceutical and Chemical Company, Inc., et al., 80-5066-CV-S-4, memorandum op. (W.D. Mo., 1984). In Northeastern Pharmaceutical the district court noted that a literal reading of Section 101(20)(A) "provides that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste." (Memorandum op. at 36.) The court went on to find that there was sufficient evidence to impose liability on one of the defendants pursuant to this statutory definition of "owner and operator," and the Section 107(a)(1) liability provision of the Act. The fact that the defendant was a major stockholder did not necessitate the application of corporate law, and thus the principle of limited liability: "To hold otherwise and allow [the defendant] to be shielded by the corporate veil 'would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA].'" (Memorandum op. at 37, citation omitted.)

entity to hold either corporate shareholders or specific individuals liable for corporate activities. 5/

In order to determine whether to disregard corporate form and thereby pierce the corporate veil, courts generally have sought to establish two primary elements. 6/ First, that the corporation and the shareholder share such a unity of interest and ownership between them that the two no longer exist as distinct entities. 7/ Second, that a failure to disregard the corporate form would create an inequitable result. 8/

The first element may be established by demonstrating that the corporation was controlled by an "alter ego." This would not include "mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked

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5/ See Henn, LAW OF CORPORATIONS §§143, 146 (1961). This doctrine applies with equal force to parent-subsidiary relationships (i.e., where one corporation owns the controlling stock of another corporation).

6/ Generally, courts have sought to establish these elements in the context of various theories, such as the "identity," "instrumentality," "alter ego," and "agency" theories. Although these terms actually suggest different concepts, each employs similiar criteria for deciding whether to pierce the corporate veil.

7/ See United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977); FMC Fin. Corp. v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980).

8/ See Automotriz Del Golfo de Cal. S.A. v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1 (1957); DeWitt Truck Broker, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 689 (4th Cir. 1976). Some jurisdictions require a third element for piercing the corporate veil: that the corporate structure must have worked an injustice on, or was the proximate cause of injury to, the party seeking relief. See e.g., Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 995 (5th Cir. 1972), cert. denied, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972); Lowendahl v. Baltimore & O.R.R., 247 A.D. 144, 287 N.Y.S. 62, 76 (1936), aff'd 272 N.Y. 360, 6 N.E.2d 56 (Ct. App. 1936), but see, Brunswick Corp. v. Waxman, 599 F.2d 34, 35-36 (2d Cir. 1979).

so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." 9/

In analyzing this first element, courts have generally considered the degree to which corporate "formalities have been followed [so as] to maintain a separate corporate identity." 10/ For example, the corporate veil has been pierced in instances where there had been a failure to maintain adequate corporate records, or where corporate finances had not been kept separate from personal accounts. 11/

The second element of the test is satisfied when the failure to disregard the corporate entity would result in fraud or injustice. 12/ This would occur, for example, in cases where there has been a failure to adequately capitalize for the debts normally assocated with the business undertaking, 13/ or where the corporate form has been employed to misrepresent or defraud a creditor. 14/

9/ Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 995 (5th Cir. 1972), cert. denied, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972).

10/ Labadie Coal Co. v. Black, 672 F.2d 92, 96 (D.C. Cir. 1982); See DeWitt Truck Broker, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 686 n. 14 (collecting cases) (4th Cir. 1976).

11/ Lakota Girl Scout C., Inc. v. Havey Fund-Rais. Man., Inc., 519 F.2d 634, 638 (8th Cir. 1975); Dudley v. Smith, 504 F.2d 979, 982 (5th Cir. 1974).

12/ Some courts require that there be actual fraud or injustice akin to fraud. See Chengelis v. Cenco Instruments Corp., 386 F. Supp 862 (W.D. Pa.) aff'd mem., 523 F.2d 1050 (3d Cir. 1975). Most jurisdictions do not require proof of actual fraud. See DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681, 684 (4th Cir. 1976).

13/ See Anderson v. Abbot, 321 U.S. 349, 362, 64 S.Ct. 531, 88 L.Ed. 793 (1944); Machinery Rental, Inc. v. Herpel (In re Multiponics, Inc.), 622 F.2d 709, 717 (5th Cir. 1980).

14/ See FMC Fin. Corp. v. Murphree, 632 F.2d 413, 423 (5th Cir. 1980).

In applying the dual analysis, courts act under considerations of equity; therefore, the question of whether the corporate veil will be lifted is largely one of fact, unique to a given set of circumstances. However, the substantive law applicable to a case may also have great importance. For example, in applying state corporation law, state courts have been generally reluctant to pierce the corporate veil. 15/ Federal courts, however, in applying federal standards, have shown more willingness to disregard the corporate entity and hold individuals liable for corporate actions. 16/

In many instances federal decisions do draw upon state law and state interpretations of common law for guidance. 17/ However, federal courts that are involved with federal question litigation are not bound by state substantive law or rulings. 18/ In such cases, either federal common law

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15/ See discussion in Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harvard L.R. 853, 855 (1982).

16/ It is well settled that a corporate entity must be disregarded whenever it was formed or used to circumvent the provisions of a statute. See United States v. Lehigh Valley R.R., 220 U.S. 257, 259, 31 S.Ct. 387, 55 L.Ed. 458 (1911); Schenley Distillers Corp. v. United States, 326 U.S. 432, 437, 66 S.Ct. 247, 90 L.Ed. 181 (1945); Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965); Casanova Guns, Inc. v. Connally, 454 F.2d 1320, 1322 (7th Cir. 1972).

17/ See Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105 (9th Cir. 1979); Rules of Decision Act, 28 U.S.C. §1652 (1976). Generally, federal courts will adopt state law when to do so is reasonable and not contrary to existing federal policy. United States v. Polizzi, 500 F.2d 856, 907 (1974). See also discussion in note 19, infra.

18/ UNITED STATES CONSTITUTION art. VI, cl. 2.

or specific statutory directives may determine whether or not to pierce the corporate veil. [19]

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[19] See Anderson v. Abbot, 321 U.S. 349, 642 S.Ct. 531, 88 L.Ed. 793 (1944); Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1981). For a general discussion of federal common law and piercing the corporate veil see, note 15, supra. The decision as to whether to apply state law or a federal standard is dependent on many factors:

> "These factors include the extent to which: (1) a need exists for national uniformity; (2) a federal rule would disrupt commercial relationships predicated on state law; (3) application of state law would frustrate specific objectives of the federal program; (4) implementation of a particular rule would cause administrative hardships or would aid in administrative conveniences; (5) the regulations lend weight to the application of a uniform rule; (6) the action in question has a direct effect on financial obligations of the United States; and (7) substantial federal interest in the outcome of the litigation exists.
>
> Even with the use of these factors, however, whether state law will be adopted as the federal rule or a unique federal uniform rule of decision will be formulated remains unclear. The courts have failed to either mention the applicable law or to state the underlying rationale for their choice of which law to apply." Note, Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?, 13 Pac. L.J. 1245, 1249 (1982) (citations omitted).

In discussions concerning CERCLA, the courts and Congress have addressed several of the above mentioned factors. CERCLA. For example, the need for national uniformity to carry out the federal superfund program has been clearly stated in United States v. Chem-Dyne, C-1-82-840, slip op. (S.D. Ohio, Oct. 11, 1983). In Chem-Dyne, the court stated that the purpose of CERCLA was to ensure the development of a uniform rule of law, and the court pointed out the dangers of a variable standard on hazardous waste disposal practices that are clearly interstate. (Slip op. at 11-13.) See also, Ohio v. Georgeoff, 562 F. Supp. 1300,

The general rule applied by federal courts to cases involving federal statutes is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." 20/ In applying this rule, "federal courts will look closely at the purpose of the federal statute to determine whether that statute places importance on the corporate form." 21/ Furthermore, where a statute contains specific directives on when the corporate entity may be disregarded and individuals held liable for the acts or debts of a valid corporation, courts must defer to the congressional mandate. 22/

Thus, even under general principles of corporation law, courts may consider the language of statute in determining whether to impose liability on corporate shareholders. Therefore, a court may use the statutory language of CERCLA either as a rationale for piercing a corporate veil (when corporation law is applied) or as an independent statutory basis for imposing liability (notwithstanding the general principles of corporation law). 23/

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19 (continued)/

1312 (N.D. Ohio, 1983); 126 Cong. Rec. H. 11,787 (Dec. 3, 1983).

The Chem-Dyne court stated that "the improper disposal or release of hazardous substances is an enormous and complex problem of national magnitude involving uniquely federal interests." (Slip op. at 11.) The court further noted that "a driving force toward the development of CERCLA was the recognition that a response to this pervasive condition at the State level was generally inadequate: and that the United States has a unique federal financial interest in the trust fund that is funded by general and excise taxes." (Slip op. at 11, citing, 5 U.S. Code Cong. & Ad. News at 6,142.) See also, 126 Cong. Rec. at H. 11,801.

20/ Capital Telephone Company, Inc. v. F.C.C., 498 F.2d 734, 738 (D.C. Cir. 1974).

21/ Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1981).

22/ Anderson v. Abbot, 321 U.S. 349, 365, 64 S.Ct. 531, 88 L.Ed 793 (1944).

23/ See discussion, supra, note 4.

Conclusion

The Agency should rely upon the statutory language of the Act as the basis for imposing liability on any person who controlled or directed the activities of a hazardous waste facility immediately prior to abandonment, or on any person who is a generator or transporter, notwithstanding the fact that that individual is a shareholder. Additionally, and alternatively, the Agency may rely on the general principles of corporation law to pierce the corporate veil by applying the current federal standard of public convenience, fairness, and equity. However, when seeking to pierce the corporate veil, the Agency should be prepared to apply the traditional dual test previously discussed in order to provide additional support for extending liability to corporate shareholders.

II. THE LIABILITY OF SUCCESSOR CORPORATIONS UNDER CERCLA

Background

Section 107(a)(2) of CERCLA extends liability for response costs to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." Situations may arise, however, where a corporation, which previously had owned or operated a hazardous waste facility, now transfers corporate ownership to another corporation. In such cases, it is important to determine whether the liability of the predecessor corporation's action regarding the disposal of hazardous waste is also transferred to the successor corporation. [24]/

Issue

What is the extent of liability for successor corporations under CERCLA?

24/ The discussion that follows is equally applicable to successor corporations of generators and transporters associated with hazardous substances released from CERCLA facility.

Summary

When corporate ownership is transferred from one corporation to another, the successor corporation is liable for the acts of its predecessor if the new corporation acquired ownership by merger or consolidation. If, however, the acquisition was through the sale or transfer of assets, the successor corporation is not liable unless:

a) The purchasing corporation expressly or impliedly agrees to assume such obligations;

b) The transaction amounts to a "de facto" consolidation or merger;

c) The purchasing corporation is merely a continuation of the selling corporation; or

d) The transaction was fraudulently entered into in order to escape liability.

Notwithstanding the above criteria, a successor corporation may be held liable for the acts of the predecessor corporation if the new corporation continues substantially the same business operations as the selling corporation.

Discussion

The liability of a successor corporation, according to traditional corporation law, is dependent on the structure of the corporate acquistion. 25/ Corporate ownership may be transferred in one of three ways: 1) through the sale of stock to another corporation; 2) by a merger or consolidation with another corporation; or 3) by the sale of its assets to another corporation. 26/ Where a corporation is acquired through the "purchase of all of its outstanding stock, the corporate entity remains intact and retains its liabilities, despite

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25/ See N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980).

26/ Note, Torts - Product Liability - Successor Corporation Strictly Liable for Defective Products Manufactured by the Predecessor Corporation, 27 Villanova L.R. 411, 412 (1980) (citations omitted) [hereinafter cited as Note, Torts - Product Liability].

the change of ownership." 27/ By the same token, a purchasing corporation retains liability for claims against the predecessor company if the transaction is in the form of a merger or consolidation. 28/ Where, however, the acquisition is in the form of a sale or other transferance of all of a corporation's assets to a successor corporation, the latter is not liable for the debts and liabilities of the predecessor corporation. 29/

There are four exceptions to this general rule of non-liability in asset acquisitions. A successor corporation is liable for the actions of its predecessor corporation if one of the following is shown:

1) The purchaser expressly or impliedly agrees to assume such obligations;

2) The transaction amounts to a "de facto" consolidation or merger;

3) The purchasing corporation is merely a continuation of the selling corporation; or

4) The transaction is entered into fraudulently in order to escape liability. 30/

The application of the traditional corporate law approach to successor liability has in many instances led to particularly

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27/ N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1157 (Super. Ct. Law Div. 1980).

28/ Id. A merger occurs when one of the combining corporations continues to exist; a consolidation exists when all of the combining corporations are dissolved and an entirely new corporation is formed.

29/ See N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980), citing, Jackson v. N.J. Manu. Ins. Co., 166 N.J. Super. 488, 454 (Super. Ct. App. Div. 1979), cert. denied, 81 N.J. 330 (1979).

30/ Id., Note, Torts - Product Liability, supra note, 26 at 413 n. 15-18.

harsh and unjust results, especially with respect to product liability cases. 31/ Therefore, in an effort to provide an adequate remedy and to protect injured consumers, courts have broadened the exemptions to the general rule by either modifying or recasting the "de facto" and "mere continuation" exemptions to include an element of public policy. 32/

More recently, however, the general rule has been abandoned altogether by several jurisdictions and, in essence, a new theory for establishing successor liability has evolved based upon the similarity of business operations. 33/ The new approach has been cast by one court in the following way:

> "[W]here...the successor corporation acquires all or substantially all of the assets of the predecessor corporation for cash and continues

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31/ See McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98 (Super. Ct. Law Div. 1970), aff'd per curiam, 118 N.J. Super. 480, 288 A.2d 585 (Super. Ct. App. Div. 1972); Kloberdanz v. Joy Mfg. Co., 288 F.Supp. 817 (D. Colo. 1968).

32/ See N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980); See also, Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975); Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1975); Turner v. Bituminous Gas Co., 397 Mich. 406, 244 N.W.2d 873 (1976).

33/ The theory has also been referred to as the "product-line" approach. In adopting this new approach to successor liability, some courts have abandoned the traditional rule of non-liability in asset acquisitions. See e.g., Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). Other courts have considered the new approach as an exemption to the general rule. See e.g., Daweko v. Jorgensen Steel Co., 290 Pa. Super. Ct. 15, 434 A.2d 106 (1981); Note, Torts - Product Liability, supra note, 26 at 418 n. 38. And, a few jurisdictions have rejected the new approach. See Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir. 1981).

> essentially the same manufacturing operation as the predecessor corporation the successor remains liable for the products liability claims of its predecessor." 34/

This theory of establishing successor liability differs from the "de facto" and "mere continuation" exemptions in that the new approach does not examine whether there is a continuity of corporate structure or ownership (e.g., whether the predecessor and successor corporation share a common director or officer). Instead, according to the new theory, liability will be imposed if the successor corporation continues essentially the same manufacturing or business operation as its predecessor corporation, even if no continuity of ownership exists between them. 35/

Until recently, this new approach for establishing successor liability was confined mostly to product liability cases. However, a recent New Jersey decision extended its application to the area of environmental torts. The Superior Court of New Jersey, in N.J. Transportation Department v. PSC Resources, Inc. 36/, rejected the traditional corporate approach to successor liability where the defendant and its predecessor corporation had allegedly discharged hazardous wastes. The court reasoned that the underlying policy rationale for abandonment of the traditional approach in defective product cases is applicable to environmental torts. Therefore, the court held that a corporation which purchased assets of another corporation and engaged in the practice of discharging hazardous waste into a state-owned lake is strictly liable for present and previous discharges made by itself and the predecessor corporation because the successor continued the same waste disposal practice as its predecessor.

34/ Ramirez v. Amstead Indus., Inc., 171 N.J. Super. 261, 278, 408 A.2d 818 (Super. Ct. App. Div. 1979), aff'd, 86 N.J. 332, 431 A.2d 811 (1981).

35/ See Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); some form of acquisition, however, is still required. See Meisal v. Modern Press, 97 Wash. 2d 403, 645 P.2d 693.

36/ 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980);

A similar "continuity of business operation" approach has been used in cases involving statutory violations. 37/ The Ninth Circuit, for example, held in a case involving the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA] 38/, that "EPA's authority to extend liability to successor corporations stems from the purpose of the statute it administers, which is to regulate pesticides to pr[illegible] the national environment." 39/ Furthermore, the court noted that "[t]he agency may pursue the objectives of the Act by imposing successor liability where it will facilitate enforcement of the Act." 40/ After establishing that there had been violations of FIFRA by the predecessor corporation, the court found that there was substantial continuity of business operation between the predecessor and successor corporations to warrant imposition of successor liability.

Although CERCLA is not primarily a regulatory statute, public policy considerations and the legislative history of the Act clearly indicate that federal law would be applicable to CERCLA situations involving successor liability. 41/ Therefore, it is reasonable to assume that courts would similarly adopt the federal "continuity of business operation approach" in cases involving CERCLA.

Conclusion

In establishing successor liability under CERCLA, the

37/ See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed2d 388 (1973); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

38/ 7 U.S.C. §136 et seq.

39/ Oner II, Inc. v. United States Environ. Protection Agency, 597 F.2d 184, 186 (9th Cir. 1979).

40/ Id.

41/ See discussion, supra, n. 19; One of Congress' primary concerns in enacting CERCLA was to alleviate the vast national health hazard created by inactive and abandoned disposal sites. See e.g., Remarks of Rep. Florio, 126 Cong. Rec. H. 9,154 (Sept. 19, 1980), 126 Cong. Rec. H. 11,773 (Dec. 3. 1980).

Agency should initially utilize the "continuity of business operation" approach of federal law. However, to provide additional support or an alternative basis for successor corporation liability, the Agency should be prepared to apply the traditional exemptions to the general rule of non-liability in asset acquisitions.

cc: A. James Barnes, General Counsel

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

Association of State and Territorial Solid Waste Management Officials
444 North Capitol Street, N.W. • Washington, D.C. 20001 • 202-624-5828

OCT 2 1984

MEMORANDUM

SUBJECT: EPA/State Relationship in Enforcement Actions for Sites on the National Priorities List

TO: EPA Regional Administrators
Directors, State Solid Waste Programs

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) empowers the Environmental Protection Agency to take certain enforcement actions to obtain responsible party cleanup of sites on the National Priorities List (NPL). CERCLA does not, however, address the enforcement authority or role of States. The result is that EPA and States have, to this point, proceeded essentially independently, despite common purposes. Needed site coordination has been lacking in many instances, and there have been occasional conflicts regarding policies and specific site results. The cause has not been disagreement over broad goals, but rather the absence of a basic framework for the relationship.

The attached EPA policy statement creates such a framework. It has been developed over the past year in close consultation with EPA's Regions, and with the States through the Association of State and Territorial Solid Waste Management Officials and the National Association of Attorneys General. Based on the recognition that EPA and the States share common interests, the policy stresses increased coordination and cooperation in enforcement actions, beginning with site planning and continuing through to selection and implementation of site remedy. It also resolves several operational issues in the current relationship: criteria are established for determining lead responsibility for enforcement sites; EPA's intent to begin providing funding assistance for remedial investigations and feasibility studies at State-lead enforcement sites is stated; the nature and scope of EPA and State involvement in the other's site activities are defined;

and provision is made for EPA/State site agreements through which EPA and State roles and responsibilities at enforcement sites can be agreed and documented to prevent later misunderstandings or misapprehensions.

Taken together, the actions described in the policy provide a solid foundation for an effective EPA/State relationship in pursuing enforcement actions at NPL sites. The absence of a statutory structure for the relationship has presented some problems in the past, and issues will continue to arise, but a mechanism has been created to allow EPA and States to deal with those issues in a way that can minimize conflict and improve the chances for acceptable solutions.

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Donald A. Lazarchik
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OSWER 9831.3

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

OCT 2 1984

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: EPA/State Relationship in Enforcement Actions for Sites on the National Priorities List

FROM: Lee M. Thomas
Assistant Administrator

TO: Regional Administrators

PURPOSE

One of the major goals of EPA enforcement activities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and of State enforcement activities under State authorities, is to obtain maximum possible and timely responsible party cleanup of sites on the National Priorities List (NPL). The purpose of this policy statement is to establish a base on which an effective EPA/State relationship can be constructed.

GENERAL GUIDING PRINCIPLES

The actions to be taken to establish a more effective relationship between EPA and the States in NPL site enforcement activities are guided by certain general principles. In brief, they are:

- Aggressive enforcement efforts on a broad scale are essential if EPA and the States are to make substantial progress toward dealing effectively with sites on the National Priorities List.

- State contributions to NPL site enforcement have been and will continue to be significant.

- Close cooperation and coordination between EPA and the States in planning and carrying out enforcement activities is necessary to obtain maximum effect and to avoid possible conflicts and duplication.

- States and EPA can maximize the number of enforcement actions by operating independently, conducting joint actions only where such action will best serve EPA and State interests.

- EPA and State enforcement policies and procedures need not be identical, but results of enforcement actions should be mutually acceptable.

- To the extent that State and EPA enforcement programs parallel each other in substantive respects, such as in the process for determining the appropriate extent of remedy, the need for oversight of, and direct involvement in, the other's activities will be minimized.

- Sharing of information between EPA and the States is key to developing a more effective relationship.

- State experience in hazardous waste enforcement must be recognized and accommodated in formulating agency policies.

- EPA will provide financial and technical support for State enforcement actions to the extent practicable and allowed by law.

- EPA remains ultimately responsible for cleanup at NPL sites, and retains the authority to take enforcement or response actions where needed.

BACKGROUND

From the survey of EPA Regional and headquarters officials conducted to assess the nature and extent of the current EPA/State relationship, and as a result of meetings for the same purpose with State representatives under the auspices of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and the National Association of Attorneys General (NAAG), it is clear that EPA and the States generally agree on broad goals in hazardous waste enforcement activities. It is clear also that frequently there are differences between EPA and States, and among States, in capabilities and in legal and technical approaches toward achieving these goals. These differences -- whether based in provisions of law, policy decisions, or resource constraints -- can lead to situations where a responsible party cleanup or settlement agreement obtained by EPA or a State does not satisfy the requirements or needs of the other.

Problems created in such situations are particularly acute when they arise in connection with NPL sites. First, EPA and the State each may be called on to explain or justify site results,

regardless of which had the lead enforcement responsibility. Second, EPA potentially could be put in the position of denying a State request to delete from the NPL a State-lead site, or of seeking to delete an agency-lead site in the face of State objections.

Uniformity of EPA and State legal and technical approaches is not essential to prevent these situations, nor is uniformity practicable. CERCLA is unusual among Federal environmental laws in that it does not create a mechanism for authorizing State enforcement programs on the basis of certain minimum legal and resource requirements that States must meet. Accordingly, there is no requirement that State legal provisions and technical procedures be consistent with Federal standards, nor are there the usual mechanisms for required State reporting and Federal oversight. This means that EPA and the States must establish a cooperative relationship in order to prevent, or at least minimize, those instances where differences in capability or approach result in a responsible party cleanup or settlement which is not mutually acceptable.

The purpose of this policy, therefore, is to seek to create an effective EPA/State relationship by taking certain actions to increase cooperation and coordination, and by establishing a mechanism for ongoing EPA/State efforts to address issues that may later arise.

SPECIFIC ISSUES IN THE CURRENT EPA/STATE RELATIONSHIP

To establish the context for a discussion of the specific actions that EPA and the States can take to build an effective relationship, it is important first to describe briefly the issues in the current relationship that have been identified through the survey of EPA personnel and the meetings with State representatives. These issues are divided among Coordination, State Enforcement Authorities and Procedures, and Resources.

Coordination. The absence of a comprehensive policy regarding EPA/State relations has left the Regional Offices and States essentially in the position of determining for themselves the nature and extent of their relationship. As a result, the level of coordination and cooperation varies among the Regions, and even from State-to-State within the same Region.

Further, limited guidance from EPA to the States on specific issues has contributed to the differences in policies and procedures that often exist among States and between States and EPA.

Problems created by the lack of a comprehensive EPA/State policy and by limited issue-specific guidance have been compounded by the absence of systematic information sharing between EPA and the States on the status of enforcement actions. Combined with the lack of procedures for coordinating case management, EPA and States therefore have had limited knowledge of the status of the other's activities. These factors have led to occasional delays and conflicts in administrative enforcement and litigation, and to the discovery of problems -- if discovered at all -- often late in the enforcement process.

State Enforcement Authorities and Procedures. Most States must rely either on broad State environmental or general statutes, or on State hazardous waste legislation enacted prior to CERCLA. As a consequence, few States have the full range of authorities available to EPA. While this has not prevented State enforcement actions against responsible parties, it has meant that in some instances actions have been limited in scope or coercive potential. For example, few States have provisions analogous either to Section 106 of the Act which provides for fines of up to $5,000 per day against any responsible party who willfully violates or fails or refuses to comply with an administrative order issued under the section, or to Section 107 of CERCLA which enables EPA to seek treble damages from any responsible party who fails without sufficient cause to comply with a Section 106 administrative order.

With regard to enforcement procedures, two particular issues have arisen. First, some States work informally with responsible parties, which can lead to arrangements that are difficult to enforce successfully. Second, State negotiations with responsible parties often are conducted without a time limit, and in some instances involve one round led by the administrative agency and a second round led by the attorney general's office. In either instance, negotiations easily can become protracted.[1/] In these circumstances, it is often difficult to assess the effectiveness or the likelihood of success of State enforcement efforts or negotiations. This uncertainty makes it difficult for EPA to define, or to plan for implementation of, its role at the site in a manner that is sensitive both to State concerns and to public concerns about achieving response objectives at the site. Further, this type of situation can create EPA/State conflicts if site or programmatic concerns cause EPA to conclude that effective enforcement action is required on an expedited or more certain schedule.

1/ EPA's experience with negotiations without time limits resulted in the agency developing a policy which targets negotiations for completion within 60 to 120 days, unless more time is needed to resolve complex issues with responsible parties who in the agency's view are negotiating in good faith.

Resources. Funding for State hazardous waste enforcement programs, whether from appropriations or in some instances from fees and taxes, ranges from negligible to substantial. The norm, however, is less than adequate. A survey conducted by ASTSWMO in mid-1983 showed that anticipated FY 1984 increases in funding among the responding 47 States still would leave these States, in the aggregate, with staffing levels some 40 percent short of optimum. The survey did not categorize technical and administrative personnel resources as either program- or enforcement-specific, but this distinction is not significant, because enforcement activities depend extensively on technical resources, and the survey indicates overall conditions.

Limited funding has had a particularly negative effect with respect to the availability of certain necessary disciplines. The ASTSWMO survey indicates that the number of State-employed engineers (civil, sanitary, and environmental), chemists, geologists/hydrologists, and soil scientists is less than half the number needed. No similar data exist with respect to legal resources available to State administrative agencies and attorney general offices, but discussions with State officials indicate that more resources are necessary, particularly with regard to para-legal personnel, investigators, and administrative support.

Limitations in State funding also have been felt with regard to laboratory and analytical capabilities, training opportunities, and the adequacy of case preparation and documentation.

The net effect of these resource limitations is to constrain the scope of State enforcement activities, particularly with respect to the number of actions that can be taken, but also in part with respect to the detail of field investigation and site analysis.

ACTIONS TO BE TAKEN

As is clear from the summary discussion of issues confronting EPA and the States in the current relationship, some issues cannot be resolved through this statement of policy. For example, funding assistance for additional personnel resources needed by the States is beyond the current ability of EPA to provide, and any inadequacies that may exist in State legal authorities is a matter for States to resolve on an individual basis. However, most of the issues can be resolved by EPA and the States through the actions described in the remaining sections of this document.

These actions are based not only on the general guiding principles stated earlier, but also on a specific operating consideration. EPA is responsible for listing sites on the National Priorities List and for deleting sites that have been cleaned up appropriately. This means that EPA has a responsibility to assure to the extent possible that human and environmental risks at NPL sites are eliminated or at least reduced to acceptable levels. Sites cannot be deleted without such assurances.

The actions to be taken, described in the remainder of this document, address:

- funding assistance to States,
- criteria for determining lead responsibility for enforcement sites,
- enforcement planning activities,
- extent of EPA and State involvement in the other's activities where the other has the enforcement lead,
- development of EPA/State Enforcement Site Agreements to clearly delineate the EPA/State relationship at each enforcement site,
- mechanisms for sharing enforcement information,
- State involvement in the development of EPA enforcement policies and guidance for NPL sites, and
- ongoing cooperation with States through ASTSWMO and NAAG to deal with issues that arise in the future.

Funding to Assist State Enforcement Activities. It is clear from the ASTSWMO survey that States require a broad range of assistance to support needed qualitative and quantitative increases in State enforcement activity. Consequently, the issue of enforcement funding assistance from EPA was a major focus of an agency work group that was formed to consider ways in which the scope of multi-site cooperative agreements might be expanded. ASTSWMO and NAAG were represented on the work group.

The EPA Office of General Counsel (OGC) concluded that CERCLA authorizes the agency to fund remedial investigations and feasibility studies at State-lead enforcement sites. Accordingly, the work group developed guidance to incorporate these activities in multi-site and individual site cooperative agreements. This guidance will be issued as part of an addendum to the manual State Participation in the Superfund Remedial Program. Funding of RI/FSs at selected State-lead enforcement sites will begin in FY 1985.

However, the Office of General Counsel also concluded that CERCLA does not authorize funding of other State enforcement costs. In its opinion dated July 20, 1984, OGC stated that "the Superfund eligibility of State enforcement costs is limited to those activities authorized by section 104(b). Section 104(b) authority does not extend to litigation or other efforts to compel private party cleanups, or to monitoring or community relations activities associated with such cleanups. Payment of these State enforcement-related costs will require more explicit statutory authority than exists in section 104."

Site Classification. Current interim guidance for classifying sites as Fund- or enforcement-lead establishes criteria for making classification determinations. It does not, however, provide specifically for State involvement in the process. While some Regions may consult with States in making classification decisions, there has been no consistent effort in this regard. The result is that there have been occasions where sites that have been classified as Fund-lead might properly have been classified instead as an enforcement site, based on information and data available to the State, with the State assuming the lead responsibility. Accordingly, Regions should consult with States in classifying sites to ensure that fuller information is considered before decisions are made. The final site classification guidance will incorporate appropriate provisions.

The Regions and States should jointly make determinations as to whether an enforcement site is to be EPA- or State-lead, or "shared-lead" where both the Region and the State will pursue site enforcement. A site should be classified as EPA-lead or State-lead where direct participation in enforcement actions on the part of the other is not anticipated or is expected to be minimal. A site should be classified as shared-lead where the Region and State determine that joint enforcement action can best achieve effective site cleanup. Regardless of a site's classification, the Regions and States should adhere to the provisions described later in this document regarding consultation and cooperation in the course of enforcement activities.

In determining lead responsibility for enforcement sites, the Regions and States should apply the following considerations:

(1) past site history, i.e., whether there has been EPA or State enforcement activity at the site;

(2) the effectiveness of enforcement actions to date;

(3) the strength of legal evidence to support EPA or State action;

(4) the severity of problems at the site;

(5) the national significance of legal or technical issues presented by the site; and

(6) the availability of EPA and State legal authorities and personnel and funding resources adequate to enable effective action.

A site initially classified as State-lead on the basis of the above considerations will be classified finally as State-lead if the State assures that it will:

(1) prepare, or have the responsible party prepare, an RI/FS (or equivalent as agreed by the Region and the State),[2/] and provide for public comment, in accordance with EPA guidance;

(2) conduct negotiations with responsible parties formally (e.g., culminating in the issuance of an enforceable order, decree, or equivalent) and, to the extent practicable, within agreed time limits;

(3) provide for public comment on settlements, voluntary and negotiated cleanups, and consent orders and decrees in accordance with EPA guidance;

(4) pursue and ensure implementation of a remedy that is at least as protective of public health, welfare and the environment as a cost-effective remedy as that term is defined in the National Contingency Plan; and

(5) keep EPA informed of its activities, including consulting with the Regional Office when issues arise that do not have clear-cut solutions.

These assurances should be incorporated in the EPA/State Enforcement Site Agreement (described later in this document).

2/ In accordance with agency guidance issued on March 27, 1984, regarding procedures for deleting sites from the NPL, documentation to support deleting a State-lead enforcement site "should include the State feasibility study (if one has been prepared), . . . or a copy of an EPA or State study, or an EPA or State review of a responsible party study or documents, used by the Region to determine that . . . no further cleanup is appropriate." To the extent that a State or responsible party conducts an RI/FS in accordance with agency guidance, the deletion process for State-lead enforcement sites will be simplified.

Where a State is unable to provide the above assurances in connection with a site that initially has been classified as State-lead, the site cannot finally be designated as State-lead. In such instances, consideration should be given to classifying the site as shared-lead so that State enforcement interests can be directly represented in site actions.

Finally, all current EPA- and State-lead enforcement site designations should be reviewed by the Regions and States in light of these criteria and modified as necessary.

Planning. In accordance with recent agency guidance, site management plans are to be developed for all sites on the National Priorities List. As indicated [illegible] guidance, site management plans are intended principally [illegible] dynamic planning tools for allocating resources and estimating the timing of technical and legal actions. For EPA-lead enforcement sites, the Region should develop the plan in consultation with both the State administrative agency and the State attorney general's office.[3/] Such consultation is necessary to ensure early that interested State officials are aware of the general scheme and timing of EPA's intended actions. For State-lead enforcement sites, the State should develop the plan in consultation with the Region, and obtain the concurrence of the State attorney general's office before the plan is adopted. Site management plans for shared-lead sites should be developed jointly.

Extent of EPA Involvement in State-lead Enforcement Actions. There are two aspects to EPA involvement in State-lead actions. The first concerns the type of assistance and support that the Region agrees to provide. The second concerns actions that the Region subsequently determines to be necessary in the course of State enforcement activity.

Among the types of assistance and support that Regions can provide are review of technical and legal documents, making contractor assistance available, providing direct technical assistance through Regional personnel, and providing expert witness testimony through EPA or contractor personnel. Regions should plan to review technical and legal documents associated with State-lead enforcement sites; other assistance and support should be provided to the extent that resources allow. Appropriate provisions should be incorporated in the EPA/State Enforcement Site Agreement.

3/ In some States, the attorneys who prosecute enforcement actions are assigned directly to the program offices. In this situation, involvement of the attorney general's office may be unnecessary. Therefore, statements made at various places in this document referring to consultation with or concurrence of the attorney general's office should be read in this context.

Where a State does not want EPA assistance in its site activities, particularly with regard to review of technical and legal documents, the Region should advise the State that it must accept the risk that cleanup may later prove to be inappropriate. In such an instance, the site could not be removed from the NPL, and subsequent EPA enforcement action might be necessary.

Regions should continually monitor State-lead enforcement activities. Where the Region determines that the terms of the EPA/State Enforcement Site Agreement are not being followed or that the State is not making effective or timely progress, the Region should consider involving the agency in site activities to a greater degree than previously agreed. Potential actions include taking enforcement action in lieu of State action, and assuming lead responsibility for the site.

Determinations regarding whether greater EPA involvement is necessary, and the nature of response, will be made jointly by the Region and the Office of Waste Programs Enforcement in accordance with the following considerations:

(1) the State's willingness and ability to correct the problem;

(2) the availability of EPA resources;

(3) the likely efficacy of EPA action; and

(4) the significance of agency inaction.

Where Federal enforcement action is contemplated, the decision to pursue such action will be made also in conjunction with the Office of Enforcement and Compliance Monitoring - Waste.

Extent of State Involvement in EPA-lead Enforcement Actions. State interest in the conduct and outcome of EPA enforcement actions must be recognized, and State experience and expertise accommodated in EPA's site activities to the extent possible. While mechanisms are created in various sections of this policy for coordinating the planning and execution of enforcement actions, and for keeping States informed of the status of EPA actions, specific provision also needs to be made to consider State interests, experience, and expertise in the course of EPA enforcement activities.

Accordingly, Regions should consult and, wherever practicable, seek agreement with the States in the design and conclusions of RI/FSs, in the identification of the recommended remedy to be pursued with responsible parties, and in the determination of the final remedy. There may be occasions where time or litigative constraints preclude efforts to consult or seek agreement with a State. In such cases, the Region should proceed with its actions,

but also should inform the State of the circumstances as soon as possible. Situations also may arise where a State is unable to agree with a particular action. In these instances, to the extent that time and other considerations permit, the Region should seek to resolve the issues which prevent State agreement. However, absence of State agreement initially, or inability subsequently to resolve any outstanding issues, is not a bar to necessary and timely action by the Region or to determination by EPA of appropriate action to be taken. EPA recognizes that a State may seek additional remedy through its own authorities if the State disagrees with an EPA action.

EPA/State Enforcement Site Agreements. Once lead responsibility for an enforcement site has been finally determined, a site management plan has been prepared, and the extent of anticipated EPA and State involvement in the site determined, the Region and State should develop an EPA/State Enforcement Site Agreement. The Agreement will delineate the roles and responsibilities of EPA and the State, lead officials or contacts, mechanisms for coordination and communication, and any other arrangements or understandings, including the applicability of State standards.4/

The purpose of the Agreement is to ensure that the extent of the EPA/State relationship at each site is fully thought out and documented to prevent later misapprehensions or misunderstandings. (Detailed guidance for preparing the Agreements will be developed in consultation with ASTSWMO and NAAG and issued separately. In developing the guidance, consideration will be given to making provision for multiple sites to be incorporated in a single Agreement.)

Sharing Enforcement Information. As stated previously in this policy, the absence of a system for sharing enforcement status information often has left EPA and the States with little knowledge of the actions of the other.

Development of site management plans can be an effective starting point. Since a site management plan is to be prepared through consultation between the Region and the State, and since it must be updated periodically, a mechanism has been created for beginning and continuing site-specific discussion and information sharing. This applies equally to EPA-lead and State-lead enforcement sites.

4/ EPA will endeavor to incorporate State standards in the selected remedy where the State standards are consistent with a cost-effective remedy as defined in the NCP. Accordingly, Regions and States should explore the applicability of State standards and incorporate the outcome in the Site Agreement. Where the Region and State are unable to agree, the State may choose to pursue independent action under its own authorities.

In addition to EPA contacts with States to keep site management plans current, the Region and State officials, including representatives of the State's attorney general, should meet periodically to review the status of EPA and State actions. The review should concentrate on NPL sites, including the status of enforcement and responsible party RI/FS activities, but potential NPL sites may be addressed as well. Frequency of these meetings is a matter for Regional and State discretion, but should be no less often than twice a year. Further, the Regions should contact appropriate State agencies regularly to advise them of impending actions and keep them abreast of developments, and States similarly should inform the Region of impending actions and developments in State enforcement activities. Arrangements regarding these contacts and meetings should be incorporated in EPA/State Enforcement Site Agreements.

Finally, agency guidance in two areas creates additional mechanisms to keep States informed of EPA's enforcement activities and to allow State comment. The pending community relations guidance provides for a public comment period both on administrative orders on consent and on remedial investigations and feasibility studies, including those prepared by EPA or responsible parties for Federal enforcement-lead sites. (Both provisions are among changes to be proposed in the National Contingency Plan.) Further, guidance implementing agency rules regarding intergovernmental review of certain agency actions provides up to 60 days for States to comment on the agency's intent to initiate RI/FS activities. While responsible party RI/FS activities are not included in the intergovernmental review process because they do not constitute Federal actions, they nonetheless will be subject to State review in accordance with the impending community relations guidance.

In implementing the community relations review procedures, the Region should assure effective opportunity for State comment on consent orders and decrees (the latter subject to public comment by Department of Justice regulations), and agency and responsible party RI/FSs, by providing copies of the documents directly to interested State administrative agencies and to the State attorney general's office. These activities, however, should not be regarded as a substitute for the extensive consultation and coordination with States described earlier in this policy. State interests are to be considered, and accommodated to the extent practicable, prior to public comment periods for agency actions.

Development of Policies and Guidance. The agency is proceeding to develop enforcement policies and guidance on a broad range of NPL site issues, and will continue to do so for some time into the future. The value of increased State involvement is clear, as is the need for timely distribution of policy and guidance documents to the States.

Wherever practicable, EPA will provide opportunity to comment on draft NPL site enforcement policies and guidance documents that are of interest to States. The opportunity will be made available either to all States through the Regions when time permits or, when time constraints are particularly acute, to representative States through the Association of State and Territorial Solid Waste Management Officials and the National Association of Attorneys General. Further, for those issues which will require substantial effort to study and resolve, EPA will seek to increase State participation through early consultation and, where appropriate, by including State representatives on any study or work groups that may be formed.

Once policy and guidance documents have been made final, the Regions should, upon receipt, provide copies to State administrative agencies and attorney general offices, and make arrangements for briefing State officials where appropriate.

EPA has an interest also in State hazardous waste enforcement policies and guidance, and encourages States to consult with the Regional Offices in their development and to provide to the Regions copies of final documents.

FUTURE EFFORTS

EPA intends to continue to work directly with States, and through the Association of State and Territorial Solid Waste Management Officials and the National Association of Attorneys General, to allow frequent and regular meetings of State representatives and agency officials. Through these arrangements, EPA and the States will be able to continue the dialogue, begun in the course of developing this policy document, to find solutions to issues that arise in the course of CERCLA and related State enforcement programs.

1985

ENVIRONMENTAL PROTECTION AGENCY

[SW-FRL 2770-4]

Hazardous Waste Enforcement Policy

AGENCY: Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The Agency is publishing today its interim CERCLA settlement policy in order to solicit public comment on it. The policy governs private party cleanup and contribution proposals under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund"). The Agency is also publishing as an attachment a more detailed discussion of issues raised by this policy.

DATE: Comments must be provided on or before April 8, 1985.

FOR FURTHER INFORMATION CONTACT: Debbie Wood, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, WH-527, 401 M St. SW., Washington D.C. 20460, (202) 382-4829.

SUPPLEMENTARY INFORMATION: This interim policy describes the approach the Environmental Protection Agency is now taking in evaluating private party settlement proposals for cleanup of hazardous waste sites or contribution to funding of response action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). It reflects our recent reevaluation of Agency settlement policies. The policy is also generally applicable to imminent hazard enforcement actions under section 7003 of RCRA.

The Agency's hazardous waste settlement policies have resulted in numerous comprehensive private party cleanups, and in stronger settlements with private parties. Some potentially responsible parties (PRPs), however, have argued that Agency settlement policies have fostered litigation, and discouraged voluntary private party cleanup actions. They have suggested a number of changes, such as expanded releases from liability for PRPs and routine provision to PRPs of protection against possible contribution actions by non-settling parties. These suggestions have been made with the expectation that such changes would substantially encourage voluntary response.

The Agency's interim policy on CERCLA case settlement has therefore been amended to:

—Include additional incentives for private party cleanup;
—Articulate policy decisions previously made on a case by case basis in evaluating particular settlement offers;
—Address additional policy concerns, including releases from liability and contribution protection; and,
—Include a statement of the general principles governing EPA's CERCLA enforcement program.

This policy sets forth the general principles governing private party settlement under CERCLA, and specific procedures for Regions and Headquarters to use in assessing private party settlement proposals. It addresses negotiations concerning conduct of or contribution to the remedy determined by the Agency as a result of the remedial investigations and feasibility studies. The following topics are covered:

1. General principles for EPA review of private-party cleanup proposals;
2. Management guidelines for negotiation;
3. Factors governing release of information to potentially responsible parties;
4. Criteria for assessing settlement offers;
5. Partial cleanup proposals;
6. Contribution among responsible parties;
7. Releases and covenants not to sue;
8. Targets for litigation;
9. Timing for negotiations;
10. Management and review of settlement negotiations.

The policy does not explicitly address PRP participation in the Agency's selection of remedies for private party cleanups. That topic was addressed in a memorandum from Lee Thomas and Courtney Price, entitled "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies under CERCLA" (March 20, 1984).

The policies and procedures set forth in the interim policy are guidance to Agency and other government employees. The policy sets forth enforcement priorities and procedures, and internal procedures which are not appropriate or necessary subjects for rulemaking. Thus, the policy does not constitute rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable by any other person. The government may, therefore, take action that is at variance with policies and procedures contained in this document.

The Agency is publishing and soliciting comment on this interim policy for a number of reasons. The Agency recognizes that the public is very concerned with hazardous waste enforcement. We believe that this policy will substantially benefit the public by encouraging responsible parties to undertake appropriate and long term remedies through settlements. We also believe that the policy will yield better results if the public and potentially responsible parties understand the policy and our reasons for adopting it.

This policy was originally drafted in December, 1983, has been the subject of extensive review and evaluation by the Agency and the Department of Justice. It is therefore being published as interim policy. We will reevaluate this policy in light of our working experience with implementing it, and the public comments that we receive.

The Agency statement of policy follows. A more detailed discussion of issues for public comment is included in the Appendix.

Dated: January 25, 1985.

Jack W. McGraw,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

Dated: January 28, 1985.

Courtney M. Price,

Assistant Administrator, Office of Enforcement and Compliance Monitoring.

Memorandum

December 5, 1984.

Subject: Interim CERCLA Settlement Policy

From: Lee M. Thomas, Assistant Administrator Office of Solid Waste and Emergency Response, Courtney M. Price, Assistant Administrator Office of Enforcement and Compliance Monitoring F. Henry Habicht, II, Assistant Attorney General Land and Natural Resources Division, Department of Justice

To: Regional Administrators, Regions I–X

This memorandum sets forth the general principles governing private party settlements under CERCLA, and specific procedures for the Regions and Headquarters to use in assessing private party settlement proposals. It addresses the following topics:

1. general principles for EPA review of private-party cleanup proposals;
2. management guidelines for negotiation;
3. factors governing release of information to potentially responsible parties;
4. criteria for evaluating settlement offers;
5. partial cleanup proposals;
6. contribution among responsible parties;

7. release and convenants not to sue:
8. targets for litigation:
9. timing for negotiations:
10. management and review of settlement negotiations.

Applicability

This memorandum incorporates the draft Hazardous Waste Case Settlement Policy, published in draft in December of 1983. It is applicable not only to multiple party cases but to all civil hazardous waste enforcement cases under Superfund. It is generally applicable to imminent hazard enforcement actions under section 7003 of RCRA.

This policy establishes criteria for evaluating private party settlement proposals to conduct or contribute to the funding of response actions, including removal and remedial actions. It also addresses settlement proposals to contribute to funding after a response action has been completed. It does not address private-party proposals to conduct remedial investigations and feasibility studies. These proposals are to be evaluated under criteria established in the policy guidance from Lee M. Thomas, Assistant Administrator, Office of Solid Waste and Emergency Response, and Courtney Price, Assistant Administrator, Office of Enforcement and Compliance Monitoring entitled "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies under CERCLA". (March 20, 1984)

I. General Principles

The Government's goal in implementing CERCLA is to achieve effective and expedited cleanup at as many uncontrolled hazardous waste facilities as possible. To achieve this goal, the Agency is committed to a strong and vigorous enforcement program. The Agency has made major advances in securing cleanup at some of the nation's worst hazardous waste sites because of its demonstrated willingness to use the Fund and to pursue administrative and judicial enforcement actions. In addition, the Agency has obtained key decisions, on such issues as joint and several liability, which have further advanced its enforcement efforts.

The Agency recognizes, however, that Fund-financed cleanups, administrative acton and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites. The Agency is therefore re-evaluating its settlement policy, in light of three years experience with negotiation and litigation of hazardous waste cases, to remove or minimize if possible the impediments to voluntary cleanup.

As a result of this reassessment, the Agency has identified the following general principles that govern its Superfund enforcement program:

- The goal of the Agency in negotiating private party cleanup and in settlement of hazardous waste cases has been and will continue to be to obtain complete cleanup by the responsible parties, or collect 100% of the costs of the cleanup action.
- Negotiated private party actions are essential to an effective program for cleanup of the nation's hazardous waste sites. An effective program depends on a balanced approach relying on a mix of Fund-financed cleanup, voluntary agreements reached through negotiations, and litigation. Fund-financed cleanup and litigation under CERCLA will not in themselves be sufficient to assure the success of this cleanup effort. In addition, expeditious cleanup reached through negotiated settlements is preferable to protracted litigation.
- A strong enforcement program is essential to encourage voluntary action by PRPs. Section 106 actions are particularly valuable mechanisms for compelling cleanups. The effectiveness of negotiation is integrally related to the effectiveness of enforcement and Fund-financed cleanup. The demonstrated willingness of the Agency to use the Fund to clean up sites and to take enforcement action is our most important tool for achieving negotiated settlements.
- The liability of potentially responsible parties is strict, joint and several, unless they can clearly demonstrate that the harm at the site is divisible. The recognition on the part of responsible parties that they may be jointly and severally liable is a valuable impetus for these parties to reach the agreements that are necessary for successful negotiations. Without such an impetus, negotiations run a risk of delay because of disagreements over the particulars of each responsible party's contribution to the problems at the site.
- The Agency recognizes that the factual strengths and weaknesses of a particular case are relevant in evaluating settlement proposals. The Agency also recognizes that courts may consider differences among defendants in allocating payments among parties held jointly and severally liable under CERCLA. While these are primarily the concerns of PRPs, the Agency will also consider a PRP's contribution to problems at the site, including contribution of waste, in assessing proposals for settlement and in identifying targets for litigation.
- Section 106 of CERCLA provides courts with jurisdiction to grant such relief as the public interest and the equities of the case may require. In assessing proposals for settlement and identifying targets for litigation, the Agency will consider aggravating and mitigating factors and appropriate equitable factors.
- In many circumstances, cleanups can be started more quickly when private parties do the work themselves, rather than provide money to the Fund. It is therefore, preferable for private parties to conduct cleanups themselves, rather than simply provide funds for the States or Federal Government to conduct the cleanup.
- The Agency will create a climate that is receptive to private party cleanup proposals. To facilitate negotiations, the Agency will make certain information available to private parties. PRPs will normally have an opportunity to be involved in the studies used to determine the appropriate extent of remedy. The Agency will consider settlement proposals for cleanup of less than 100% of cleanup activities or cleanup costs. Finally, upon settling with cooperative parties, the government will vigorously seek all remaining relief, including costs, penalties and treble damages where appropriate, from parties whose recalcitrance made a complete settlement impossible.
- The Agency anticipates that both the Fund and private resources may be used at the same site in some circumstances. When the Agency settles for less than 100% of cleanup costs, it can use the Fund to assure that site cleanup will proceed expeditiously, and then use to recover these costs from non-settling responsible parties. Where the Federal government accepts less than 100% of cleanup costs and no financially viable responsible parties remain, Superfund monies may be used to make up the difference.
- The Agency recognizes the value of some measure of finality in determinations of liability and in settlements generally. PRPs frequently want some certainty in return for assuming the costs of cleanup, and we recognize that this will be a valuable incentive for private party cleanup. PRPs frequently seek a final determination of liability through contribution protection, releases or covenants not to sue. The Agency will consider releases from liability in appropriate situations, and

will also consider contribution protection in limited circumstances. The Agency will also take aggressive enforcement action against those parties whose recalcitrance prevents settlements. In bringing cost recovery actions, the Agency will also attempt to raise any remaining claims under CERCLA section 106, to the extent practicable.

The remainder of this memorandum sets forth specific policies for implementing these general principles.

Section II sets forth the management guidelines for negotiating with less than all responsible parties for partial settlements. This section reflects the Agency's willingness to be flexible by considering offers for cleanup of less than 100% of cleanup activities or costs.

Section III sets forth guidelines on the release of information. The Agency recognizes that adequate information facilitates more successful negotiations. Thus, the Agency will combine a vigorous program for obtaining the data and information necessary to facilitate settlements with a program for releasing information to facilitate communications among responsible parties.

Sections IV and V to discuss the criteria for evaluating partial settlements. As noted above, in certain circumstances the Agency will entertain settlement offers from PRPs which extend only to part of the site or part of the costs of cleanup at a site. Section IV of this memo sets forth criteria to be used in evaluating such offers. These criteria apply to all cases. Section V sets forth the Agency's policy concerning offers to perform or pay for discrete phases of an approved cleanup.

Sections VI and VII relate to contribution protection and releases from liability. Where appropriate, the Agency may consider contribution protection and limited releases from liability to help provide some finality to settlements.

Section VIII sets forth criteria for selecting enforcement cases and identifying targets for litigation. As discussed above, effective enforcemnt depends on careful case selection and the careful selection of targets for litigation. The Agency will apply criteria for selection of cases to focus sufficient resources on cases that provide the broadest possible enforcemnt impact. In addition, targets for litigation will be identified in light of the willingness of parties to perform voluntary cleanup, as well as conventional litigation management concerns.

Section IX sets forth the requirements governing the timing of negotiations and section X the provision for Headquarters review. These sections address the need to provide the Regions with increased flexibility in negotiations and to change Headquarters review in order to expedite site cleanup.

II. Management Guidelines for Negotiation

As a guideline, the Agency will negotiate only if the initial offer from PRPs constitutes a substantial proportion of the costs of cleanup at the site, or a substantial portion of the needed remedial action. Entering into discussion for less than a substantial proportion of cleanup costs or remedial action needed at the site, would not be an effective use of government resources. No specific numerical threshold for initiating negotiations has been established.

In deciding whether to start negotiations, the Regions should weight the potential resource demands for conducting negotiations against the likelihood of getting 100% of costs or a complete remedy.

Where the Region proposes to negotiate for a partial settlement involving less than the total costs of a cleanup, or a complete remedy, the Region should prepare as part of its Case Negotiations Strategy a dreaft evaluation of the case using the settlement criteria identified in section IV. The draft should discuss how each of the factors in section IV applies to the site in question, and explain why negotiations for less than all of the cleanup costs, or a partial remedy, are appropriate. A copy of the draft should be forwarded to Headquarters. The Headquarters review will be used to identify major issues of national significance or issues that may involve significant legal precedents.

In certain other categories of cases, it may be appropriate for the Regions to enter into negotiations with PRPs, even though the offers from PRPs do not represent a substantial portion of the costs of cleanup. These categories of cases include:

- administrative settlements of cost recovery actions where total cleanup costs were less than $200,000;
- claims in bankruptcy;
- administrative settlements with *de minimis* contributors of wastes.

Actions subject to this exceptions are administrative settlements of cost recovery cases where all the work at the site has been completed and all costs have been incurred. The figure of $200,000 refers to all of the costs of cleanup. The Agency is preparing more detailed guidance on the appropriate form of such settlement agreements, and the types of conditions that must be included.

Negotiation of claims in bankruptcy may involve both present owners, where the United States may have an administrative costs claim, and other parties such as past owners or generators, where the United States may be an unsecured potential creditor. The Regions should avoid becoming involved in bankruptcy proceedings if there is little likelihood of recovery, and should recognize the risks involved in negotiating without creditor status. It may be appropriate to request DOJ filing of a proof of claim. Further guidance is provided in the Memorandum from Courtney Price entitled "Information Regarding CERCLA Enforcement Against Bankrupt Parties," dated May 24, 1984.

In negotiating with *de minimis* parties, the Regions should limit their efforts to low volume, low toxicity disposers who would not normally make a significant contribution to the costs of cleanup in any case.

In considering settlement offer from *de minimis* contributors, the Region should normally focus on achieving cash settlements. Regions should generally not enter into negotiations for full administrative or judicial settlements with releases, contribution protection, or other protective clauses. Substantial resources should not be invested in negotiations with *de minimis* contributors, in light of the limited costs that may be recovered, the time needed to prepare the necessary legal documents, the need for Headquarters review, potential *res judicata* effects, and other effects that *de minimis* settlements may have on the nature of the case remaining to the Government.

Partial settlements may also be considered in situations where the unwillingness of a relatively small group of parties to settle prevents the development of a proposal for a substantial portion of costs or the remedy. Proposals for settlement in these circumstances should be assessed under the criteria set forth in section IV.

Earlier versions of this policy included a threshold for negotiations, which provided that negotiations should not be commenced unless an offer was made to settle for at least 80% of the costs of cleanup, or of the remedial action. This threshold has been eliminated from the final version of this policy. It must be emphasized that elimination of this threshold does not mean that the Agency is therefore more willing to accept offers for partial settlement. The objective of the Agency is still to obtain complete cleanup by PRPs, or 100% of the costs of cleanup.

III. Release of Information

The Agency will release information concerning the site to PRPs to facilitate discussions for settlement among PRPs. This information will include:

—Identity of notice letter recipients:
—Volume and nature of wastes to the extent identified as sent to the site:
—Ranking by volume of material sent to the site, if available.

In determining the type of information to be released, the Region should consider the possible impacts on any potential litigation. The Regions should take steps to assure protection of confidential and deliverative materials. The Agency will generally not release actual evidentiary material. The Region should state on each released summary that it is preliminary, that it was furnished in the course of compromise negotiations (Fed. Rules of Evidence 408), and that it is not binding on the Federal Government.

This information release should be preceded by and combined with a vigorous program for collecting information from responsible parties. It remains standard practice for the Agency to use the information gathering authorities of RCRA and CERCLA with respect to all PRPs at a site. This information release should generally be conditioned on a reciprocal release of information by PRPs. The information request need not be simultaneous, but EPA should receive the information within a reasonable time.

IV. Settlement Criteria

The objective of negotiations is to collect 100% of cleanup costs or complete cleanup from responsible parties. The Agency recognizes that, in narrowly limited circumstances, exceptions to this goal may be appropriate, and has established criteria for determining where such exceptions are allowed. Although the Agency will consider offers of less than 100% in accordance with this policy, it will do so in light of the Agency's position, reinforced by recent court decisions, that PRP liability is strict, joint and several unless it can be shown by the PRPs that injury at a site is clearly divisible.

Based on a full evalution of the facts and a comprehensive analysis of all of the listed criteria, the Agency may consider accepting offers of less than 100 percent. Rapid and effective settlement depends on a thorough evaluation, and an aggressive information collection program is necessary to prepare effective evaluations. Proposals for less than total settlement should be assessed using the criteria identified below

1. Volume of Wastes Contributed to Site by Each PRP

Information concerning the volume of wastes contributed to the site by PRPs should be collected, if available, and evaluated in each case. The volume of wastes is not the only criterion to be considered, nor may it be the most important. A small quantity of waste may cost proportionately more to contain or remove than a larger quantity of a different waste. However, the volume of waste may contribute significantly and directly to the distribution of contamination on the surface and subsurface (including groundwater), and to the complexity of removal of the contamination. In addition, if the properties of all wastes at the site are relatively equal, the volume of wastes contributed by the PRPs provides a convenient, easily applied criterion for measuring whether a PRP's settlement offer may be reasonable.

This does not mean, however, that PRPs will be required to pay only their proportionate share based on volume of contribution of wastes to the site. At many sites, there will be wastes for which PRPs cannot be identified. If identified, PRPs may be unable to provide funds for cleanup. Private party funding for cleanup of those wastes would, therefore, not be available if volumetric contribution were the only criteria.

Therefore, to achieve the the Agency's goal of obtaining 100 percent of cleanup or the cost of cleanup, it will be necessary in many cases to require a settlement contribution greater than the percentage of wastes contributed by each PRP to the site. These costs can be obtained through the application of the theory of joint and several liability where the harm is indivisible, and through application of these criteria in evaluating settlement proposals.

2. Nature of the Wastes Contributed

The human, animal and environmental toxicity of the hazardous substances contributed by the PRPs, its mobility, persistence and other properties are important factors to consider. As noted above, a small amount of wastes, or a highly mobile waste, may cost more to clean up, dispose, or treat than less toxic or relatively immobile wastes. In addition, any disproportionate adverse effects on the environment by the presence of wastes contributed by those PRPs should be considered.

If a waste contributed by one or more of the parties offering a settlement disproportionately increases the costs of cleanup at the site, it may be appropriate for parties contributing such waste to bear a larger percentage of cleanup costs than would be the case by using solely a volumetric basis.

3. Strength of Evidence Tracing the Wastes at the Site to the Settling Parties

The quality and quantity of the Government's evidence connecting PRPs to the wastes at the site obviously affects the settlement value of the Government's case. The Government must show, by a preponderance of the evidence, that the PRP's are connected with the wastes in one or more of the ways provided in Section 107 of CERCLA. Therefore, if the Government's evidence against a particular PRP is weak, we should weigh that weakness in evaluating a settlement offer from that PRP.

On the other hand, where indivisible harm is shown to exist, under the theory of joint and several liability the Government is in a position to collect 100% of the cost of cleanup from all parties who have contributed to a site. Therefore, where the quality and quantity of the Government's evidence appears to be strong for establishing the PRP's liability, the Government should rely on the strength of its evidence and not decrease the settlement value of its case. Discharging such PRPs from liability in a partial settlement without obtaining a substantial contribution may leave the Government with non-settling parties whose involvement at the site may be more tenuous.

In any evaluation of a settlement offer, the Agency should weigh the amount of information exchange that has occurred before the settlement offer. The more the Government knows about the evidence it has to connect the settling parties to the site, the better this evaluation will be. The information collection provisions of RCRA and/or CERCLA should be used to develop evidence prior to preparation of the evaluation.

4. Ability of the Settling Parties To Pay

Ability to pay is not a defense to an action by the Government. Nevertheless, the evaluation of a settlement proposal should discuss the financial condition of that party, and the practical results of pursuing a party for more than the Government can hope to actually recover. In cost recovery actions it will be difficult to negotiate a settlement for more than a party's assets. The Region should also consider allowing the party

to reimburse the Fund in reasonable installments over a period of time, if the party is unable to pay in a lump sum, and installment payments would benefit the Government. A structured settlement providing for payments over time should be at a payment level that takes into account the party's cash flow. An excessive amount could force a party into bankruptcy, which will of course make collection very difficult. See the memorandum dated August 28, 1983, entitled "Cost Recovery Actions under Section 107 of CERCLA" for additional guidance on this subject.

5. Litigative Risks in Proceeding to Trial

Litigative risks which might be encountered at trial and which should weigh in consideration of any settlement offer include traditional factors such as:

a. *Admissibility of the Government's evidence*

If necessary Government evidence is unlikely to be admitted in a trial because of procedural or substantive problems in the acquisition or creation of the evidence, this infirmity should be considered as reducing the Government's chance of success and, therefore, reducing the amount the Government should expect to receive in a settlement.

b. *Adequacy of the Government's evidence*

Certain aspects of this point have already been discussed above. However, it deserves mention again because the Government's case depends on substantial quantities of sampling, analytical and other technical data and expert testimony. If the evidence in support of the Government's case is incomplete or based upon controversial science, or if the Government's evidence is otherwise unlikely to withstand the scrutiny of a trial, the amount that the Government might expect to receive in a settlement will be reduced.

c. *Availability of defenses*

In the unlikely event that one or more of the settling parties appears to have a defense to the Government's action under section 107(b) of CERCLA, the Government should expect to receive less in a settlement from that PRP. Availability of one or more defenses to one PRP which are not common to all PRPs in the case should not, however, lower the expectation of what an entire offering group should pay.

6. Public Interest Considerations

The purpose of site cleanup is to protect public health and the environment. Therefore, in analyzing a settlement proposal the timing of the cleanup and the ability of the Government to clean up the site should be considered. For example, if the State cannot fund its portion of a Fund-financed cleanup, a private-party cleanup proposal may be given more favorable consideration than one received in a case where the State can fund its portion of cleanup costs, if necessary.

Public interest considerations also include the availability of Federal funds for necessary cleanup, and whether privately financed action can begin more quickly than Federally-financed activity. Public interest concerns may be used to justify a settlement of less than 100% only when there is a demonstrated need for a quick remedy to protect public health or the environment.

7. Precedential Value

In some cases, the factual situation may be conducive to establishing a favorable precedent for future Government actions. For example, strong case law can be developed in cases of first impression. In addition, settlements in such cases tend to become precedents in themselves, and are examined extensively by PRPs in other cases. Settlement of such cases should always be on terms most favorable to the Government. Where PRPs will not settle on such terms, and the quality and quantity of evidence is strong, it may be in the overall interest of the Government to try the case.

8. Value of Obtaining a Present Sum Certain

If money can be obtained now and turned over to the Fund, where it can earn interest until the time it is spent to clean up a site, the net present value of obtaining the sum offered in settlement now can be computed against the possibility of obtaining a larger sum in the future. This calculation may show that the net present value of the sum offered in settlement is, in reality, higher than the amount the Government can expect to obtain at trial. EPA has developed an economic model to assess these and other related economic factors. More information on this model can be obtained from the Director, Office of Waste Programs Enforcement.

9. Inequities and Aggravating Factors

All analyses of settlement proposals should flag for the decision makers any apparent inequities to the settling parties inherent in the Government's case, and apparent inequities to others if the settlement proposal is accepted, and any aggravating factors. However, it must be understood that the statute operates on the underlying principle of strict liability, and that equitable matters are not defenses.

10. Nature of the Case that Remains After Settlement

All settlement evaluations should address the nature of the case that remains if the settlement is accepted. For example, if there are no financially viable parties left to proceed against for the balance of the cleanup after the settlement, the settlement offer should constitute everything the Government expects to obtain at that site. The questions are: What does the Government gain by settling this portion of the case? Does the settlement or its terms harm the remaining portion of the case? Will the Government have to expend the same amount of resources to try the remaining portion of the case? If so, why should the settlement offer be accepted?

This analysis is extremely important and should come at the conclusion of the evaluation.

V. Partial Cleanups

On occasion, PRPs may offer to perform or pay for one phase of a site cleanup (such as a surface removal action) but not commit to any other phase of the cleanup (such as ground water treatment). In some circumstances, it may be appropriate to enter into settlements for such partial cleanups, rather than to resolve all issues in one settlement. For example, in some cases it is necessary to conduct initial phases of site cleanup in order to gather sufficient data to evaluate the need for and type of work to be done on subsequent phases. In such cases, offers from PRPs to conduct or pay for less than all phases of site cleanup should be evaluated in the same manner and by the same criteria as set forth above. Settlements performed at the site. This provision does not cover preparation of an RI/FS, which is covered by a separate guidance document: Lee Thomas and Courtney Price's "Participation of Potentially Responsible Parties in RI/FS Development" (March 20, 1984).

VI. Contribution Protection

Contribution among responsible parties is based on the principle that a jointly and severally liable party who has paid all or a portion of a judgment or settlement may be entitled to reimbursement from other jointly or severally liable parties. When the Agency reaches a partial settlement with some parties, it will frequently pursue an enforcement action against non-settling responsible parties to recover the remaining costs of cleanup. If such an action is undertaken, there is a possibility that those non-settlors

would in turn sue settling parties. If this action by nonsettling parties is successful, then the settling parties would end up paying a larger share of cleanup costs than was determined in the Agency's settlement. This is obviously a disincentive to settlement.

Contribution protection in a consent decree can prevent this outcome. In a contribution protection clause, the United States would agree to reduce its judgment against the non-settling parties, to the extent necessary to extinguish the settling party's liability to the nonsettling third party.

The Agency recognizes the value of contribution protection in limited situations in order to provide some measure of finality to settlements. Fundamentally, we believe that settling parties are protected from contribution actions as a matter of law, based on the Uniform Contribution Among Tortfeasors Act. That Act provides that, where settlements are entered into in "good faith", the settlors are discharged from "all liability for contribution to any other joint tortfeasors." To the extent that this law is adopted as the Federal rule of decision, there will be no need for specific clauses in consent agreements to provide contribution protection.

There has not yet been any ruling on the issue. Thus, the Agency may still be asked to provide contribution protection in the form of offsets and reductions in judgment. In determining whether explicit contribution protection clauses are appropriate, the Region should consider the following factors:

- Explicit contribution protection clauses are generally not appropriate unless liability can be clearly allocated, so that the risk of reapportionment by a judge in any future action would be minimal.
- Inclusion should depend on case-by-case consideration of the law which is likely to be applied.
- The Agency will be more willing to consider contribution protection in settlements that provide substantially all the costs of cleanup.

If a proposed settlement includes a contribution protection clause, the Region should prepare a detailed justification indicating why this clause is essential to attaining an adequate settlement. The justification should include an assessment of the prospects of litigation regarding the clause. Any proposed settlement that contains a contribution protection clause with a potential ambiguity will be returned for further negotiation.

Any subsequent claims by settling parties against non-settlors must be subordinated to Agency claims against these non-settling parties. In no event will the Agency agree to defend on behalf of a settlor, or to provide direct indemnification. The Government will not enter into any form of contribution protection agreement that could require the Government to pay money to anyone.

If litigation is commenced by non-settlors against settlors, and the Agency became involved in such litigation, the Government would argue to the court that in adjusting equities among responsible parties, positive consideration should be given to those who came forward voluntarily and were a part of a group of settling PRPs.

VII. Releases from Liability

Potentially responsible parties who offer to wholly or partially clean up a site or pay the costs of cleanup normally wish to negotiate a release from liability or a covenant not to sue as a part of the consideration for that cleanup or payment. Such releases are appropriate in some circumstances. The need for finality in settlements must be balanced against the need to insure that PRPs remain responsible for recurring endangerments and unknown conditions.

The Agency recognizes the current state of scientific uncertainty concerning the impacts of hazardous substances, our ability to detect them, and the effectiveness of remedies at hazardous waste sites. It is possible that remedial measures will prove inadequate and lead to imminent and substantial endangerments, because of unknown conditions or because of failures in design, construction or effectiveness of the remedy.

Although the Agency approves all remedial actions for sites on the National Priorities List, releases from liability will not automatically be granted merely because the Agency has approved the remedy. The willingness of the Agency to give expansive releases from liability is directly related to the confidence that Agency has that the remedy will ultimately prove effective and reliable. In general, the Regions will have the flexibility to negotiate releases that are relatively expansive or relatively stringent, depending on the degree of confidence that the Agency has in the remedy.

Releases or covenants must also include certain reopeners which preserve the right of the Government to seek additional cleanup action and recover additional costs from responsible parties in a number of circumstances. They are also subject to a variety of other limitations. These reopener clauses and limitations are described below.

In addition, the the Agency can address future problems at a site by enforcement of the decree or order, rather than by action under a particular reopener clause. Settlements will normally specify a particular type of remedial action to be undertaken. That remedial action will normally be selected to achieve a certain specified level of protection of public health and the environment. When settlements are incorporated into consent decrees or orders, the decrees or orders should wherever possible include performance standards that set out these specified levels of protection. Thus, the Agency will retain its ability to assure cleanup by taking action to enforce these decrees or orders when remedies fail to meet the specified standards.

It is not possible to specify a precise hierarchy of preferred remedies. The degree of confidence in a particular remedy must be determined on an individual basis, taking site-specific conditions into account. In general, however, the more effective and reliable the remedy, the more likely it is that the Agency can negotiate a more expansive release. For example, if a consent decree or order commits a private party to meeting and/or continuing to attain health based performance standards, there can be great certainty on the part of the Agency that an adequate level of public health protection will be met and maintained, as long as the terms of the agreement are met. In this type of case, it may be appropriate to negotiate a more expansive release than, for example, cases involving remedies that are solely technology-based.

Expansive releases may be more appropriate where the private party remedy is a demonstrated effective alternative to land disposal, such as incineration. Such releases are possible whether the hazardous material is transported offsite for treatment, or the treatment takes place on site. In either instance, the use of treatment can result in greater certainty that future problems will not occur.

Other remedies may be less appropriate for expansive releases particularly if the consent order or agreement does not include performance standards. It may be appropriate in such circumstances to negotiate releases that become effective several years after completion of the remedial action, so that the effectiveness and reliability of the technology can be clearly demonstrated. The Agency anticipates that responsible parties may be able to achieve a greater degree of certainty in

settlements when the state of scientific understanding concerning these technical issues has advanced.

Regardless of the relative expansiveness or stringency of the release in other respects, at a minimum settlement documents must include reopeners allowing the Government to modify terms and conditions of the agreement for the following types of circumstances:

• Where previously unknown or undetected conditions that arise or are discovered at the site after the time of the agreement may present an imminent and substantial endangerment to public health, welfare of the environment;

• Where the Agency receives additional information, which was not available at the time of the agreement, concerning the scientific determinations on which the settlement was premised (for example, health effects associated with levels of exposure, toxicity of hazardous substances, and the appropriateness of the remedial technologies for conditions at the site) and this additional information indicates that site conditions may present an imminent and substantial endangerment to the public health or welfare or the environment.

In addition, release clauses must not preclude the Government from recovering costs incurred in responding to the type of imminent and substantial endangerments identified above.

In extraordinary circumstances, it may be clear after application of the settlement criteria set out in section IV that it is in the public interest to agree to a more limited or more expansive release not subject to the conditions outlined above. Concurrence of the Assistant Administrators for OSWER and OECM (and the Assistant Attorney General when the release is given on behalf of the United States) must be obtained before the Government's negotiating team is authorized to negotiate regarding such a release or covenant.

The extent of releases should be the same, whether the private parties conduct the cleanup themselves or pay for Federal Government cleanup. When responsible parties pay for Federal Government cleanup, the release will ordinarily not become effective until cleanup is completed and the actual costs of the cleanup are ascertained. Responsible parties will thereby bear the risk of uncertainties arising during execution of the cleanup. In limited circumstances, the release may become effective upon payment for Federal Government cleanup, if the payment includes a carefully calculated premium or other financial instrument that adequately insures the Federal Government against these uncertainties. Finally, the Agency may be more willing to settle for less than the total costs of cleanup when it is not precluded by a release clause from eventually recovering any additional costs that might ultimately be incurred at a site.

Release clauses are also subject to the following limitations:

• A release or covenant may be given only to the PRP providing the consideration for the release.

• The release or covenant must not cover any claims other than those involved in the case.

• The release must not address any criminal matter.

• Releases for partial cleanups that do not extend to the entire site must be limited to the work actually completed.

• Federal claims for natural resource damages should not be released without the approval of Federal trustees.

• Responsible parties must release any related claims against the United States, including the Hazardous Substances Response Fund.

• Where the cleanup is to be performed by the PRPs, the release or covenant should normally become effective only upon the completion of the cleanup (or phase of cleanup) in a manner satisfactory to EPA.

• Release clauses should be drafted as covenants not to sue, rather than releases from liability, where this form may be necessary to protect the legal rights of the Federal Government.

A release or covenant not to sue terminates or seriously impairs the Government's rights of action against PRPs. Therefore, the document should be carefully worded so that the intent of the parties and extent of the matters covered by the release or covenant are clearly stated. Any proposed settlement containing a release with a possible ambiguity will be returned for further negotiation.

VIII. Targets for Litigation

The Regions should identify particular cases for referral in light of the following factors:

—Substantial environmental problems exist;
—The Agency's case has legal merit;
—The amount of money or cleanup involved is significant;
—Good legal precedent is possible (cases should be rejected where the potential for adverse precedent is substantial);
—The evidence is strong, well developed, or capable of development;
—Statute of limitations problems exist;
—Responsible parties are financially viable.

The goal of the Agency is to bring enforcement action wherever needed to assure private party cleanup or to recover costs. The following types of cases are the highest priorities for referrals:

—107 actions in which all costs have been incurred;
—Combined 106/107 actions in which a significant phase has been completed, additional injunctive relief is needed and identified, and the Fund will not be used;
—106 actions which will not be the subject of Fund-financed cleanup.

Referrals for injunctive relief may also be appropriate in cases when it is possible that Fund-financed cleanup will be undertaken. Such referrals may be needed where there are potential statute of limitation concerns, or where the site has been identified as enforcement-lead, and prospects for successful litigation are good.

Regional offices should periodically reevaluate current targets for referral to determine if they meet the guidelines identified above.

As indicated before, under the theory of joint and several liability the Government is not required to bring enforcement action against all of the potentially responsible parties involved at a site. The primary concern of the Government in identifying targets for litigation is to bring a meritorious case against responsible parties who have the ability to undertake or pay for response action. The Government will determine the targets of litigation in order to reach the largest manageable number of parties, based on toxicity and volume, and financial viability. Owners and operators will generally be the target of litigation, unless bankrupt or otherwise judgment proof. In appropriate cases, the Government will consider prosecuting claims in bankruptcy. The Government may also select targets for litigation for limited purposes, such as site access.

Parties who are targeted for litigation are of course not precluded from involving parties who have not been targeted in developing settlement offers for consideration by the Government.

In determining the appropriate targets for litigation, the Government will consider the willingness of parties to settle, as demonstrated in the negotiation stage. In identifying a manageable number of parties for litigation, the Agency will consider the recalcitrance or willingness to settle of the parties who were involved in the

negotiations. The Agency will also consider other aggravating and mitigating factors concerning responsible party actions in identifying targets for litigation.

In addition, it may be appropriate, when the Agency is conducting phased cleanup and has reached a settlement for one phase, to first sue only non-settling companies for the next phase, assuming that such financially viable parties are available. This approach would not preclude suit against settling parties, but non-settlers would be sued initially.

The Agency recognizes that Federal agencies may be responsible for cleanup costs at hazardous waste sites. Accordingly, Federal facilities will be issued notice letters and administrative orders where appropriate. Instead of litigation, the Agency will use the procedures established by Executive Orders 12088 and 12146 and all applicable Memoranda of Understanding to resolve issues concerning such agency's liability. The Agency will take all steps necessary to encourage successful negotiations.

V. Timing of Negotiations

Under our revised policy on responsible party participation in RI/FS, PRPs have increased opportunities for involvement in the development of the remedial investigations and feasibility studies which the Agency uses to identify the appropriate remedy. In light of the fact that PRPs will have received notice letters and the information identified in section III of this policy, prelitigation negotiations can be conducted in an expeditious fashion.

The Negotiations Decision Document (NDD), which follows completion of the RI/FS, makes the preliminary identification of the appropriate remedy for the site. Prelitigation negotiations between the Government and the PRPs should normally not extend for more than 60 days after approval of the NDD. If significant progress is not made within a reasonable amount of time, the Agency will not hesitate to abandon negotiations and proceed immediately with administrative action or litigation. It should be noted that these steps do not preclude further negotiations.

Extensions can be considered in complex cases where there is no threat of seriously delaying cleanup action. Any extension of this period must be predicated on having a good faith offer from the PRPs which, if successfully negotiated, will save the Government substantial time and resources in attaining the cleanup objectives.

X. Management and Review of Settlement Negotiations.

All settlement documents must receive concurrence from OWPE and OECM-Waste, and be approved by the Assistant Administrator of OECM in accordance with delegations. The management guideline discussed in Section II allows the Regions to commence negotiations if responsible parties make an initial offer for a substantial proportion of the cleanup costs. Before commencing negotiations for partial settlements, the Regions should prepare a preliminary draft evaluation of the case using the settlement criteria in section IV of this policy. A copy of this evaluation shuud be forwarded to Headquarters.

A final detailed evaluation of settlements is required when the Regions request Headquarters approval of these settlements. This written evaluation should be submitted to OECM-Waste and OWPE by the legal and technical personnel on the case. These will normally be the Regional attorney and technical representative.

The evaluation memorandum should indicate whether the settlement is for 100% of the work or cleanup costs. If this figure is less than 100%, the memorandum should include a discussion of the advantages and disadvantages of the proposed settlement as measured by the criteria in section IV. The Agency expects full evaluations of each of the criteria specified in the policy and will return inadequate evaluations.

The Regions are authorized to conclude settlements in certain types of hazardous waste cases on their own, without prior review by Headquarters or DOJ. Cases selected for this treatment would normally have lower priority for litigation. Categories of cases not subject to Headquarters review include negotiation for cost recovery cases under $200,000 and negotiation of claims filed in bankruptcy. In cost recovery cases, the Regions should pay particular attention to weighing the resources necessary to conduct negotiations and litigation against the amounts that may be recovered, and the prospects for recovery.

Authority to appear and try cases before the Bankruptcy Court would not be delegated to the Regions, but would be retained by the Department of Justice. The Department will file cases where an acceptable negotiated settlement cannot be reached. Copies of settlement documents for such agreements should be provided of OWPE and OECM.

Specific details concerning these authorizations will be addressed in delegations that will be forwarded to the Regions under separate cover. Headquarters is conducting an evaluation of the effectiveness of existing delegations, and is assessing the possibility of additional delegations.

Note on Purpose and Uses of this Memorandum

The policies and procedures set forth here, and internal Government procedures adopted to implement these policies, are intended as guidance to Agency and other Government employees. They do not constitute rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable by any other person. The Government may take action that is at variance with the policies and procedures in this memorandum.

If you have any questions or comments on this policy, or problems that need to be addressed in further guidance to implement this policy, please contact Gene A. Lucero, Director of the Office of Waste Programs Enforcement (FTS 382-4814), or Richard Mays, Senior Enforcement Counsel (FTS 382-4137).

Appendix—Discussion of Issues Raised by Interim CERCLA Settlement Policy

This appendix discusses in greater detail certain issues raised by the interim policy and identifies specific issues for public comment. It focuses on issues of broad public concern, rather than issues related primarily to internal Agency management. The section headings of this attachment generally parallel the specific sections of the enforcement policy.

I. General Principles

The discussion of general principles sets out the overall philosophy governing the Superfund enforcement program. To achieve the greatest possible number of timely and effective cleanup actions, the Agency must strike a balance between two opposite approaches. One approach emphasizes quick resort to the Fund and enforcement authorities, and the other features more incentives for private party cleanup.

We have attempted to combine features of both these approaches into a vigorous enforcement program that will encourage private party cleanups. These approaches, and their limitations, are described in greater detail below.

Under one general approach, the Agency would quickly resort to either

enforcement action such as litigation and administrative orders, or Federal government cleanup under the Fund. Releases from liability and explicit contribution protection clauses would be strictly limited under this approach, and the time for negotiations prior to enforcement or Fund-financed cleanup action would be short. The limitation of this general approach is that EPA may not always be able to move to clean up enough sites, because of restrictions on the use of the Fund and the time and resources needed to compel cleanup through enforcement. Furthermore, many private parties believe that, as a general matter, they can conduct cleanup activities more quickly and at less cost than the Federal government, and have claimed that this approach may discourage private party initiatives.

Under the other general approach, the Agency would provide additional incentives to encourage PRP cleanup. For example, settlements would allow more expansive releases from liability, contribution protection would be provided, and EPA would take as much time as needed to resolve issues through negotiations before it resorted to enforcement action or Fund-financed cleanup. It is possible that the Agency would reach more negotiated settlements under this approach. One limitation of this approach is that the Agency would assume financial risks if it becomes clear in light of changed circumstances or improved knowledge of site problems that additional cleanup action is needed; expansive releases from liability would preclude the Agency from pursuing responsible parties for additional cleanup costs.

Also, protracted negotiations would delay cleanup of sites. Further, private party cleanups may not increase without an attendant aggressive enforcement program (unilateral administrative orders, imminent hazard enforcement actions under CERCLA section 106, and cost-recovery actions under section 107) because private parties may lack an incentive to reach negotiated settlements.

We have attempted to strike a balance between the two directions, recognizing that no approach may be completely adequate to satisfy all of these concerns. While the Agency remains committed to a strong and vigorous enforcement program, it recognizes that negotiated private party cleanups are essential to a successful cleanup program. The Agency will minimize impediments to voluntary cleanup, and take aggressive enforcement action against those parties whose recalcitrance prevents settlements or makes complete settlement impossible.

The Agency solicits comments on whether any additional factors or principles should be considered by the Agency in formulating a settlement policy.

II. Management Guidelines for Negotiation

The previous settlement policy included a resource management guideline for use after the Agency has evaluated the case using the settlement criteria and determined that the prospects for successfully pursuing the case were good. The guideline stated that the Agency would generally negotiate only if the initial offer from PRPs was for 80 percent of the remedy or costs of cleanup. This 80 percent threshold was established so that the Regional offices would spend their time and resources negotiating cases where settlement on acceptable terms seems more likely. EPA considered retaining that guideline in this interim policy.

The threshold was not intended to be an absolute barrier to offers for less than 80 percent, and the earliest drafts of this interim policy indicated that offers for less than that amount might be considered. However, some PRPs may have perceived the guideline as an absolute barrier, and been reluctant to approach the Agency with valid settlement offers because those offers were not for 80 percent of the remedy or costs of the cleanup. Minor volumetric contributors of wastes to the site would generally be unwilling to offer 80 percent. It is also possible that a few recalcitrant parties who refused to join a group settlement offer could prevent the others from coming up with an 80 percent offer.

The Agency considered a variety of approaches for providing potentially responsible parties with a greater opportunity and incentive for becoming involved in negotiations. They include:

- Eliminating the threshold;
- Eliminating the threshold for certain categories of PRPs or cases;
- Lowering the threshold;
- Allowing deviation from the threshold when the Region has prepared an evaluation of the case, and Headquarters has reviewed this evaluation; and
- Allowing negotiations with individual parties, as long as the Region ultimately recovers a certain percentage of the costs of cleanup.

The approach in the interim policy combines elements of a number of these options. It eliminates the 80 percent threshold. Instead, the interim policy states that the Agency will negotiate only if the initial offer from PRPs constitutes a substantial proportion of the remedy or cleanup costs. Regions are asked to weigh the potential resource demands for conducting negotiations against the likelihood of getting 100 percent of costs or a complete remedy. Thus, while an offer of 80 percent is not required to initiate negotiations, there will be cases where offers of 80 percent will de deemed inadequate. Offers to negotiate for a partial settlement or cleanup should be evaluated by Regions using the criteria set forth in section IV of the policy. A copy of these draft evaluations are to be forwarded to Headquarters for review.

The policy announced today also recognizes that in certain limited categories of cases, it may be appropriate for Regions to enter into negonations even though offers do not represent a substantial portion of costs. These categories include administrative settlements of cost recovery ections where total cleanup costs were less than $200,000, claims in bankruptcy, and administrative settlements with *de minimis* contributors of wastes. The term "*de minimis*" does not include parties who deposited any significant amount or type of waste at a site.

The approach of deleting the resource management guideline should provide a greater incentive for individual or small groups of PRPs to negotiate settlements. It should also give the Regions and the litigation team more flexibility in negotiating and settling with low volume PRPs. In addition, the 80 percent figure will not serve as a point of departure for negotiations, limiting the initial offers to that stated threshold percentage. PRPs should find it easier to develop proposals for settlement, and the ability of recalcitrants to obstruct a settlement will be reduced. However, since the objective of the Agency is still to obtain complete cleanup by PRPs, or 100 percent of the costs of cleanup, there will be cases where offers of 80 percent will be deemed inadequate. If a partial settlement offer is accepted, the Agency is committed to vigorous pursuit on non-settlors.

This approach, however, may increase the likelihood that Regional resources will be consumed by fragmented multiple negotiations with a wide variety of parties. The more intensive and time-consuming negotiations that may be necessary might ultimately limit the number of settlements that can be reached. It also places a higher burden on the Regions and Headquarters to assess the adequacy of settlement proposals in light of the settlement criteria, and to determine that sufficient

parties are left to provide the remaining cleanup costs.

The Agency solicits comment on whether substantial settlements will be possible without a threshold and whether eliminating the threshold will encourage a greater number of settlements for either a substantial portion of the costs of cleanup or of the cleanup itself. The Agency also solicits comment on how the term "*de minimis* contributor" should be defined.

III. Release of Information

The Agency will release information concerning the site to facilitate discussions of settlement among PRPs. This information will include:

—Identity of notice letter recipients:
—Volume and nature of wastes identified as delivered to the site:
—Any ranking by volume of material sent to the site:

Release of some of this material to PRPs is discretionary under the Freedom of Information Act (FOIA).

Under the policy announced today, information released to PRPs will generally be conditioned on a reciprocal release of information by PRPs. The Agency solicits comment on whether information exempt from disclosure under FOIA should be made available to PRPs on a discretionary basis.

IV. Settlement Criteria

As discussed above, there will no longer be any specific threshold for considering settlement offers from PRPs. Rather, settlement offers will be evaluated using the criteria in this seciton. Evaluations under these criteria should result in a full evaluation of the offer and will promote consistency among Regional offices. These criteria will apply in evaluation offers from PRPs (1) to clean up the site, (2) to pay for clean up of the site, and (3) in cost recovery actions. These criteria include:

- Volume of waste contributed by each PRP:
- Nature of waste contributed:
- Strength of evidence tracing waste to settling parties:
- Ability of settling parties to pay:
- Litigative risks in proceeding to trial:
- Public interest considerations:
- Precedential value:
- Value of obtaining a present sum certain:
- Inequities and aggravating factors:
- Nature of case that remains after settlement.

Many of these criteria are typical for assessing offers to settle any type of litigation. Although the Agency will consider offers of less than 100 percent in accordance with this policy, it will do so in light of the Agency's position that PRP liability is strict, joint and several unless it can be shown by PRPs that injury at a site is clearly divisible. EPA solicits comment on the need, if any, for additional criteria.

V. Partial Cleanups

Under the interim policy, EPA will now, on occasion, consider PRP offers to perform or pay for one phase of a site cleanup. The interim policy discusses the circumstances in which it may be appropriate to enter into settlements for such partial cleanups. ESA solicits comments on these arrangements.

VI. Contribution Protection

Contribution among responsible parties is based on the principle that, where liability is joint and several, a party who has paid more than his proportional share of a judgment or settlement is entitled to reimbursement from other liable parties. When the Agency reaches a partial settlement with some parties, it will frequently pursue an enforcement action against non-settling responsible parties to recover the remaining costs of cleanup. If such as action is undertaken, there is a possibility that those non-settlors would in turn sue settling parties, arguing that the settlors are liable to them for contribution. If this action by non-settling parties is successful, settling parties could end up paying a larger share of cleanup costs than was determined in the Agency's settlement.

A contribution protection clause in a consent decree is one method to prevent this outcome. While maintaining the right to go against non-settlors for all remaining relief, the United States could agree to reduce its judgment against the non-settling parties, to the extent necessary to extinguish the settling party's liability to the non-settling third party. This suggested approach is one of several contribution protection options available to the government. Parties negotiating settlement have frequently sought such protection.

The position taken by the government in litigation involving contribution is that the courts should adopt a Federal rule of decision that follows section 4 of the Uniform Contribution Among Tortfeasors Act. Section 4 provides that, where settlements are entered into in "good faith," the settlors are discharged from "all liability for contribution to any other tortfeasors." Under this interpretation, there is no need to provide contribution protection to PRPs who reach good faith settlements with the government. (We do not support adopting section 1 of the Uniform Act as a Federal rule of decision. Section 1 would preclude settlors from seeking contribution from non-settlors unless the settlors financed or performed a 100 percent cleanup at a site.)

However, since the right of contribution under CERCLA is not yet a settled question, the Agency can take two approaches in response to requests from PRPs for contribution protection:

- argue that under its legal interpretation, explicit contribution protection clauses are unnecessary;
- provide explicit contribution protection clauses in consent decrees on a case-by-case basis, based on the Agency's ability to clearly apportion liability, the percentage of the cleanup represented by the settlement, and a case-specific consideration of the law which is likely to be applied.

Explicit contribution protection clauses may serve as an incentive for private party settlement, because PRPs may be more confident with a settlement which includes an explicit contribution protection clause as part of an agreement. It is consistent with our position on joint and several liability and our support for a uniform Federal rule of decision in this area. However, explicit contribution protection clauses have several limitations. For example, the Agency may become vulnerable for part of the cleanup costs that would otherwise be borne by responsible parties. In addition, the drafting problems involved with such clauses are complex. Finally, such clauses may embroil the Federal government in complex litigation rather than resulting in final settlements.

In the interim policy published today, the Agency has authorized a very limited use of contribution protection clauses. The Agency is soliciting public comment on whether the interim policy provides for contribution protection in the proper circumstances.

VII. Releases From Liability

Potentially responsible parties have frequently sought total releases from past and future liability as a condition of settlement. The Agency has generally been reluctant to grant such total releases because they impair the Agency's ability to assure cleanup in light of changed conditions or new information concerning a site.

We recognize the current state of scientific uncertainty concerning the impacts of hazardous substances, our ability to detect them, and the effectiveness of remedies at hazardous waste sites. It would be inappropriate for the Agency to assume the responsibility for cleanup if previously

unknown or undetected conditions arise or are discovered after settlement, or if new information indicates there may be an imminent and substantial endangerment to public health or welfare or the environment.

Three broad approaches for reconciling the concerns of the Agency and of PRPs are to:

- authorize releases for remedial actions taken pursuant to EPA-approved RI/FS and design;
- authorize total releases for remedial actions taken pursuant to EPA-approved RI/FS and design, but include a reopener clause allowing the Agency to seek additional cleanup action or cleanup costs for unknown conditions that indicate possible imminent and substantial endangerments;
- allow very limited releases with reopener clauses that not only cover imminent and substantial endangerments, but require private parties to respond to all other releases or threats of release from the site.

The guidelines in this policy take the second approach. We recognize that an expansive release policy would be an incentive for private party cleanup, but its value as an incentive must be weighed against the scientific uncertainties surrounding the nature of exposure to hazardous substances, their degree of toxicity, and the effectiveness of remedies.

Generally, the expansiveness of a release will depend on the degree of confidence that the Agency has in a remedy. It may be appropriate to negotiate a more expansive release where responsible parties consent to meeting and continuing to attain health based performance standards. In addition, the Agency is considering allowing more expansive releases where the private party remedy is a demonstrated effective alternative to land disposal, such as incineration.

Under the second approach, designed for remedial actions, PRPs will be required to assume risks of imminent and substantial endangerments attributable to problems not known by the Agency at the time the remedy was selected. In return, EPA will be responsible for responding to future releases of contaminants that do not rise to the level of an imminent and substantial endangerment (assuming that, if PRPs conduct the remedial action, the approved remedy is maintained as required).

Releases will be of a similar scope, whether activities will be conducted by EPA or by private parties. Any release policy that allowed more extensive releases when the Agency conducted the cleanup actions than when private parties conducted the actions would discourage private party cleanup, or, at a minimum, encourage private parties to pay for government cleanups rather than conduct the remedial action themselves. Private party conduct of the remedial action is preferable because it is likely to occur sooner than Agency cleanup, and the use of private money frees the government to use the Fund for other sites with no identified PRPs.

The Agency is also considering whether a more expansive release may be allowed where the PRPs hire an approved contractor to perform the cleanup, and the PRPs' performance is secured by a satisfactory premium payment or surety bond in an amount well in excess of the estimated cost of the work. The term "premium payment" refers to risk apportionment device under which the risk of an ineffective remedy would be mitigated by a cash payment in excess of cleanup costs, or another financial assurance mechanism.

The Agency solicits comments on the interim release policy, including the circumstances under which releases should be granted, reopener conditions that should be included, and when releases should become effective. The Agency also solicits comment on the premium payment or surety bond concept.

VIII. Targets for Litigation

The Agency is not legally required to bring action against all potentially responsible parties at a site. The interim policy provides that the Agency will continue to identify targets for litigation on the basis of factors such as financial viability, strength of the case, and our ability to manage litigation. This policy also provides an additional incentive for voluntary cleanup by targeting recalcitrants for litigation.

The presence of a Federal agency as a potentially responsible party at a hazardous waste site sometimes delays negotiations because the position of the Federal PRP may not be clear to government negotiators or other PRPs. The interim policy provides that Federal facilities are to be treated like other PRPs in most respects except being joined as a party in litigation. The reference to administrative orders is intended to direct the Regions to make more aggressive use of administrative orders in dealing with Federal facilities. Instead of litigation, we will use the procedures established by Executive Orders 12088 and 12146 and appropriate Memoranda of Understanding to resolve issues remaining with these facilities after negotiation ends. EPA will encourage Federal facilities to participate in these negotiations.

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DRAFTING CONSENT DECREES IN HAZARDOUS WASTE IMMINENT HAZARD CASES

TABLE OF CONTENTS

		Page
Introduction		1
I.	Releases and Contribution Protection	2
	A. Scope of Releases	2
	B. Timing of Releases	3
	C. Limiting Releases to Account for an Inadequate Remedy	3
	D. Contribution Protection	5
	E. Sample Language on Releases and Contribution Protection	7
II.	Site Access	9
III.	Authority of the Signatories	10
IV.	Insurance/Financial Responsibility	10
	A. Insurance	10
	B. Financial Responsibility	11
V.	Establishment of a Trust Fund	11
VI.	Restrictions on Conveyance	13
VII.	Priorities of Claims Versus Non-Settling Parties	14
VIII.	Preclusion of Claims Against the Fund	15
IX.	Joint Responsibility Among Responsible Parties for Implementing the Decree	16
X.	Public Access to Documents	17
XI.	Dispute Resolution Provisions	18
XII.	Stipulated Penalties	20
XIII.	Admissibility of Data	22
	Disclaimer	22

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

MAY 1 1985

MEMORANDUM

SUBJECT: Drafting Consent Decrees in Hazardous Waste Imminent Hazard Cases

FROM: Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

Jack W. McGraw
Acting Assistant Administrator for Solid Waste and Emergency Response

TO: Regional Administrators

INTRODUCTION

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

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

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

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

I. Releases and Contribution Protection

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

A. Scope of Release

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

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

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

B. Timing of Releases

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

C. Limiting Releases to Account for an Inadequate Remedy

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

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

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

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

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

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

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

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

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

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

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

D. Contribution Protection

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

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

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

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

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

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

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

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

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

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

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

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

E. Sample Language on Releases and Contribution Protection

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

Covenant Not to Sue

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

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

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

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

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

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

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

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

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

II. Site Access

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

A sample site access clause is:

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

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

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

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

III. Authority of the Signatories

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

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

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

IV. Insurance/Financial Responsibility

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

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

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

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

(1) Performance bond;

(2) Letter of credit;

(3) Guarantee by a third party; or

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

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

V. Establishment of a Trust Fund

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

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

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

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

A sample Schedule of Payment clause is:

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

VI. Restrictions on Conveyance

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

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

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

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

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

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

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

VII. Priority of Claims Versus Non-Settling Parties

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

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

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

VIII. Preclusion of Claims Against the Fund

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

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

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

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

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

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

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

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

IX. Joint Responsibility Among Responsible Parties for Implementing the Decree

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

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

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

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

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

X. Public Access to Documents

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

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

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

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

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

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

An example of such a provision is provided below.

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

XI. Dispute Resolution Provisions

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

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

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

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

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

DISPUTE RESOLUTION

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

XII. Stipulated Penalties

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

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

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

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

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

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

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

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

STIPULATED PENALTIES

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

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

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

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

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

XIII. Admissibility of Data

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

A model clause is:

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

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

DISCLAIMER

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

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

JUL 12 1985

9832.6

MEMORANDUM

SUBJECT: Small Cost Recovery Referrals

FROM: Frederick F. Stiehl
Associate Enforcement Counsel for Waste
Office of Enforcement and Compliance Monitoring

Gene A. Lucero, Director
Office of Waste Programs Enforcement
Office of Solid Waste and Emergency Response

TO: Regional Counsels, Regions I-X
Regional Waste Management Division Directors, Regions I-X

Based on discussions among our staff and Regional enforcement personnel, it appears that confusion exists regarding Agency policy on referring CERCLA cost recovery cases valued at less than $200,000. Apparently, a few of the Regions believe that Headquarters will not accept these cases because the December 5, 1984, Interim CERCLA Settlement Policy (1) places a high priority on large dollar amount cases (see the section on targets for litigation (p. 17), which discusses referring cases involving a "significant" amount of money), and (2) references the possibility that cases under $200,000 could be handled administratively.

Although the Agency has placed a higher priority on referring cost recovery cases with expenditures in excess of $200,000, there are situations where referring small cost recovery actions is entirely appropriate. For example, where we have initiated settlement discussions which have failed to produce a settlement because of the recalcitrance of the responsible parties, referral would generally be appropriate to demonstrate the Agency's commitment toward enforcement as a vehicle to compel private party response at CERCLA sites. In addition, where a Region has no cases for more than $200,000, where an enforcement presence would serve a deterrent effect, where a Region's other enforcement priorities allow for the expenditure of resources to support a small cost recovery case, or where the circumstances are ripe for testing some important aspect of law, referral of such a case would be appropriate.

As you know, the Agency is working toward providing the Regions with both the tools and the authority to settle small cost recovery cases (up to $500,000) administratively. To ensure that such administrative resolutions are attractive options for responsible parties, however, the Agency must be prepared to take judicial action against those who do not settle on terms acceptable to the Agency. Under such circumstances, small cost recovery actions will take on an even greater importance, since it will be necessary to show the regulated community that the Agency is serious about pursuing small cost recovery cases in the judicial, as well as the administrative, forum. In furtherance of that effort, our offices and the Department of Justice are prepared to fully support small cost recovery cases referred by the Regions which further program goals and are otherwise consistent with Agency policy.

For most of you this memorandum simply confirms operating guidance which you are already following. We wanted to ensure, however, that the Settlement Policy did not create any undue reluctance on the part of the Regions to develop small cost recovery cases for referral.

cc: David T. Buente, Department of Justice

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

OSWER # 9837.1

JUL 30 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Preparation of Hazardous Waste Referrals

FROM: Frederick F. Stiehl
Associate Enforcement Counsel for Waste

TO: Regional Counsels, Regions I-X

On August 8, 1984, the RCRA/CERCLA Case Management Handbook was provided to the EPA Regional Offices to assist you and your staff in the preparation of judicial referrals under RCRA and CERCLA authorities. The purpose of this guidance was to describe the process of assembling a case and to clearly identify the requirements for all hazardous waste referral packages. EPA must assure that cases referred to the Department of Justice are complete and can be filed within 60 days of referral.

Experience with the implementation of the Case Management Handbook has indicated that filing by the Department of Justice has been delayed in some cases by the following problems with the referral packages:

- Demand Letters. For cost recovery cases, the Region should send Demand Letters and allow the response time to run before referral. Where prospective defendants are willing to settle, the settlement can be worked out before referring a complaint (and consent decree) for filing or possibly obviating the need to file.

- Settlement Negotiations. In most cases, limited settlement negotiations with identified responsible parties should be completed prior to the referral of a case to Headquarters. This preference for conducting negotiations prior to requesting that the Department of Justice commence preparation of judicial pleadings is set out in the Case Management Handbook, Chapter II. If the negotiations may result in a consent decree

or present precedential issues, Headquarters or the Department of Justice can be brought in informally without a referral.

- Financial Viability of Potential Defendants. It is important that all referrals contain complete information based on thorough research regarding the financial status and insurance assets of potential defendants. Chapter III of the Case Management Handbook describes the contents of a hazardous waste referral, including the types of information required regarding potential defendants.

- Endangerment Assessment. A complete endangerment assessment must be included in all referral packages for CERCLA §106 and RCRA §7003 cases. The endangerment assessment should contain information sufficient to establish a prima facie imminent hazard claim. Appendices two and three of the Case Management Handbook contain a checklist of facts necessary for imminent and substantial endangerment cases.

- Cost Documentation. The Region must submit accurate cost recovery check lists to OWPE at least six weeks prior to submitting the referral package to Headquarters. This will ensure that cost recovery cases referred to the Department of Justice will have thorough cost documentation as required by the Case Management Handbook, Appendix one.

The Department of Justice is required to file a complaint within 60 days of the referral from EPA. The 60 day period is intended to allow the Department of Justice to review the litigation report and prepare its final pleadings. The 60 day period is not intended to allow the Agency time to provide supplemental information for the referral package or make initial contact with the defendants regarding the possibility of settlement.

All requests to the Department of Justice to delay the filing of a case beyond the 60 day period must be made by the Assistant Administrator for OECM. To originate such a request, the Region must write the Assistant Administrator for OECM. Any request by the Region to OECM to extend the filing date of an action should be made before the 60 day period at the Department of Justice has run. We have informally stressed to the Department that the filing of cases should not be delayed in reliance on the Region's intention to request such a delay.

Effective prosecution of hazardous waste cases, once referred to the Department of Justice, is a critical element of the Agency's enforcement strategy. Compliance with the procedures set out above and in the Case Management Handbook will assure that matters appropriate for judicial enforcement will be referred and filed in a timely way. If you have any questions regarding these procedures, please contact me.

cc: Gene A. Lucero, Director, OWPE
David T. Buente, Acting Chief, Environmental Enforcement Section, DOJ
Richard H. Mays, Senior Enforcement Counsel

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA)

14-14-C. Administrative Actions Through Consent Orders

1. AUTHORITY. After giving notice to the affected state, to take administrative action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA), including, but not limited to, issuing such orders on consent as may be necessary to protect public health and welfare and the environment.

2. TO WHOM DELEGATED. Regional Administrators.

3. LIMITATIONS.

a. Regional Administrators or their delegatees must obtain the advance concurrence of the Assistant Administrator for Solid Waste and Emergency Response or his/her designee before exercising any of the above authorities.

b. The Assistant Administrator for Solid Waste and Emergency Response or his/her designee may waive advance concurrence requirements by memorandum.

c. This authority does not include recovery of response costs under CERCLA Section 122(h) or settlements with *de minimis* parties under CERCLA Section 122(g).

4. REDELEGATION AUTHORITY. This authority may be redelegated.

5. ADDITIONAL REFERENCES.

a. Sections 104, 106, and 122 of CERCLA.

b. All applicable Agency guidance and directives.

c. Authority to enter into or exercise Agency concurrence authority for non-judicial cost recovery agreements or administrative orders is delegated in 14-14-D, "Cost Recovery Non-Judicial Agreements and Administrative Consent Orders."

d. Authority to enter into or exercise Agency concurrence authority in *de minimis* settlements under CERCLA Section 122(g) is delegated in Delegation 14-14-E, "*De Minimis* Settlements."

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA)

14-14-B. Administrative Actions Through Unilateral Orders

1. AUTHORITY. After giving notice to the affected State, to take administrative action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA), including, but not limited to, issuing such unilateral orders as may be necessary to protect public health and welfare and the environment.

2. TO WHOM DELEGATED. Regional Administrators.

3. LIMITATIONS. Regional Administrators or their delegatees must consult with the Assistant Administrator for Solid Waste and Emergency Response or his/her designee when exercising this authority.

4. REDELEGATION AUTHORITY. This authority may be redelegated.

5. ADDITIONAL REFERENCES.

   a. Sections 104, 106, and 122 of CERCLA.

   b. Applicable Agency guidance and OSWER directives.

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA)

14-14-A. Determinations of Imminent and Substantial Endangerment

1. AUTHORITY. Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), to make determinations that there may be an imminent and substantial endangerment to public health or welfare or the environment.

2. TO WHOM DELEGATED. Regional Administrators.

3. LIMITATIONS. This authority shall be exercised subject to directives issued by the Assistant Administrator for Solid Waste and Emergency Response. Regional Administrators must consult with the Assistant Administrator for Solid Waste and Emergency Response or his/her designee when exercising this authority.

4. REDELEGATION AUTHORITY. This authority may be redelegated.

5. ADDITIONAL REFERENCES. Section 106(a) of CERCLA.

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

14-13-C. Emergency TROs

1. AUTHORITY. To refer to the Attorney General requests for emergency Temporary Restraining Orders under the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA).

2. TO WHOM DELEGATED. Regional Administrators and the Assistant Administrator for Enforcement and Compliance Monitoring.

3. LIMITATIONS.

a. The Regional Administrator or his/her delegatee must notify the Assistant Administrator for Enforcement and Compliance Monitoring and the Assistant Administrator for Solid Waste and Emergency Response or their designees when exercising this authority.

b. The Assistant Administrator for Enforcement and Compliance Monitoring or his/her delegatee must notify the appropriate Regional Administrator and the Assistant Administrator for Solid Waste and Emergency Response or their designees when exercising this authority.

4. REDELEGATION AUTHORITY. The Assistant Administrator for Enforcement and Compliance Monitoring may redelegate this authority. The authority delegated to Regional Administrators may be redelegated to the On-Scene Coordinator level.

5. ADDITIONAL REFERENCES.

a. Memorandum of Understanding between the Agency and the Department of Justice.

b. Sections 106(a), 106(b) and 107 of CERCLA.

c. For referral of other civil actions under CERCLA, see Delegation 14-12, "Civil Judicial Enforcement Actions."

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

14-13-B. Concurrence in Settlement of Civil Judicial Actions (cont')

4. REDELEGATION AUTHORITY. The authority to request the Attorney General to amend a consent decree issued under CERCLA may be redelegated to the Division Director level. The other authorities cited in paragraph 1. above may be redelegated.

5. ADDITIONAL REFERENCES.

a. Sections 104, 106, 107, 109, and 122 of CERCLA.

b. All applicable Agency guidance and directives.

c. For actions including 31 USC 3711 and its applicable regulations, see delegations covering claims of EPA found in Chapter 1 of this Manual.

d. Settlements under CERCLA section 122(g) are covered by delegation 14-14-E, "De Minimis Settlements."

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

14-13-B. Concurrence in Settlement of Civil Judicial Actions

1. AUTHORITY. To exercise the Agency's concurrence in the settlement of civil judicial enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), and to request the Attorney General to amend a consent decree issued under CERCLA.

2. TO WHOM DELEGATED. Regional Administrators.

3. LIMITATIONS.

a. Regional Administrators may exercise the Agency's concurrence authority in settlement of Regionally-initiated CERCLA section 104/107 recovery actions where the total response costs at the facility do not exceed $500,000, excluding interest.

b. For all cases initiated by the Assistant Administrator for Solid Waste and Emergency Response, the Regional Administrator or delegatee must obtain the concurrence of the Assistant Administrators for Enforcement and Compliance Monitoring and Solid Waste and Emergency Response or their designees before exercising this authority. The Assistant Administrators for Enforcement and Compliance Monitoring and Solid Waste and Emergency Response or their designees may waive the concurrence requirement by memorandum on a Region-by-Region basis.

c. For cases initiated by the Regional Administrator other than those identified in paragraph 3.a of this delegation (in which the Regional Administrator concurs for the Agency), the Regional Administrator or delegatee must obtain the concurrence of the Assistant Administrators for Enforcement and Compliance Monitoring and Solid Waste and Emergency Response or their designees before exercising this authority. The Assistant Administrators for Enforcement and Compliance Monitoring and Solid Waste and Emergency Response or their designees may waive the concurrence requirement by memorandum on a Region-by-Region basis.

d. Six months after the Administrator's signature of this delegation, and every six months thereafter, the Assistant Administrators for Enforcement and Compliance Monitoring and Solid Waste and Emergency Response, or their designees, will review each Region's experience in settlement of civil judicial actions and, based upon that review, will consider jointly waiving or modifying any advance concurrence requirement on a Region-by-Region basis. The Administrator shall be apprised of the status of the advance concurrence requirement upon completion of each review.

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

14-13-A. Criminal Enforcement Actions

1. AUTHORITY. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), to cause criminal matters to be referred to the Department of Justice for assistance in field investigation, for initiation of a grand jury investigation, or for prosecution under CERCLA; to authorize payment of awards up to $10,000 to any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under CERCLA.

2. TO WHOM DELEGATED. The Assistant Administrator for Enforcement and Compliance Monitoring.

3. LIMITATIONS. The amount of CERCLA funds to be made available each fiscal year for the payment of the awards as authorized by this delegation is limited to an amount agreed upon annually by the Assistant Administrator for Enforcement and Compliance Monitoring and the Assistant Administrator for Solid Waste and Emergency Response.

4. REDELEGATION AUTHORITY. The authority to refer cases may be redelegated. The authority to authorize payment of awards may be redelegated to the Senior Enforcement Counsel for Criminal Enforcement.

5. ADDITIONAL REFERENCES. Sections 103(b)(3), 103(c), 103(d), and 109(d) of CERCLA.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

14-12. Civil Judicial Enforcement Actions (cont'd.)

d. The General Counsel may only exercise this authority with regard to appeals.

e. Any exercise of appeal authority will be be exercised by the General Counsel and the Assistant Administrator for Enforcement and Compliance Monitoring.

f. The Regional Administrators must notify the Assistant Administrator for Solid Waste and Emergency Response and the Assistant Administrator for Enforcement and Compliance Monitoring prior to the time they refer cases to the Department of Justice.

4. REDELEGATION AUTHORITY. The Assistant Administrator for Enforcement and Compliance Monitoring and the General Counsel may redelegate this authority to the Division Director level. Regional Administrators may redelegate this authority to the Regional Counsel.

5. ADDITIONAL REFERENCES.

a. Memorandum of Understanding between the Agency and the Department of Justice, June 1977.

b. CERCLA Sections 104, 106, 107, 109, 122.

c. See the Chapter 14 delegation entitled "Emergency TRO's" for Regional Administrators' authority to make direct referrals of requests for emergency CERCLA Temporary Restraining Orders.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

14-12. Civil Judicial Enforcement Actions

1. AUTHORITY. To request the Attorney General to appear and represent the Agency in any civil enforcement action and to intervene in any civil enforcement action instituted under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA); to request the Attorney General to decline to prosecute a previously referred civil enforcement action; and to request the Attorney General to initiate an appeal of a decision in a civil enforcement action under CERCLA and represent the Agency in such an appeal.

2. TO WHOM DELEGATED. Regional Administrators, Assistant Administrator for Enforcement and Compliance Monitoring, and the General Counsel.

3. LIMITATIONS.

a. The Regional Administrators may exercise this authority only in regard to requesting that the Attorney General appear and represent the Agency in civil actions under CERCLA, requesting that the Attorney General intervene in civil actions under CERCLA, exclusive of appeals, and requesting that the Attorney General decline to prosecute a previously referred civil action.

b. The Regional Administrators may exercise this authority only in cases specified in and in accordance with written agreements between authorized representatives of the Agency and the Department of Justice.

c. The Assistant Administrator for Enforcement and Compliance Monitoring must notify the Assistant Administrator for Solid Waste and Emergency Response and the appropriate Regional Administrator prior to initiating or intervening in a civil action under CERCLA, requesting that the Attorney General decline to prosecute a previously referred civil enforcement action under CERCLA, requesting that the Attorney General initiate or intervene in a civil action instituted under CERCLA, or formally initiating an appeal.

SEP 13 1987

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

14-6. Inspections, Sampling, Information Gathering, Subpoenas, and Entry for Response

1. AUTHORITY. Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act as amended (CERCLA), to enter any vessel, facility, establishment, place, property or location for the purposes of inspections, sampling, information gathering and response actions; to carry out inspections, sampling, and information gathering; to require the production of information and documents; to issue subpoenas; to issue compliance orders for production of information and documents; to issue compliance orders for entry and inspection; to obtain and execute warrants to support this authority; and to designate representatives of the Administrator to carry out inspections, sampling, information gathering, and response actions.

2. TO WHOM DELEGATED. Assistant Administrator for Solid Waste and Emergency Response, Assistant Administrator for Enforcement and Compliance Monitoring, and Regional Administrators.

3. LIMITATIONS.

a. Regional Administrators and the Assistant Administrator for Solid Waste and Emergency Response or their delegatees must consult with the Assistant Administrator for Enforcement and Compliance Monitoring, or his/her designee, prior to issuing compliance orders regarding information gathering or compliance orders for entry and inspection, or issuing subpoenas, unless or until such consultation authority is waived by memorandum.

b. The Assistant Administrator for Solid Waste and Emergency Response or his/her delegatee must consult with the Assistant Administrator for Enforcement and Compliance Monitoring or his/her designee prior to obtaining warrants.

c. The Assistant Administrator for Solid Waste and Emergency Response and the Assistant Administrator for Enforcement and Compliance Monitoring or their delegatees must consult with the appropriate Regional Administrator or his/her designee prior to exercising these authorities.

4. REDELEGATION AUTHORITY: This authority may be redelegated.

5. ADDITIONAL REFERENCES.

a. Sections 104(e), 109(a), 109(b) and 122(e) of CERCLA.

b. National Contingency Plan, 40 CFR 300.

APPENDIX C. (continued)

CAS #	CHEMICAL NAME	TPQ
505-60-2	Mustard gas	500
534-52-1	Dinitrocresol	10/10,000
624-83-9	Methyl isocyanate	500
1464-53-5	Diepoxybutane	500
7550-45-0	Titanium tetrachloride	100
7647-01-0	Hydrochloric acid (gas only)	500
7664-39-3	Hydrogen flouride	100
7664-41-7	Ammonia	500
7664-93-9	Sulfuric acid	1,000
7697-37-2	Nitric acid	1,000
7723-14-0	Phosphorus	100
7782-50-5	Chlorine	100
8001-35-2	Toxaphene (Camphechlor)	500/10,000

APPENDIX C. Section 302 Chemicals on Section 313 List

CAS #	CHEMICAL NAME	TPQ
50-00-0	Formaldehyde	500
51-75-2	Mechlorethamine	10
56-38-2	Parathion	100
57-14-7	Dimethylhydrazine	1,000
57-57-8	Propiolactone, beta-	500
57-74-9	Chlordane	1,000
58-89-9	Lindane	1,000/10,000
60-34-4	Methylhydrazine	500
62-53-3	Aniline	1,000
62-73-7	Dichlorvos	1,000
62-75-9	Nitrosodimethylamine	1,000
67-66-3	Chloroform	10,000
74-83-9	Methyl bromide	1,000
74-90-8	Hydrocyanic acid	100
75-15-0	Carbon disulfide	10,000
75-21-8	Ethylene oxide	1,000
75-44-5	Phosgene	10
75-55-8	Propyleneimine	10,000
75-56-9	Propylene oxide	10,000
77-47-4	Hexachlorocyclopentadiene	100
77-78-1	Dimethyl sulfate	500
79-06-1	Acrylamide	1,000/10,000
79-11-8	Chloroacetic acid	100/10,000
79-21-0	Peracetic acid	500
91-08-7	Toluene, 2,6,-diisocyanate	100
95-48-7	Cresol, o-	1,000/10,000
98-07-7	Benzotrichloride	100
98-87-3	Benzal chloride	500
98-95-3	Nitrobenzene	10,000
100-44-7	Benzyl chloride	500
106-89-8	Epichlorohydrin	1,000
107-02-8	Acrolein	500
107-13-1	Acrylonitrile	10,000
107-30-2	Chloromethyl methyl ether	100
108-05-4	Vinyl acetate monomer	1,000
108-95-2	Phenol	500/10,000
111-44-4	Dichloroethyl ether	10,000
123-31-9	Hydroquinone	500/10,000
151-56-4	Ethyleneimine	500
302-01-2	Hydrazine	1,000
309-00-2	Aldrin	500/10,000
542-88-1	Chloromethyl ether	100
584-84-9	Toluene 2,4,-diisocyanate	500

(continued)

TITLE III - EXTREMELY HAZARDOUS SUBSTANCES
CHEMICALS DELETED FROM LIST
(As of December 17, 1987 and February 25, 1988)

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(Alphabetical Listing)

CAS No.	NAME
16919-58-7	Ammonium Chloroplatinate
1405-87-4	Bacitracin
98-09-9	Benzenesulfonyl Chloride
106-99-0	Butadiene
109-19-3	Butyl Isovalerate
111-34-2	Butyl Vinyl Ether
2244-16-8	Carvone
107-20-0	Chloroacetaldehyde
7440-48-4	Cobalt
117-52-2	Coumafuryl
287-92-3	Cylopentane
633-03-4	C.I. Basic Green 1
84-74-2	Dibutyl Phthalate
8023-53-8	Dichlorobenzalkonium Chloride
93-05-0	Diethyl-p-Phenylenediamine
131-11-3	Dimethyl Phthalate
[illegible]-84-0	Dioctyl Phthalate
[illegible]6-06-0	Dioxolane
2235-25-8	Ethylmercuric Phosphate
1335-87-1	Hexachloronaphthalene
53-86-1	Indomethacin
10025-97-5	Iridium Tetrachloride
108-67-8	Mesitylene
7440-02-0*	Nickel
65-86-1	Orotic Acid
20816-12-0	Osmium Tetroxide
76-01-7	Pentachloroethane
87-86-5	Pentachlorophenol
84-80-0	Phylloquinone
10025-65-7	Platinous Chloride
13454-96-1	Platinum Tetrachloride
1331-17-5	Propylene Glycol, Allyl Ether
95-63-6	Pseudocumene
10049-07-7	Rhodium Trichloride
128-56-3	Sodium Anthraquinone-1-Sulfonate
1314-32-5	Thallic Oxide
21564-17-0	Thiocyanic Acid, 2-(Benzothiazolylthio) Methyl Ester
640-15-3	Thiometon
52-68-6	Trichlorophon
3048-64-4	Vinylnorbornene

(Numerical List by CAS No.)

CAS No.	NAME
52-68-6	Trichlorophon
53-86-1	Indomethacin
65-86-1	Orotic Acid
76-01-7	Pentachloroethane
84-74-2	Dibutyl Phthalate
84-80-0	Phylloquinone
87-86-5	Pentachlorophenol
93-05-0	Diethyl-p-Phenylenediamine
95-63-6	Pseudocumene
98-09-9	Benzenesulfonyl Chloride
106-99-0	Butadiene
107-20-0	Chloroacetaldehyde
108-67-8	Mesitylene
109-19-3	Butyl Isovalerate
111-34-2	Butyl Vinyl Ether
117-52-2	Coumafuryl
117-84-0	Dioctyl Phthalate
128-56-3	Sodium Anthraquinone-1-Sulfonate
131-11-3	Dimethyl Phthalate
287-92-3	Cylopentane
633-03-4	C.I. Basic Green 1
640-15-3	Thiometon
646-06-0	Dioxolane
1314-32-5	Thallic Oxide
1331-17-5	Propylene Glycol, Allyl Ether
1335-87-1	Hexachloronaphthalene
1405-87-4	Bacitracin
2235-25-8	Ethylmercuric Phosphate
2244-16-8	Carvone
3048-64-4	Vinylnorbornene
7440-02-0*	Nickel
7440-48-4	Cobalt
8023-53-8	Dichlorobenzalkonium Chloride
10025-65-7	Platinous Chloride
10025-97-5	Iridium Tetrachloride
10049-07-7	Rhodium Trichloride
13454-96-1	Platinum Tetrachloride
16919-58-7	Ammonium Chloroplatinate
20816-12-0	Osmium Tetroxide
21564-17-0	Thiocyanic Acid, 2-(Benzothiazolylthio) Methyl Ester

The CAS No. for Nickel was listed incorrectly in the Federal Register on February 25, 1988 as 7440-02-2; a correction will be published in the near future.

(CAS Number Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
20859-73-8	Aluminum Phosphide	b	100	500
21548-32-3	Fosthietan	e	1	500
21609-90-5	Leptophos	e	1	500 /10,000
21908-53-2	Mercuric Oxide	e	1	500 /10,000
21923-23-9	Chlorthiophos	e,h	1	500
22224-92-6	Fenamiphos	e	1	10 /10,000
23135-22-0	Oxamyl	e	1	100 /10,000
23422-53-9	Formetanate Hydrochloride	e,h	1	500 /10,000
23505-41-1	Pirimifos-Ethyl	e	1	1,000
24017-47-8	Triazofos	e	1	500
24934-91-6	Chlormephos	e	1	500
26419-73-8	Carbamic Acid, Methyl-, O-(((2,4-Dimethyl-1, 3-Dithiolan-2-Yl) Methylene)Amino)-	e	1	100 /10,000
26628-22-8	Sodium Azide (Na(N3))	b	1,000	500
27137-85-5	Trichloro(Dichlorophenyl)Silane	e	1	500
28347-13-9	Xylylene Dichloride	e	1	100 /10,000
28772-56-7	Bromadiolone	e	1	100 /10,000
30674-80-7	Methacryloyloxyethyl Isocyanate	e,h	1	100
39196-18-4	Thiofanox		100	100 /10,000
50782-69-9	Phosphonothioic Acid, Methyl-,S-(2-(Bis(1-Methylethyl)Amino)Ethyl)O-Ethyl Ester	e	1	100
53558-25-1	Pyriminil	e,h	1	100 /10,000
58270-08-9	Zinc, Dichloro(4,4-Dimethyl-5((((Methylam:no) Carbonyl)Oxy)Imino) Pentanenitrile)-, (T-4)-	e	1	100 /10,000
62207-76-5	Cobalt, ((2,2'-(1,2-Ethanediylbis (Nitrilomethylidyne)) Bis(6-Fluorophenolato))(2-)-N,N',O,O')-	e	1	100 /10,000

* Only the statutory or final RQ is shown. For more information, see 40CFR Table 302.4

Notes:

- b This material is a reactive solid. The TPQ does not default to 10,000 pounds for non-powder, non-molten, non-solution form.
- c The calculated TPQ changed after technical review as described in the technical support document.
- d Indicates that the RQ is subject to change when the assessment of potential carcinogenicity and/or other toxicity is completed.
- e Statutory reportable quantity for purposes of notification under SARA sect 304(a)(2).
- f The statutory 1 pound reportable quantity for methyl isocyanate may be adjusted in a future rulemaking
- g New chemicals added that were not part of the original list of 402 substances.
- h Revised TPQ based on new or re-evaluated toxicity data.
- j TPQ is revised to its calculated value and does not change due to technical review as in proposed rule
- k The TPQ was revised after proposal due to calculation error.
- l Chemicals on the original list that do not meet the toxicity criteria but because of their high produc volume and recognized toxicity are considered chemicals of concern ("Other chemicals")

(CAS Number Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
7446-11-9	Sulfur Trioxide	b,e	1	100
7446-18-6	Thallous Sulfate		100	100 /10,000
7487-94-7	Mercuric Chloride	e	1	500 /10,000
7550-45-0	Titanium Tetrachloride	e	1	100
7580-67-8	Lithium Hydride	b,e	1	100
7631-89-2	Sodium Arsenate	d	1,000	1,000 /10,000
7637-07-2	Boron Trifluoride	e	1	500
7647-01-0	Hydrogen Chloride (Gas Only)	e,l	1	500
7664-39-3	Hydrogen Fluoride		100	100
7664-41-7	Ammonia	l	100	500
7664-93-9	Sulfuric Acid		1,000	1,000
7697-37-2	Nitric Acid		1,000	1,000
7719-12-2	Phosphorus Trichloride		1,000	1,000
7722-84-1	Hydrogen Peroxide (Conc > 52%)	e,l	1	1,000
7723-14-0	Phosphorus	b,h	1	100
7726-95-6	Bromine	e,l	1	500
7778-44-1	Calcium Arsenate	d	1000	500 /10,000
7782-41-4	Fluorine	k	10	500
7782-50-5	Chlorine		10	100
7783-00-8	Selenious Acid		10	1,000 /10,000
7783-06-4	Hydrogen Sulfide	l	100	500
7783-07-5	Hydrogen Selenide	e	1	10
7783-60-0	Sulfur Tetrafluoride	e	1	100
7783-70-2	Antimony Pentafluoride	e	1	500
7783-80-6	Tellurium Hexafluoride	e,k	1	100
7784-34-1	Arsenous Trichloride	d	5000	500
7784-42-1	Arsine	e	1	100
7784-46-5	Sodium Arsenite	d	1,000	500 /10,000
7786-34-7	Mevinphos		10	500
7791-12-0	Thallous Chloride	c,h	100	100 /10,000
7791-23-3	Selenium Oxychloride	e	1	500
7803-51-2	Phosphine		100	500
8001-35-2	Camphechlor	d	1	500 /10,000
8065-48-3	Demeton	e	1	500
10025-73-7	Chromic Chloride	e	1	1 /10,000
10025-87-3	Phosphorus Oxychloride	d	1,000	500
10026-13-8	Phosphorus Pentachloride	b,e	1	500
10028-15-6	Ozone	e	1	100
10031-59-1	Thallium Sulfate	h	100	100 /10,000
10102-18-8	Sodium Selenite	h	100	100 /10,000
10102-20-2	Sodium Tellurite	e	1	500 /10,000
10102-43-9	Nitric Oxide	c	10	100
10102-44-0	Nitrogen Dioxide		10	100
10124-50-2	Potassium Arsenite	d	1,000	500 /10,000
10140-87-1	Ethanol, 1,2-Dichloro-, Acetate	e	1	1,000
10210-68-1	Cobalt Carbonyl	e,h	1	10 /10,000
10265-92-6	Methamidophos	e	1	100 /10,000
10294-34-5	Boron Trichloride	e	1	500
10311-84-9	Dialifor	e	1	100 /10,000
10476-95-6	Methanediol Diacetate	e	1	1,000
12002-03-8	Paris Green	d	100	500 /10,000
12108-13-3	Manganese, Tricarbonyl Methylcyclopentadienyl	e,h	1	100
13071-79-9	Terbufos	e,h	1	100
13171-21-6	Phosphamidon	e	1	100
13194-48-4	Ethoprophos	e	1	1,000
13410-01-0	Sodium Selenate	e	1	100 /10,000
13450-90-3	Gallium Trichloride	e	1	500 /10,000
13463-39-3	Nickel Carbonyl	d	1	1
13463-40-6	Iron, Pentacarbonyl-	e	1	100
13494-80-9	Tellurium	e	1	500 /10,000
14167-18-1	Salcomine	e	1	500 /10,000
15271-41-7	Bicyclo[2.2.1]Heptane-2-Carbonitrile, 5-Chloro-6-((((Methylamino) Carbonyl)Oxy)Imino)-,(1S-(1-alpha, 2-beta,4-alpha,5-alpha,6E))-	e	1	500 /10,000
752-77-5	Methomyl	h	100	500 /10,000
702-61-9	Decaborane(14)	e	1	500 /10,000
17702-57-7	Formparanate	e	1	100 /10,000
19287-45-7	Diborane	e	1	100
19624-22-7	Pentaborane	e	1	500
20830-75-5	Digoxin	e,h	1	10 /10,000

(CAS Number Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
991-42-4	Norbormide	e	1	100 /10,000
998-30-1	Triethoxysilane	e	1	500
999-81-5	Chlormequat Chloride	e,h	1	100 /10,000
1031-47-6	Triamiphos	e	1	500 /10,000
1066-45-1	Trimethyltin Chloride	e	1	500 /10,000
1122-60-7	Nitrocyclohexane	e	1	500
1124-33-0	Pyridine, 4-Nitro-, 1-Oxide	e	1	500 /10,000
1129-41-5	Metolcarb	e	1	100 /10,000
1303-28-2	Arsenic Pentoxide	d	5000	100 /10,000
1306-19-0	Cadmium Oxide	e	1	100 /10,000
1314-56-3	Phosphorus Pentoxide	b,e	1	10
1314-62-1	Vanadium Pentoxide		1,000	100 /10,000
1314-84-7	Zinc Phosphide	b	100	500
1327-53-3	Arsenous Oxide	d,h	5000	100 /10,000
1397-94-0	Antimycin A	c,e	1	1,000 /10,000
1420-07-1	Dinoterb	e	1	500 /10,000
1464-53-5	Diepoxybutane	d	1	500
1558-25-4	Trichloro(Chloromethyl)Silane	e	1	100
1563-66-2	Carbofuran		10	10 /10,000
1600-27-7	Mercuric Acetate	e	1	500 /10,000
1622-32-8	Ethanesulfonyl Chloride, 2-Chloro-	e	1	500
1642-54-2	Diethylcarbamazine Citrate	e	1	100 /10,000
1752-30-3	Acetone Thiosemicarbazide	e	1	1,000 /10,000
1910-42-5	Paraquat	e	1	10 /10,000
1982-47-6	Chloroxuron	e	1	500 /10,000
2001-95-8	Valinomycin	c,e	1	1,000 /10,000
2032-65-7	Methiocarb		10	500 /10,000
2074-50-2	Paraquat Methosulfate	e	1	10 /10,000
2097-19-0	Phenylsilatrane	e,h	1	100 /10,000
2104-64-5	EPN	e	1	100 /10,000
2223-93-0	Cadmium Stearate	c,e	1	1,000 /10,000
2231-57-4	Thiocarazide	e	1	1,000 /10,000
2238-07-5	Diglycidyl Ether	e	1	1,000
2275-18-5	Prothoate	e	1	100 /10,000
2497-07-6	Oxydisulfoton	e,h	1	500
2524-03-0	Dimethyl Phosphorochloridothioate	e	1	500
2540-82-1	Formothion	e	1	100
2570-26-5	Pentadecylamine	e	1	100 /10,000
2587-90-8	Phosphorothioic Acid, O,O-Dimethyl-S-(2-Methylthio) Ethyl Ester	c,e,g	1	500
2631-37-0	Promecarb	e,h	1	500 /10,000
2636-26-2	Cyanophos	e	1	1,000
2642-71-9	Azinphos-Ethyl	e	1	100 /10,000
2665-30-7	Phosphorothioic Acid, Methyl-,O-(4-Nitrophenyl) O-Phenyl Ester	e	1	500
2703-13-1	Phosphorothioic Acid,Methyl-,O-Ethyl O-(4-(Methylthio)Phenyl)Estere		1	500
2757-18-8	Thallous Malonate	c,e,h	1	100 /10,000
2763-96-4	Muscimol	e,h	1,000	10,000
2778-04-3	Endothion	e	1	500 /10,000
3037-72-7	Silane, (4-Aminobutyl)Diethoxymethyl-	e	1	1,000
3254-63-5	Phosphoric Acid, Dimethyl 4-(Methylthio) Phenyl Ester	e	1	500
3569-57-1	Sulfoxide, 3-Chloropropyl Octyl	e	1	500
3615-21-2	Benzimidazole, 4,5-Dichloro-2-(Trifluoromethyl)-	e,g	1	500 /10,000
3689-24-5	Sulfotep		100	500
3691-35-8	Chlorophosphamone	e	1	100 /10,000
3734-97-2	Amiton Oxalate	e	1	100 /10,000
3735-23-7	Methyl Phenkapton	e	1	500
3878-19-1	Fuberidazole	e	1	100 /10,000
4044-65-9	Bitoscanate	e	1	500 /10,000
4098-71-9	Isophorone Diisocyanate	b,e	1	100
4104-14-7	Phosacetim	e	1	100 /10,000
4170-30-3	Crotonaldehyde		100	1,000
4301-50-2	Fluenetil	e	1	100 /10,000
4418-66-0	Phenol, 2,2'-Thiobis(4-Chloro-6-Methyl)-	e	1	100 /10,000
4835-11-4	Hexamethylenediamine, N,N'-Dibutyl-	e	1	500
5281-13-0	Piprotal	e	1	100 /10,000
5344-82-1	Thiourea, (2-Chlorophenyl)-		100	100 /10,000
5836-29-3	Coumatetralyl	e	1	500 /10,000
6533-73-9	Thallous Carbonate	c,h	100	100 /10,000
6923-22-4	Monocrotophos	e	1	10 /10,000
7446-09-5	Sulfur Dioxide	e,i	1	500

(CAS Number Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
152-16-9	Diphosphoramide, Octamethyl-		100	100
297-78-9	Isobenzan	e	1	100 /10,000
297-97-2	Thionazin		100	500
298-00-0	Parathion-Methyl	c	100	100 /10,000
298-02-2	Phorate		10	10
298-04-4	Disulfoton		1	500
300-62-9	Amphetamine	e	1	1,000
302-01-2	Hydrazine	d	1	1,000
309-00-2	Aldrin	d	1	500 /10,000
315-18-4	Mexacarbate		1,000	500 /10,000
316-42-7	Emetine, Dihydrochloride	e,h	1	1 /10,000
327-98-0	Trichloronate	e,k	1	500
353-42-4	Boron Trifluoride Compound With Methyl Ether (1:1)	e	1	1,000
359-06-8	Fluoroacetyl Chloride	c,e	1	10
371-62-0	Ethylene Fluorohydrin	c,e,h	1	10
379-79-3	Ergotamine Tartrate	e	1	500 /10,000
465-73-6	Isodrin		1	100 /10,000
470-90-6	Chlorfenvinfos	e	1	500
502-39-6	Methylmercuric Dicyanamide	e	1	500 /10,000
504-24-5	Pyridine, 4-Amino-	h	1,000	500 /10,000
505-60-2	Mustard Gas	e,h	1	500
506-61-6	Potassium Silver Cyanide	b	1	500
506-68-3	Cyanogen Bromide		1,000	500 /10,000
506-78-5	Cyanogen Iodide	e	1	1,000 /10,000
509-14-8	Tetranitromethane		10	500
514-73-8	Dithiazanine Iodide	e	1	500 /10,000
534-07-6	Bis(Chloromethyl) Ketone	e	1	10 /10,000
534-52-1	Dinitrocresol		10	10 /10,000
535-89-7	Crimidine	e	1	100 /10,000
538-07-8	Ethylbis(2-Chloroethyl)Amine	e,h	1	500
541-25-3	Lewisite	c,e,h	1	10
541-53-7	Dithiobiuret		100	100 /10,000
542-76-7	Propionitrile, 3-Chloro-		1,000	1,000
542-88-1	Chloromethyl Ether	d,h	1	100
542-90-5	Ethylthiocyanate	e	1	10,000
555-77-1	Tris(2-Chloroethyl)Amine	e,h	1	100
556-61-6	Methyl Isothiocyanate	b,e	1	500
556-64-9	Methyl Thiocyanate	e	1	10,000
558-25-8	Methanesulfenyl Fluoride	e	1	1,000
563-12-2	Ethion		10	1,000
563-41-7	Semicarbazide Hydrochloride	e	1	1,000 /10,000
584-84-9	Toluene 2,4-Diisocyanate		100	500
594-42-3	Perchloromethylmercaptan		100	500
597-64-8	Tetraethyltin	c,e	1	100
614-78-8	Thiourea, (2-Methylphenyl)-	e	1	500 /10,000
624-83-9	Methyl Isocyanate	f	1	500
624-92-0	Methyl Disulfide	e	1	100
625-55-8	Isopropyl Formate	e	1	500
627-11-2	Chloroethyl Chloroformate	e	1	1,000
630-60-4	Gualain	c,e	1	100 /10,000
639-58-7	Triphenyltin Chloride	e	1	500 /10,000
640-19-7	Fluoroacetamide	j	100	100 /10,000
644-64-4	Dimetilan	e	1	500 /10,000
675-14-9	Cyanuric Fluoride	e	1	100
676-97-1	Methyl Phosphonic Dichloride	b,e	1	100
696-28-6	Phenyl Dichloroarsine	d,h	1	500
732-11-6	Phosmet	e	1	10 /10,000
760-93-0	Methacrylic Anhydride	e	1	500
786-19-6	Carbophenothion	e	1	500
814-49-3	Diethyl Chlorophosphate	e,h	1	500
814-68-6	Acrylyl Chloride	e,h	1	100
824-11-3	Trimethylolpropane Phosphite	e,h	1	100 /10,000
900-95-8	Stannane, Acetoxytriphenyl-	e,g	1	500 /10,000
919-86-8	Demeton-S-Methyl	e	1	500
920-46-7	Methacryloyl Chloride	e	1	100
944-22-9	Fonofos	e	1	500
947-02-4	Phosfolan	e	1	100 /10,000
950-10-7	Mephosfolan	e	1	500
950-37-8	Methidathion	e	1	500 /10,000

(CAS Number Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
81-81-2	Warfarin		100	500 /10,000
82-66-6	Diphacinone	e	1	10 /10,000
86-50-0	Azinphos-Methyl		1	10 /10,000
86-88-4	ANTU		100	500 /10,000
88-05-1	Aniline, 2,4,6-Trimethyl-	e	1	500
88-85-7	Dinoseb		1,000	100 /10,000
91-08-7	Toluene 2,6-Diisocyanate		100	100
95-48-7	Cresol, o-	d	1,000	1,000 /10,000
97-18-7	Phenol, 2,2'-Thiobis(4,6-Dichloro)-	e	1	100 /10,000
98-05-5	Benzenearsonic Acid	e	1	10 /10,000
98-07-7	Benzotrichloride	d	1	100
98-13-5	Trichlorophenylsilane	e,h	1	500
98-16-8	Benzenamine, 3-(Trifluoromethyl)-	e	1	500
98-87-3	Benzal Chloride	d	5,000	500
98-95-3	Nitrobenzene	l	1,000	10,000
99-98-9	Dimethyl-p-Phenylenediamine	e	1	10 /10,000
100-14-1	Benzene, 1-(Chloromethyl)-4-Nitro-	e	1	500 /10,000
100-44-7	Benzyl Chloride	d	100	500
102-36-3	Isocyanic Acid, 3,4-Dichlorophenyl Ester	e	1	500 /10,000
103-85-5	Phenylthiourea		100	100 /10,000
106-89-8	Epichlorohydrin	d,l	1,000	1,000
106-96-7	Propargyl Bromide	e	1	10
107-02-8	Acrolein		1	500
107-07-3	Chloroethanol	e	1	500
107-11-9	Allylamine	e	1	500
107-12-0	Propionitrile		10	500
107-13-1	Acrylonitrile	d,l	100	10,000
107-15-3	Ethylenediamine		5,000	10,000
107-16-4	Formaldehyde Cyanohydrin	e,h	1	1,000
107-18-6	Allyl Alcohol		100	1,000
107-30-2	Chloromethyl Methyl Ether	c,d	1	100
107-44-8	Sarin	e,h	1	10
107-49-3	TEPP		10	100
108-05-4	Vinyl Acetate Monomer	d,l	5,000	1,000
108-23-6	Isopropyl Chloroformate	e	1	1,000
108-91-8	Cyclohexylamine	e,l	1	10,000
108-95-2	Phenol		1,000	500 /10,000
108-98-5	Thiophenol		100	500
109-61-5	Propyl Chloroformate	e	1	500
109-77-3	Malononitrile		1,000	500 /10,000
110-00-9	Furan		100	500
110-57-6	Trans-1,4-Dichlorobutene	e	1	500
110-89-4	Piperidine	e	1	1,000
111-44-4	Dichloroethyl Ether	d	1	10,000
111-69-3	Adiponitrile	e,l	1	1,000
115-21-9	Trichloroethylsilane	e,h	1	500
115-26-4	Dimefox	e	1	500
115-29-7	Endosulfan		1	10 /10,000
115-90-2	Fensulfothion	e,h	1	500
116-06-3	Aldicarb	c	1	100 /10,000
119-38-0	Isopropylmethylpyrazolyl Dimethylcarbamate	e	1	500
122-14-5	Fenitrothion	e	1	500
123-31-9	Hydroquinone	e	1	500 /10,000
123-73-9	Crotonaldehyde, (E)-		100	1,000
124-65-2	Sodium Cacodylate	e	1	100 /10,000
124-87-8	Picrotoxin	e	1	500 /10,000
126-98-7	Methacrylonitrile	h	1	500
129-00-0	Pyrene	c	5,000	1,000 /10,000
129-06-6	Warfarin Sodium	e,h	1	100 /10,000
131-52-2	Sodium Pentachlorophenate	e	1	100 /10,000
140-29-4	Benzyl Cyanide	e,h	1	500
140-76-1	Pyridine, 2-Methyl-5-Vinyl-	e	1	500
141-66-2	Dicrotophos	e	1	100
143-33-9	Sodium Cyanide (Na(CN))	b	10	100
144-49-0	Fluoroacetic Acid	e	1	10 /10,000
149-74-6	Dichloromethylphenylsilane	e	1	1,000
151-38-2	Methoxyethylmercuric Acetate	e	1	500 /10,000
151-50-8	Potassium Cyanide	b	10	100
151-56-4	Ethyleneimine	d	1	500

The attached lists represent the complete list of Section 302 Extremely Hazardous Substances of the Emergency Planning and Community Right to Know Act (Title III). The substances are listed in alphabetical order by chemical name and numerical order by Chemcial Abstract Number (CAS No.). This list was published as Appendix A and B to the final rule (40 CFR 355) in the Federal Register on April 22, 1987, (FR 13376) and revised on December 17, 1987 (FR 48072) and February 25, 1988 (FR 5574) to delete forty substances. The list of these forty substances is also provided for your information.

APPENDIX B. LIST OF EXTREMELY HAZARDOUS SUBSTANCES

U.S. Environmental Protection Agency

THE EMERGENCY PLANNING and COMMUNITY RIGHT-TO-KNOW ACT of 1986

List of Extremely Hazardous Substances

40 CFR 355

(Sections 302 and 304)

March 1, 1988

(CAS Number Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
0	Organorhodium Complex (PMN-82-147)	e	1	10 /10,000
50-00-0	Formaldehyde	d,l	1,000	500
50-07-7	Mitomycin C	d	1	500 /10,000
50-14-6	Ergocalciferol	c,e	1	1,000 /10,000
51-21-8	Fluorouracil	e	1	500 /10,000
51-75-2	Mechlorethamine	c,e	1	10
51-83-2	Carbachol Chloride	e	1	500 /10,000
54-11-5	Nicotine	c	100	100
54-62-6	Aminopterin	e	1	500 /10,000
55-91-4	Isofluorphate	c	100	100
56-25-7	Cantharidin	e	1	100 /10,000
56-38-2	Parathion	c,d	1	100
56-72-4	Coumaphos		10	100 /10,000
57-14-7	Dimethylhydrazine	d	1	1,000
57-24-9	Strychnine	c	10	100 /10,000
57-47-6	Physostigmine	e	1	100 /10,000
57-57-8	Propiolactone, Beta-	e	1	500
57-64-7	Physostigmine, Salicylate (1:1)	e	1	100 /10,000
57-74-9	Chlordane	d	1	1,000
58-36-6	Phenoxarsine, 10,10'-Oxydi-	e	1	500 /10,000
58-89-9	Lindane	d	1	1,000 /10,000
59-88-1	Phenylhydrazine Hydrochloride	e	1	1,000 /10,000
60-34-4	Methyl Hydrazine		10	500
60-41-3	Strychnine, Sulfate	e	1	100 /10,000
60-51-5	Dimethoate		10	500 /10,000
62-38-4	Phenylmercury Acetate		100	500 /10,000
62-53-3	Aniline	d,l	5,000	1,000
62-73-7	Dichlorvos		10	1,000
62-74-8	Sodium Fluoroacetate		10	10 /10,000
62-75-9	Nitrosodimethylamine	d,h	1	1,000
64-00-6	Phenol, 3-(1-Methylethyl)-, Methylcarbamate	e	1	500 /10,000
64-86-8	Colchicine	e,h	1	10 /10,000
65-30-5	Nicotine Sulfate	e	1	100 /10,000
66-81-9	Cycloheximide	e	1	100 /10,000
67-66-3	Chloroform	d,l	5,000	10,000
70-69-9	Propiophenone, 4-Amino-	e,g	1	100 /10,000
71-63-6	Digitoxin	c,e	1	100 /10,000
72-20-8	Endrin		1	500 /10,000
74-83-9	Methyl Bromide	l	1,000	1,000
74-90-8	Hydrocyanic Acid		10	100
74-93-1	Methyl Mercaptan		100	500
75-15-0	Carbon Disulfide	l	100	10,000
75-18-3	Dimethyl Sulfide	e	1	100
75-21-8	Ethylene Oxide	d,l	1	1,000
75-44-5	Phosgene	l	10	10
75-55-8	Propyleneimine	d	1	10,000
75-56-9	Propylene Oxide	l	100	10,000
75-74-1	Tetramethyllead	c,e,l	1	100
75-77-4	Trimethylchlorosilane	e	1	1,000
75-78-5	Dimethyldichlorosilane	e,h	1	500
75-79-6	Methyltrichlorosilane	e,h	1	500
75-86-5	Acetone Cyanohydrin		10	1,000
76-02-8	Trichloroacetyl Chloride	e	1	500
77-47-4	Hexachlorocyclopentadiene	d,h	1	100
77-78-1	Dimethyl Sulfate	d	1	500
77-81-6	Tabun	c,e,h	1	10
78-00-2	Tetraethyllead	c,d	10	100
78-34-2	Dioxathion	e	1	500
78-53-5	Amiton	e	1	500
78-71-7	Oxetane, 3,3-Bis(Chloromethyl)-	e	1	500
78-82-0	Isobutyronitrile	e,h	1	1,000
78-94-4	Methyl Vinyl Ketone	e	1	10
78-97-7	Lactonitrile	e	1	1,000
79-06-1	Acrylamide	d,l	5,000	1,000 /10,000
79-11-8	Chloroacetic Acid	e	1	100 /10,000
79-19-6	Thiosemicarbazide		100	100 /10,000
79-21-0	Peracetic Acid	e	1	500
79-22-1	Methyl Chloroformate	d,h	1,000	500
80-63-7	Methyl 2-Chloroacrylate	e	1	500

(Alphabetical Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
91-08-7	Toluene 2,6-Diisocyanate		100	100
110-57-6	Trans-1,4-Dichlorobutene	e	1	500
1031-47-6	Trimethiphos	e	1	500 /10,000
24017-47-8	Triazofos	e	1	500
76-02-8	Trichloroacetyl Chloride	e	1	500
115-21-9	Trichloroethylsilane	e,h	1	500
327-98-0	Trichloronate	e,k	1	500
98-13-5	Trichlorophenylsilane	e,h	1	500
1558-25-4	Trichloro(Chloromethyl)Silane	e	1	100
27137-85-5	Trichloro(Dichlorophenyl)Silane	e	1	500
998-30-1	Triethoxysilane	e	1	500
75-77-4	Trimethylchlorosilane	e	1	1,000
824-11-3	Trimethylolpropane Phosphite	e,h	1	100 /10,000
1066-45-1	Trimethyltin Chloride	e	1	500 /10,000
639-58-7	Triphenyltin Chloride	e	1	500 /10,000
555-77-1	Tris(2-Chloroethyl)Amine	e,h	1	100
2001-95-8	Valinomycin	c,e	1	1,000 /10,000
1314-62-1	Vanadium Pentoxide		1,000	100 /10,000
108-05-4	Vinyl Acetate Monomer	d,l	5,000	1,000
81-81-2	Warfarin		100	500 /10,000
129-06-6	Warfarin Sodium	e,h	1	100 /10,000
28347-13-9	Xylylene Dichloride	e	1	100 /10,000
58270-08-9	Zinc, Dichloro(4,4-Dimethyl-5((((Methylamino)Carbonyl) Oxy)Imino)Pentanenitrile)-,(T-4)-	e	1	100 /10,000
1314-84-7	Zinc Phosphide	b	100	500

* Only the statutory or final RQ is shown. For more information, see 40CFR Table 302.4

Notes:

- b This material is a reactive solid. The TPQ does not default to 10,000 pounds for non-powder, non-molten, non-solution form.
- c The calculated TPQ changed after technical review as described in the technical support document.
- d Indicates that the RQ is subject to change when the assessment of potential carcinogenicity and/or other toxicity is completed.
- e Statutory reportable quantity for purposes of notification under SARA sect 304(a)(2).
- f The statutory 1 pound reportable quantity for methyl isocyanate may be adjusted in a future rulemaking action.
- g New chemicals added that were not part of the original list of 402 substances.
- h Revised TPQ based on new or re-evaluated toxicity data.
- j TPQ is revised to its calculated value and does not change due to technical review as in proposed rule.
- k The TPQ was revised after proposal due to calculation error.
- l Chemicals on the original list that do not meet the toxicity criteria but because of their high production volume and recognized toxicity are considered chemicals of concern ("Other chemicals")

(Alphabetical Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
91-08-7	Toluene 2,6-Diisocyanate		100	100
110-57-6	Trans-1,4-Dichlorobutene	e	1	500
1031-67-6	Trimiphos	e	1	500 /10,000
24017-47-8	Triazofos	e	1	500
76-02-8	Trichloroacetyl Chloride	e	1	500
115-21-9	Trichloroethylsilane	e,h	1	500
327-98-0	Trichloronate	e,k	1	500
98-13-5	Trichlorophenylsilane	e,h	1	500
1558-25-4	Trichloro(Chloromethyl)Silane	e	1	100
27137-85-5	Trichloro(Dichlorophenyl)Silane	e	1	500
998-30-1	Triethoxysilane	e	1	500
75-77-4	Trimethylchlorosilane	e	1	1,000
824-11-3	Trimethylolpropane Phosphite	e,h	1	100 /10,000
1066-45-1	Trimethyltin Chloride	e	1	500 /10,000
639-58-7	Triphenyltin Chloride	e	1	500 /10,000
555-77-1	Tris(2-Chloroethyl)Amine	e,h	1	100
2001-95-8	Valinomycin	c,e	1	1,000 /10,000
1314-62-1	Vanadium Pentoxide		1,000	100 /10,000
108-05-4	Vinyl Acetate Monomer	d,l	5,000	1,000
81-81-2	Warfarin		100	500 /10,000
129-06-6	Warfarin Sodium	e,h	1	100 /10,000
28347-13-9	Xylylene Dichloride	e	1	100 /10,000
58270-08-9	Zinc, Dichloro(4,4-Dimethyl-5((((Methylamino)Carbonyl) Oxy)Imino)Pentanenitrile)-,(T-4)-	e	1	100 /10,000
1314-84-7	Zinc Phosphide	b	100	500

* Only the statutory or final RQ is shown. For more information, see 40CFR Table 302.4

es:

- b This material is a reactive solid. The TPQ does not default to 10,000 pounds for non-powder, non-molten, non-solution form.
- c The calculated TPQ changed after technical review as described in the technical support document.
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- e * Statutory reportable quantity for purposes of notification under SARA sect 304(a)(2).
- f The statutory 1 pound reportable quantity for methyl isocyanate may be adjusted in a future rulemaking action.
- g New chemicals added that were not part of the original list of 402 substances.
- h Revised TPQ based on new or re-evaluated toxicity data.
- j TPQ is revised to its calculated value and does not change due to technical review as in proposed rule.
- k The TPQ was revised after proposal due to calculation error.
- l Chemicals on the original list that do not meet the toxicity criteria but because of their high production volume and recognized toxicity are considered chemicals of concern ("Other chemicals")

(Alphabetical Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
110-89-4	Piperidine	e	1	1,000
5281-13-0	Piprotel	e	1	100 /10,000
23505-41-1	Pirimifos-Ethyl	e	1	1,000
10124-50-2	Potassium Arsenite	d	1,000	500 /10,000
151-50-8	Potassium Cyanide	b	10	100
506-61-6	Potassium Silver Cyanide	b	1	500
2631-37-0	Promecarb	e,h	1	500 /10,000
106-96-7	Propargyl Bromide	e	1	10
57-57-8	Propiolactone, Beta-	e	1	500
107-12-0	Propionitrile		10	500
542-76-7	Propionitrile, 3-Chloro-		1,000	1,000
70-69-9	Propiophenone, 4-Amino-	e,g	1	100 /10,000
109-61-5	Propyl Chloroformate	e	1	500
75-56-9	Propylene Oxide	l	100	10,000
75-55-8	Propyleneimine	d	1	10,000
2275-18-5	Prothoate	e	1	100 /10,000
129-00-0	Pyrene	c	5,000	1,000 /10,000
140-76-1	Pyridine, 2-Methyl-5-Vinyl-	e	1	500
504-24-5	Pyridine, 4-Amino-	h	1,000	500 /10,000
1124-33-0	Pyridine, 4-Nitro-, 1-Oxide	e	1	500 /10,000
53558-25-1	Pyriminil	e,h	1	100 /10,000
14167-18-1	Salcomine	e	1	500 /10,000
107-44-8	Sarin	e,h	1	10
7783-00-8	Selenious Acid		10	1,000 /10,000
7791-23-3	Selenium Oxychloride	e	1	500
563-41-7	Semicarbazide Hydrochloride	e	1	1,000 /10,000
3037-72-7	Silane, (4-Aminobutyl)Diethoxymethyl-	e	1	1,000
7631-89-2	Sodium Arsenate	d	1,000	1,000 /10,000
7784-46-5	Sodium Arsenite	d	1,000	500 /10,000
26628-22-8	Sodium Azide (Na(N3))	b	1,000	500
124-65-2	Sodium Cacodylate	e	1	100 /10,000
143-33-9	Sodium Cyanide (Na(CN))	b	10	100
62-74-8	Sodium Fluoroacetate		10	10 /10,000
131-52-2	Sodium Pentachlorophenate	e	1	100 /10,000
13410-01-0	Sodium Selenate	e	1	100 /10,000
10102-18-8	Sodium Selenite	h	100	100 /10,000
10102-20-2	Sodium Tellurite	e	1	500 /10,000
900-95-8	Stannane, Acetoxytriphenyl-	e,g	1	500 /10,000
57-24-9	Strychnine	c	10	100 /10,000
60-41-3	Strychnine, Sulfate	e	1	100 /10,000
3689-24-5	Sulfotep		100	500
3569-57-1	Sulfoxide, 3-Chloropropyl Octyl	e	1	500
7446-09-5	Sulfur Dioxide	e,l	1	500
7783-60-0	Sulfur Tetrafluoride	e	1	100
7446-11-9	Sulfur Trioxide	b,e	1	100
7664-93-9	Sulfuric Acid		1,000	1,000
77-81-6	Tabun	c,e,h	1	10
13494-80-9	Tellurium	e	1	500 /10,000
7783-80-4	Tellurium Hexafluoride	e,k	1	100
107-49-3	TEPP		10	100
13071-79-9	Terbufos	e,h	1	100
78-00-2	Tetraethyllead	c,d	10	100
597-64-8	Tetraethyltin	c,e	1	100
75-74-1	Tetramethyllead	c,e,l	1	100
509-14-8	Tetranitromethane		10	500
10031-59-1	Thallium Sulfate	h	100	100 /10,000
6533-73-9	Thallium Carbonate	c,h	100	100 /10,000
7791-12-0	Thallium Chloride	e,h	100	100 /10,000
2757-18-8	Thallium Malonate	c,e,h	1	100 /10,000
7446-18-6	Thallium Sulfate		100	100 /10,000
2231-57-4	Thiocarbazide	e	1	1,000 /10,000
39196-18-4	Thiofanox		100	100 /10,000
297-97-2	Thionazin		100	500
108-98-5	Thiophenol		100	500
79-19-6	Thiosemicarbazide		100	100 /10,000
5344-82-1	Thiourea, (2-Chlorophenyl)-		100	100 /10,000
614-78-8	Thiourea, (2-Methylphenyl)-	e	1	500 /10,000
7550-45-0	Titanium Tetrachloride	e	1	100
584-84-9	Toluene 2,4-Diisocyanate		100	500

(Alphabetical Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
74-93-1	Methyl Mercaptan		100	500
3735-23-7	Methyl Phenkapton	e	1	500
676-97-1	Methyl Phosphonic Dichloride	b,e	1	100
556-64-9	Methyl Thiocyanate	e	1	10,000
78-94-4	Methyl Vinyl Ketone	e	1	10
502-39-6	Methylmercuric Dicyanamide	e	1	500 /10,000
75-79-6	Methyltrichlorosilane	e,h	1	500
1129-41-5	Metolcarb	e	1	100 /10,000
7786-34-7	Mevinphos		10	500
315-18-4	Mexacarbate		1,000	500 /10,000
50-07-7	Mitomycin C	d	1	500 /10,000
6923-22-4	Monocrotophos	e	1	10 /10,000
2763-96-4	Muscimol	e,h	1,000	10,000
505-60-2	Mustard Gas	e,h	1	500
13463-39-3	Nickel Carbonyl	d	1	1
54-11-5	Nicotine	c	100	100
65-30-5	Nicotine Sulfate	e	1	100 /10,000
7697-37-2	Nitric Acid		1,000	1,000
10102-43-9	Nitric Oxide	c	10	100
98-95-3	Nitrobenzene	l	1,000	10,000
1122-60-7	Nitrocyclohexane	e	1	500
10102-44-0	Nitrogen Dioxide		10	100
62-75-9	Nitrosodimethylamine	d,h	1	1,000
991-42-4	Norbormide	e	1	100 /10,000
0	Organorhodium Complex (PMN-82-147)	e	1	10 /10,000
630-60-4	Ouabain	c,e	1	100 /10,000
23135-22-0	Oxamyl	e	1	100 /10,000
78-71-7	Oxetane, 3,3-Bis(Chloromethyl)-	e	1	500
97-07-6	Oxydisulfoton	e,h	1	500
10028-15-6	Ozone	e	1	100
1910-42-5	Paraquat	e	1	10 /10,000
2074-50-2	Paraquat Methosulfate	e	1	10 /10,000
56-38-2	Parathion	c,d	1	100
298-00-0	Parathion-Methyl	c	100	100 /10,000
12002-03-8	Paris Green	d	100	500 /10,000
19624-22-7	Pentaborane	e	1	500
2570-26-5	Pentadecylamine	e	1	100 /10,000
79-21-0	Peracetic Acid	e	1	500
594-42-3	Perchloromethylmercaptan		100	500
108-95-2	Phenol		1,000	500 /10,000
97-18-7	Phenol, 2,2'-Thiobis(4,6-Dichloro)-	e	1	100 /10,000
4418-66-0	Phenol, 2,2'-Thiobis(4-Chloro-6-Methyl)-	e	1	100 /10,000
64-00-6	Phenol, 3-(1-Methylethyl)-, Methylcarbamate	e	1	500 /10,000
58-36-6	Phenoxarsine, 10,10'-Oxydi-	e	1	500 /10,000
696-28-6	Phenyl Dichlorarsine	d,h	1	500
59-88-1	Phenylhydrazine Hydrochloride	e	1	1,000 /10,000
62-38-4	Phenylmercury Acetate		100	500 /10,000
2097-19-0	Phenylsilatrane	e,h	1	100 /10,000
103-85-5	Phenylthiourea		100	100 /10,000
298-02-2	Phorate		10	10
4104-14-7	Phosacetim	e	1	100 /10,000
947-02-4	Phosfolan	e	1	100 /10,000
75-44-5	Phosgene	l	10	10
732-11-6	Phosmet	e	1	10 /10,000
13171-21-6	Phosphamidon	e	1	100
7803-51-2	Phosphine		100	500
2703-13-1	Phosphorothioic Acid,Methyl-,O-Ethyl O-(4-(Methylthio)Phenyl)Ester	e	1	500
50782-69-9	Phosphorothioic Acid, Methyl-, S-(2-(Bis(1-Methylethyl)Amino)Ethyl)e		1	100
2665-30-7	Phosphorothioic Acid, Methyl-,O-(4-Nitrophenyl) O-Phenyl Ester	e	1	500
3254-63-5	Phosphoric Acid, Dimethyl 4-(Methylthio) Phenyl Ester	e	1	500
2587-90-8	Phosphorothioic Acid, O,O-Dimethyl-S-(2-Methylthio) Ethyl Ester	c,e,g	1	500
7723-14-0	Phosphorus	b,h	1	100
10025-87-3	Phosphorus Oxychloride	d	1,000	500
10026-13-8	Phosphorus Pentachloride	b,e	1	500
1314-56-3	Phosphorus Pentoxide	b,e	1	10
7719-12-2	Phosphorus Trichloride		1,000	1,000
57-47-6	Physostigmine	e	1	100 /10,000
57-64-7	Physostigmine, Salicylate (1:1)	e	1	100 /10,000
124-87-8	Picrotoxin	e	1	500 /10,000

(Alphabetical Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
22224-92-6	Fenamiphos	e	1	10 /10,000
122-14-5	Fenitrothion	e	1	500
115-90-2	Fensulfothion	e,h	1	500
4301-50-2	Fluenetil	e	1	100 /10,000
7782-41-4	Fluorine	k	10	500
640-19-7	Fluoroacetamide	j	100	100 /10,000
144-49-0	Fluoroacetic Acid	e	1	10 /10,000
359-06-8	Fluoroacetyl Chloride	c,e	1	10
51-21-8	Fluorouracil	e	1	500 /10,000
944-22-9	Fonofos	e	1	500
50-00-0	Formaldehyde	d,l	1,000	500
107-16-4	Formaldehyde Cyanohydrin	e,h	1	1,000
23422-53-9	Formetanate Hydrochloride	e,h	1	500 /10,000
2540-82-1	Formothion	e	1	100
17702-57-7	Formparanate	e	1	100 /10,000
21548-32-3	Fosthietan	e	1	500
3878-19-1	Fuberidazole	e	1	100 /10,000
110-00-9	Furan		100	500
13450-90-3	Gallium Trichloride	e	1	500 /10,000
77-47-4	Hexachlorocyclopentadiene	d,h	1	100
4835-11-4	Hexamethylenediamine, N,N'-Dibutyl-	e	1	500
302-01-2	Hydrazine	d	1	1,000
74-90-8	Hydrocyanic Acid		10	100
7647-01-0	Hydrogen Chloride (Gas Only)	e,l	1	500
7664-39-3	Hydrogen Fluoride		100	100
7722-84-1	Hydrogen Peroxide (Conc > 52%)	e,l	1	1,000
7783-07-5	Hydrogen Selenide	e	1	10
7783-06-4	Hydrogen Sulfide	l	100	500
123-31-9	Hydroquinone	e	1	500 /10,000
13463-40-6	Iron, Pentacarbonyl-	e	1	100
297-78-9	Isobenzan	e	1	100 /10,000
78-82-0	Isobutyronitrile	e,h	1	1,000
102-36-3	Isocyanic Acid, 3,4-Dichlorophenyl Ester	e	1	500 /10,000
465-73-6	Isodrin		1	100 /10,000
55-91-4	Isofluorphate	c	100	100
4098-71-9	Isophorone Diisocyanate	b,e	1	100
108-23-6	Isopropyl Chloroformate	e	1	1,000
625-55-8	Isopropyl Formate	e	1	500
119-38-0	Isopropylmethylpyrazolyl Dimethylcarbamate	e	1	500
78-97-7	Lactonitrile	e	1	1,000
21609-90-5	Leptophos	e	1	500 /10,000
541-25-3	Lewisite	c,e,h	1	10
58-89-9	Lindane	d	1	1,000 /10,000
7580-67-8	Lithium Hydride	b,e	1	100
109-77-3	Malononitrile		1,000	500 /10,000
12108-13-3	Manganese, Tricarbonyl Methylcyclopentadienyl	e,h	1	100
51-75-2	Mechlorethamine	c,e	1	10
950-10-7	Mephosfolan	e	1	500
1600-27-7	Mercuric Acetate	e	1	500 /10,000
7487-94-7	Mercuric Chloride	e	1	500 /10,000
21908-53-2	Mercuric Oxide	e	1	500 /10,000
10476-95-6	Methacrolein Diacetate	e	1	1,000
760-93-0	Methacrylic Anhydride	e	1	500
126-98-7	Methacrylonitrile	h	1	500
920-46-7	Methacryloyl Chloride	e	1	100
30674-80-7	Methacryloyloxyethyl Isocyanate	e,h	1	100
10265-92-6	Methamidophos	e	1	100 /10,000
558-25-8	Methanesulfenyl Fluoride	e	1	1,000
950-37-8	Methidathion	e	1	500 /10,000
2032-65-7	Methiocarb		10	500 /10,000
16752-77-5	Methomyl	h	100	500 /10,000
151-38-2	Methoxyethylmercuric Acetate	e	1	500 /10,000
80-63-7	Methyl 2-Chloroacrylate	e	1	500
74-83-9	Methyl Bromide	l	1,000	1,000
79-22-1	Methyl Chloroformate	d,h	1,000	500
624-92-0	Methyl Disulfide	e	1	100
60-34-4	Methyl Hydrazine		10	500
624-83-9	Methyl Isocyanate	f	1	500
556-61-6	Methyl Isothiocyanate	b,e	1	500

(Alphabetical Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
21923-23-9	Chlorthiophos	e,h	1	500
10025-73-7	Chromic Chloride	e	1	1 /10,000
62207-76-5	Cobalt, ((2,2'-(1,2-Ethanediylbis (Nitrilomethylidyne)) Bis(6-Fluorophenolato))(2-)-N,N',O,O')-	e	1	100 /10,000
10210-68-1	Cobalt Carbonyl	e,h	1	10 /10,000
64-86-8	Colchicine	e,h	1	10 /10,000
56-72-4	Coumaphos		10	100 /10,000
5836-29-3	Coumatetralyl	e	1	500 /10,000
95-48-7	Cresol, o-	d	1,000	1,000 /10,000
535-89-7	Crimidine	e	1	100 /10,000
4170-30-3	Crotonaldehyde		100	1,000
123-73-9	Crotonaldehyde, (E)-		100	1,000
506-68-3	Cyanogen Bromide		1,000	500 /10,000
506-78-5	Cyanogen Iodide	e	1	1,000 /10,000
2636-26-2	Cyanophos	e	1	1,000
675-14-9	Cyanuric Fluoride	e	1	100
66-81-9	Cycloheximide	e	1	100 /10,000
108-91-8	Cyclohexylamine	e,i	1	10,000
17702-41-9	Decaborane(14)	e	1	500 /10,000
8065-48-3	Demeton	e	1	500
919-86-8	Demeton-S-Methyl	e	1	500
10311-84-9	Dialifor	e	1	100 /10,000
19287-45-7	Diborane	e	1	100
111-44-4	Dichloroethyl Ether	d	1	10,000
149-74-6	Dichloromethylphenylsilane	e	1	1,000
62-73-7	Dichlorvos		10	1,000
141-66-2	Dicrotophos	e	1	100
64-53-5	Diepoxybutane	d	1	500
14-49-3	Diethyl Chlorophosphate	e,h	1	500
1642-54-2	Diethylcarbamazine Citrate	e	1	100 /10,000
71-63-6	Digitoxin	c,e	1	100 /10,000
2238-07-5	Diglycidyl Ether	e	1	1,000
20830-75-5	Digoxin	e,h	1	10 /10,000
115-26-4	Dimefox	e	1	500
60-51-5	Dimethoate		10	500 /10,000
2524-03-0	Dimethyl Phosphorochloridothioate	e	1	500
77-78-1	Dimethyl Sulfate	d	1	500
75-18-3	Dimethyl Sulfide	e	1	100
75-78-5	Dimethyldichlorosilane	e,h	1	500
57-14-7	Dimethylhydrazine	d	1	1,000
99-98-9	Dimethyl-p-Phenylenediamine	e	1	10 /10,000
644-64-4	Dimetilan	e	1	500 /10,000
534-52-1	Dinitrocresol		10	10 /10,000
88-85-7	Dinoseb		1,000	100 /10,000
1420-07-1	Dinoterb	e	1	500 /10,000
78-34-2	Dioxathion	e	1	500
82-66-6	Diphacinone	e	1	10 /10,000
152-16-9	Diphosphoramide, Octamethyl-		100	100
298-04-4	Disulfoton		1	500
514-73-8	Dithiazanine Iodide	e	1	500 /10,000
541-53-7	Dithiobiuret		100	100 /10,000
316-42-7	Emetine, Dihydrochloride	e,h	1	1 /10,000
115-29-7	Endosulfan		1	10 /10,000
2778-04-3	Endothion	e	1	500 /10,000
72-20-8	Endrin		1	500 /10,000
106-89-8	Epichlorohydrin	d,i	1,000	1,000
2104-64-5	EPN	e	1	100 /10,000
50-14-6	Ergocalciferol	c,e	1	1,000 /10,000
379-79-3	Ergotamine Tartrate	e	1	500 /10,000
1622-32-8	Ethanesulfenyl Chloride, 2-Chloro-	e	1	500
10140-87-1	Ethanol, 1,2-Dichloro-, Acetate	e	1	1,000
563-12-2	Ethion		10	1,000
13194-48-4	Ethoprophos	e	1	1,000
538-07-8	Ethylbis(2-Chloroethyl)Amine	e,h	1	500
371-62-0	Ethylene Fluorohydrin	c,e,h	1	10
75-21-8	Ethylene Oxide	d,i	1	1,000
107-15-3	Ethylenediamine		5,000	10,000
151-56-4	Ethyleneimine	d	1	500
542-90-5	Ethylthiocyanate	e	1	10,000

(Alphabetical Order)

CAS #	Chemical Name	Notes	Reportable Quantity * (pounds)	Threshold Planning Quantity (pounds)
75-86-5	Acetone Cyanohydrin		10	1,000
1752-30-3	Acetone Thiosemicarbazide	e	1	1,000 /10,000
107-02-8	Acrolein		1	500
79-06-1	Acrylamide	d,l	5,000	1,000 /10,000
107-13-1	Acrylonitrile	d,l	100	10,000
814-68-6	Acrylyl Chloride	e,h	1	100
111-69-3	Adiponitrile	e,l	1	1,000
116-06-3	Aldicarb	c	1	100 /10,000
309-00-2	Aldrin	d	1	500 /10,000
107-18-6	Allyl Alcohol		100	1,000
107-11-9	Allylamine	e	1	500
20859-73-8	Aluminum Phosphide	b	100	500
54-62-6	Aminopterin	e	1	500 /10,000
78-53-5	Amiton	e	1	500
3734-97-2	Amiton Oxalate	e	1	100 /10,000
7664-41-7	Ammonia	l	100	500
300-62-9	Amphetamine	e	1	1,000
62-53-3	Aniline	d,l	5,000	1,000
88-05-1	Aniline, 2,4,6-Trimethyl-	e	1	500
7783-70-2	Antimony Pentafluoride	e	1	500
1397-94-0	Antimycin A	c,e	1	1,000 /10,000
86-88-4	ANTU		100	500 /10,000
1303-28-2	Arsenic Pentoxide	d	5000	100 /10,000
1327-53-3	Arsenous Oxide	d,h	5000	100 /10,000
7784-34-1	Arsenous Trichloride	d	5000	500
7784-42-1	Arsine	e	1	100
2642-71-9	Azinphos-Ethyl	e	1	100 /10,000
86-50-0	Azinphos-Methyl		1	10 /10,000
98-87-3	Benzal Chloride	d	5,000	500
98-16-8	Benzenamine, 3-(Trifluoromethyl)-	e	1	500
100-14-1	Benzene, 1-(Chloromethyl)-4-Nitro-	e	1	500 /10,000
98-05-5	Benzenearsonic Acid	e	1	10 /10,000
3615-21-2	Benzimidazole, 4,5-Dichloro-2-(Trifluoromethyl)-	e,g	1	500 /10,000
98-07-7	Benzotrichloride	d	1	100
100-44-7	Benzyl Chloride	d	100	500
140-29-4	Benzyl Cyanide	e,h	1	500
15271-41-7	Bicyclo[2.2.1]Heptane-2-Carbonitrile, 5-Chloro-6-((((Methylamino) Carbonyl)Oxy)Imino)-,(1a-(1-alpha, 2-beta,4-alpha,5-alpha,6E))-	e	1	500 /10,000
534-07-6	Bis(Chloromethyl) Ketone	e	1	10 /10,000
4044-65-9	Bitoscanate	e	1	500 /10,000
10294-34-5	Boron Trichloride	e	1	500
7637-07-2	Boron Trifluoride	e	1	500
353-42-4	Boron Trifluoride Compound With Methyl Ether (1:1)	e	1	1,000
28772-56-7	Bromadiolone	e	1	100 /10,000
7726-95-6	Bromine	e,l	1	500
1306-19-0	Cadmium Oxide	e	1	100 /10,000
2223-93-0	Cadmium Stearate	c,e	1	1,000 /10,000
7778-44-1	Calcium Arsenate	d	1000	500 /10,000
8001-35-2	Camphechlor	d	1	500 /10,000
56-25-7	Cantharidin	e	1	100 /10,000
51-83-2	Carbachol Chloride	e	1	500 /10,000
26419-73-8	Carbamic Acid, Methyl-, O-(((2,4-Dimethyl-1, 3-Dithiolan-2-Yl) Methylene)Amino)-	e	1	100 /10,000
1563-66-2	Carbofuran		10	10 /10,000
75-15-0	Carbon Disulfide	l	100	10,000
786-19-6	Carbophenothion	e	1	500
57-74-9	Chlordane	d	1	1,000
470-90-6	Chlorfenvinfos	e	1	500
7782-50-5	Chlorine		10	100
24934-91-6	Chlormephos	e	1	500
999-81-5	Chlormequat Chloride	e,h	1	100 /10,000
79-11-8	Chloroacetic Acid	e	1	100 /10,000
107-07-3	Chloroethanol	e	1	500
627-11-2	Chloroethyl Chloroformate	e	1	1,000
67-66-3	Chloroform	d,l	5,000	10,000
542-88-1	Chloromethyl Ether	d,h	1	100
107-30-2	Chloromethyl Methyl Ether	c,d	1	100
3691-35-8	Chloromethiuron	e	1	100 /10,000
1982-47-4	Chloroxuron	e	1	500 /10,000

APPENDIX A. Summary of Requirements and Enforcement Authorities

A. Sections 302 and 303. Section 302(c) requires the owner or operator of a facility at which an extremely hazardous substance (EHS) is present in an amount exceeding its threshold planning quantity (TPQ) to notify the State Emergency Response Commission (SERC) by May 17, 1987, that the facility is subject to Title III. Section 303(d) requires owner/operators of facilities regulated under §302 to notify the Local Emergency Planning Committee (LEPC) of a facility representative to participate in the planning process. This notification should have occurred no more than 30 days after the LEPC was established (or no later than September 17, 1987). Section 303(d)(3) requires the facility to supply promptly information upon request by the LEPC.

Section 325(a) authorizes the Administrator to order owners or operators of facilities to comply with §§302 and 303. The local U.S. district court has jurisdiction to enforce the order and impose a penalty. Under §326, State and local governments can bring civil action against an owner or operator for violations of §302(c); SERCs and LEPCs can bring a civil action for violations of §303(d). For State and local suits under §326, the U.S. district court for the jurisdiction in which the alleged violation occurred has authority to impose civil penalties provided by the statute.

Penalty: Violations of §§302 and 303 subject the violator to civil penalties of not more than $25,000 for each day the violation or failure to comply with the order continues.

B. Section 304. Section 304 requires owners or operators of a facility at which there has been a release of an EHS or CERCLA hazardous substance in an amount greater than or equal to its reportable quantity (RQ), to immediately notify the SERCs and LEPCs of all States and districts likely to be affected. For releases of EHSs or CERCLA hazardous substances without a designated reportable quantity, a release of one pound or more triggers the notification requirement. For releases of CERCLA hazardous substances, notification must also be given to the National Response Center (NRC).

CERCLA §103. The Act requires the person in charge of a vessel or facility to notify the NRC immediately when there is a release of a CERCLA hazardous substance in an amount greater than or equal to its RQ. For hazardous substances without a designated RQ, a release of one pound or more triggers the notice requirement.

The CERCLA §109 and Title III §325 enforcement provisions for emergency notification are very similar. Both establish administrative penalties and the authority to bring actions judicially to assess penalties for non-notification. Both CERCLA and Title III also provide criminal fines for knowingly failing to provide notice or providing false or misleading information. Section 326(a) of Title III authorizes any citizen to file a civil action in the U.S. district court for failure to submit a follow up report on a release required to be reported to State and local officials under §304(c). State and local governments may bring civil action under the citizen suit provisions for §304 violations.[1]

Penalties: Under Title III §325 and CERCLA §109, Class I administrative penalty of not more than $25,000 per violation and Class II administrative penalty of not more than $25,000 per violation per day may be assessed. Penalties also may be assessed judicially. In the case of subsequent violations, penalties of up to $75,000 for each day a violation continues may be assessed. Any person who knowingly fails to provide notice in accordance with CERCLA §103 or Title III §304 shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than two years, or both. For second or subsequent convictions, the violator shall be subject to a fine of not more than $50,000 or imprisoned for not more than five years, or both.

C. Sections 311, 312 and 313. Section 311 requires the owner or operator of any facility that is required to prepare or have available a Material Safety Data Sheet (MSDS) for a hazardous chemical under the Occupational Safety and Health Administration (OSHA) Hazard Communication Standard and has a certain amount of the chemicals onsite, to submit the MSDS (or a list of the MSDSs) to the SERC, LEPC, and local fire department before the later of October 17, 1987, or three months after the owner or operator is required to prepare or have available a MSDS under OSHA. As a result of the OSHA expansion, facilities in the nonmanufacturing sector are required to submit MSDSs or a list by September 24, 1988.

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[1] Title III §329 defines person as "any individual, trust, firm, joint stock company, corporation, (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a state, or interstate body." Section 326 authorizes any person to bring a civil action against owners and operators for their failure to submit reports specified under §326(a)(1).

Under §312(a), the owner or operator of any facility that is required to prepare or have available a MSDS for hazardous chemicals above a certain threshold level must also submit an emergency inventory form containing "Tier I" information (aggregate information on the amounts and location of hazardous chemicals at the facility). The forms are due by March 1, 1988 and must be submitted annually thereafter. Section 312(e)(1) requires the owner or operator to provide "Tier II" information (chemical specific) to the SERC, LEPC, and/or the fire department with jurisdiction over the facility upon request.

Under §313, owners or operators of certain facilities that manufactured, processed, or otherwise used a statutorily defined toxic chemical in certain amounts in the previous year must submit a toxic chemical release form to EPA and the State for each such chemical beginning July 1, 1988 and then annually thereafter.

For each of these three sections, the Administrator can assess civil penalties through issuance of administrative orders or bring actions to enforce compliance and assess penalties in the U.S. district court. State and local governments can bring civil actions for violations of §§311 and 312 and they can bring an action against violators of §313 through the citizen suit provisions. Citizens have the authority to bring action against an owner or operator for violations of all three sections. In civil suits, the district court has the authority to enforce the requirement and to impose any civil penalty provided for violation of the particular requirement.

Penalties: Violation of §311 subjects the violator to a civil penalty of not more than $10,000 for each such violation. Section 312 and 313 violations subject the violator to civil penalties of not more than $25,000 for each such violation. Each day a violation continues constitutes a separate violation.

D. Section 322 and 323. Section 322 covers the submittal and verification of trade secret information. For violations of this section, the Administrator may assess a civil penalty by administrative order or bring action to assess and collect penalties in the U.S. district court. Criminal penalties can be levied for persons who knowingly and willfully disclose trade secret information.

Section 323 requires owners or operators of facilities subject to §§311, 312, and 313 to provide information to health professionals when requested, subject to certain restrictions. The Administrator can assess an administrative penalty or file an action to assess and collect a penalty in U.S. district court.

Health professionals may also bring an action against a facility owner or operator in the U.S. district court.

Penalties: Any person who fails to furnish information required under §322(a)(2) or requested by the Administrator under §322(d) shall be liable for a penalty of not more than $10,000 per violation per day. For frivolous claims, the trade secret claimant is liable for a civil penalty of $25,000 per claim. Any person who knowingly and willfully discloses trade secret information shall, upon conviction, be subject to a fine of not more than $20,000 or to imprisonment not to exceed one year, or both. Any person who violates §323(b) shall be subject to a civil penalty not to exceed $10,000 per violation per day.

OSWER 9834.2

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

OCT 9 1985

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information

FROM: Gene A. Lucero, Director Gene A. Lucero
Office of Waste Programs Enforcement

TO: Addressees

PURPOSE

This memorandum re-emphasizes the importance of early identification of potentially responsible parties (PRPs) and timely issuance of notice letters for the RI/FS. These actions support the Agency's policy to secure cleanup by responsible parties in lieu of Superfund use, where such cleanup can be accomplished in a timely and effective manner. The sooner PRPs are identified and notified about their potential responsibility, the more time they have to organize themselves to assure responsibility for the RI/FS and cleanup (See "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasiblity Studies Under CERCLA," Lee M. Thomas and Courtney M. Price, March 20, 1984).

This memo also clarifies Agency policy on release of site-specific information to PRPs and others. It supplements the information release section of the Interim CERCLA Settlement Policy (December 5, 1984). The clarification is designed to facilitate information exchange in order to encourage effective negotiation and coalescing by PRPs among themselves. Effective PRP negotiations and coalescing are likely to engender effective settlement discussions with the government.

INITIATION OF PRP SEARCHES

In an effort to expedite and streamline the RI/FS process, you should focus attention on early identification of PRPs and timely issuance of notice letters. As you are aware, in FY 86 you will be required to conduct PRP searches for NPL Updates 3, 4, 5, and 6. This will be reflected in your SCAP targets.

In order to accomplish this, it will be necessary to start PRP searches concurrently with developing sites for listing. At the latest, PRP searches should be initiated when candidate sites are sent to HQ for NPL quality control review. You will need to plan accordingly for this activity, particularly in your case budgets.

Technical assistance resources for PRP searches are available through the Techncial Enforcement Support Contracts, TES I and TES II, and are coordinated through the case budgeting process. Each Region will be given a line of credit to support the costs of responsible party searches, title searches, and financial assessments. This credit will be allocated by a straight-forward calculation of average past costs of such activities multiplied by the number to be done in each Region.

Because of the heavy work undertaken by TechLaw in both the TES I and TES II contracts, the prime contractors have been distributing new work assignments for PRP searches to other subcontractors. This should result in more timely reports.

NOTICE LETTER ISSUANCE

Timely issuance of notice letters for the RI/FS normally means that notice letters are issued as soon as possible after completion of the PRP search and prior to any Federally-financed response action. Timing of the notice letter should take into account the number of PRPs and the complexity of the data associating PRPs with the site. In general, notice letters should be issued 60 days before obligation of RI/FS funds (See "Procedures for Issuing Notice Letters," Gene A. Lucero, October 12, 1984). PRPs should therefore have sufficient time to organize themselves and initiate preliminary contacts and discussions with Agency personnel. This will also avoid delay in beginning a Fund financed RI/FS should it become necessary.

Notice letters are generally combined with information requests under RCRA §3007 and CERCLA §104(e) (See "Policy on Enforcing Information Requests in Hazardous Waste Cases", Courtney M. Price, September 10, 1984). Notice letters are an important step in determining whether a PRP is willing and financially capable of undertaking a proper response. The NEIC Technical Information Center is a useful source for assessing the financial viability of PRPs that offer stock to the public. For privately held companies, the TES contract can be used to estimate the financial capability.

Notice letters should be issued only to parties where sufficient evidence is available to make a preliminary determination of liability under CERCLA §107. Where doubt exists as to whether available information supports notice letter issuance, information recuests should be sent prior to notice letters.

In the past, notice letters were sent to PRPs who may or may not have been liable under CERCLA. This may be avoided by issuing notice letters to parties where sufficient evidence is available to make a preliminary determination of liability under CERCLA §107. For example, parties known to have arranged for disposal of material which is not known to contain a hazardous substance should not receive a notice letter. The Regions should be particularly aware of the adequacy and completeness of the PRP searches. This will mean expending resources on the quality review of contracto[illegible] I'm sure this will save critical resources at a la[illegible] in the enforcement process.

In addition, it is imperative that copies of notice letters be sent to Headquarters for purposes of tracking and responding to information requests. Along with other reporting requirements, each Region will be responsible for sending copies of notice letters quarterly.

RELEASE OF SITE-SPECIFIC INFORMATION

It is important to conduct PRP searches, issue notice letters and collect information as soon as possible, not only to expedite the RI/FS process, but to ensure that certain site-specific information is available for use by PRPs. Availability of this information to PRPs will help PRPs organize and negotiate among themselves.

As stated in the Interim CERCLA Settlement Policy, EPA will release certain site-specific information to PRPs in order to facilitate settlement discussions. This information includes:

- Identity of notice letter recipients;
- Volume and nature of wastes to the extent identified as sent to the site ("waste-in" list); and
- Ranking by volume of material sent to the site, if available

There are, however, certain limitations with regard to the information outlined above. For example, summary conclusions about the volume and nature of waste sent to a site, including a volumetric ranking should be provided to the extent that such information exists. Volumetric rankings should be developed when the Region determines that the rankings will be of significant benefit to the Agency and responsible parties in facilitating settlement or cleanup. Moreover, due to their preliminary and summary nature, EPA will not expend resources to explain or defend any list or ranking. Lists or rankings released to PRPs and others should always contain appropriate disclaimers.

The settlement policy states that release of information to PRPs should generally be conditioned on a reciprocal release of information by PRPs. The reciprocal release policy does not apply to the release to PRPs of the names of other notice letter recipients on a site, or to waste-in lists and volumetric rankings. Release of any additional information, however, should be conditioned on a reciprocal release of information by PRPs. In determining the type of additional information to be released, Regions should consider the possible impact on any potential litigation.

Again, it is important to conduct PRP searches, issue notice letters, and collect information as soon as possible so that the information discussed here is available for use. Waste-in lists and volumetric rankings should be developed as soon as possible after completion of PRP searches. This information should be provided with notice letters, if available. Such information may also be released in advance of notice letters upon request when the Region determines it will facilitate settlement.

The names of notice letter recipients are available to the public in response to requests under the Freedom of Information Act (FOIA) (See "Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests," January 26, 1984). The names may also be released at the Agency's initiative without a FOIA request. Now, to the extent the information exists, waste-in lists and volumetric rankings will also be available to the public under FOIA and at the Agency's discretion. Thus, requests for information on notice letter recipients and for waste-in lists or volumetric rankings should be handled consistently whether the requests are made by PRPs or the general public.

For further information on topics discussed in this memo, please contact Linda Southerland at FTS 382-2035.

Addressees:

Director, Office of Emergency and Remedial Response
Region II

Director, Air and Waste Management Division
Regions III, IV, VI, VII, VIII

Director, Waste Management Division
Regions I, V

Director, Toxics and Waste Division
Region IX

Director, Air and Waste Division
Region X

Regional Counsels, Regions I-X

ATTACHMENT

Documents for Removal Actions*

- QA/QC'd raw data**
- Removal preliminary assessment
- Site investigation report
- Any other factual data relating to reasons why we selected a particular removal action at the site
- Chain of custody forms**
- Engineering evaluations
- Cost analysis documents
- Final data summary sheets of technical models used to evaluate the site
- Action Memorandum
- ATSDR health assessment (draft versions not included)
- Memoranda on major site specific policy and legal interpretations (e.g., off-site disposal availability, compliance with other environmental statutes, special coordination needs, e.g., dioxin, provisions for State assumption of post-removal site control)
- Information from telephone logs relied on in selecting response
- New technical information presented by PRPs during negotiations
- Guidance documents and technical sources ***
- Community Relations Plan
- Public comments, if any
- Responses to significant comments
- Copies of any notices, including notices to PRPs, States, Natural Resources Trustees, notices of availability of information
- Documentation of meetings during which the public and PRPs present information upon which the agency bases its decision on selection of a removal action (may be after-the-fact restatement of issues rai
- Administrative Orders
- Consent decree(s), comments and responses to comments on the consent decree
- Affidavits or other sworn statements of expert witnesses
- Amendments to Action Memorandum, including ceiling increase Action Memoranda, and Action Memoranda on technical changes; information which caused the agency to change the decision, comments, and responses to comments

* Drafts and internal memoranda are not included in the record unless they contain information used to base the decision which the final document does not contain, or the decision-maker chooses to base the decision on a draft document.

** QA/QC'd raw data (e.g., results of QC runs, chromatograms, mass spectra) and chain of custody forms are part of the record and available to the public, but need not be in the same physical location as the record in the Regional office or in the information repository at or near the site.

*** Guidance documents and technical sources may be kept in a central compendium by the docket clerk. They need not be in each site-specific record. The index to the record should reference titles of relevant guidance documents and technical sources.

- Documentation of opportunity for consultation with the State on the scope of the removal action; comments from State, if any, and responses to substantive comments
- Index of documents in the record

(Expedited Response Actions should be treated like removals for purposes of compiling an administrative record; for purposes of the administrative record, RI/FSs should be treated as a phase of a remedial action, and not a removal)

Documents for Remedial Actions*

- Preliminary assessment report
- Site investigation report
- Any relevant removal documents (if removal action completed or ongoing at site)
- QA/QC'd raw data**
- Data summary sheets (usually part of the FS)
- Chain of custody forms**
- QAPP
- Initial work plan and any amendments thereto
- RI/FS (final deliverable released for public comment)
- Any other factual data relating to reasons for selecting the remedia action at the site
- Memoranda on site-specific major policy and legal interpretations e.g., off-site disposal availability
- Information from telephone logs relied on in selecting response
- Guidance documents and technical sources ***
- Community Relations Plan
- Proposed plan and brief analysis of plan
- Feasibility Study (final deliverable released for public comment)
- Endangerment Assessment or other public health assessment
- ATSDR Health Assessment (draft versions not included)
- Copies of any notices, including notices to PRPs, States, Natural Resources Trustees, notices of availability of information
- Public comments (including a late comments section)
- Documentation of meetings during which the public and PRPs present information upon which the agency bases its decision on selection of a remedial action (may be after-the-fact restatement of issues raised)
- New technical information presented by PRPs during negotiations
- Documents relating to State involvement (e.g., ARAR determinations, opportunity to comment on screening of alternatives, FS, proposed plan, selected remedy)
- Responses to substantive comments
- Transcript of required public meeting(s) on the proposed plan

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* Drafts and internal memoranda are not included in the record unless they contain information used to base the decision which the final document does not contain, or the decision-maker chooses to base the decision on a draft document.

** QA/QC'd raw data (e.g., results of QC runs, chromatograms, mass spectra) and chain of custody forms are part of the record and available to the public, but need not be in the same physical location as the record in the Regional office or in the information repository at or near the site.

*** Guidance documents and technical sources may be kept in a central compendium by the docket clerk. They need not be in each site-specific record. The index to the record should reference titles of relevant guidance documents and technical sources.

- ROD, including statement of basis and purpose of selected action; summary of alternatives considered; an explanation of why the Agency chose the preferred alternative; explanation of any statutory preferences under §121(b) not met; Explanation of significant differences between the Proposed Plan and ROD
- Amendments to the ROD, information which caused the Agency to change its decision, comments and responses to those comments
- Relevant documents generated during a RCRA corrective action proceeding at the site, if applicable
- Administrative Orders
- Consent decree(s), comments and responses to comments
- Affidavits or other sworn statements of expert witnesses
- Interagency agreement (for federal facilities)
- Index to documents in record

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

OSWER # 9834.

NOV 21 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Procedural Guidance on Treatment of Insurers Under CERCLA

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Regional Administrators, I-X
Regional Counsels, I-X

INTRODUCTION

Defendants in EPA's CERCLA enforcement cases have begun to look to their insurance carriers for both legal representation and indemnification. It is expected that the number of collateral actions involving the insurance carriers of CERCLA defendants will continue to grow, particularly in CERCLA cases involving multiple parties. 1/

The purpose of this guidance is to provide EPA Regional offices with the appropriate procedures to follow in issuing notice letters, developing referrals, and tracking CERCLA enforcement cases that may include insurers as third party defendants. A separate reference notebook and memorandum of law are being prepared by OECM and the Department of Justice to supplement this guidance. The memorandum of law will summarize the recent judicial decisions which have interpreted the applicability and coverage of insurance policies in hazardous waste cases.

1/ Most insurance policies are effective on an annual basis and parties commonly changed carriers during the disposal period, or had several policies in effect at the same time. Therefore, large CERCLA lawsuits could involve multiple insurance carriers and multiple policy periods.

INSURANCE INFORMATION REQUESTS - IDENTIFICATION OF POTENTIAL DEFENDANTS

EPA Regional offices are responsible for preparing and issuing CERCLA notice letters to potentially responsible parties. These notice letters generally include requests for information under RCRA §3007(a)(3) and CERCLA §104(e)(4). All information requests should include a request for copies of insurance policies in force during the PRP's association with the site. The requests should solicit information regarding insurance policies that are currently in effect as well as those effective during the period of activity in question. 2/

The information request responses from potentially responsible parties should be reviewed by the Regional Counsel's Office to determine the types of policies carried by the party and the extent of coverage under each policy. Insurance carriers determined to have exposure should be notified at the same time we notify the insured PRP.

REFERRALS TO THE DEPARTMENT OF JUSTICE

The Department of Justice attempts to ascertain the existence of insurance coverage and, where appropriate, to assert litigation theories which would enable the United States to proceed against insurance carriers in hazardous waste cases, or to involve them in settlement negotiations. The Department of Justice has requested that EPA provide insurance information as a routine portion of our case development report and referral package.

All referrals of hazardous waste cases to the Department of Justice should include a brief summary of the insurance coverage of potential defendants. This information is particularly important for actions involving bankrupt or potentially insolvent parties.

2/ See Memorandum "Procedures for Issuing Notice Letters" From Gene A. Lucero, Director EPA Office of Waste Programs Enforcement, to Directors, Waste Management Divisions Regions I-X; Directors, Environmental Services Divisions Regions I-X; Regional Counsels, Regions I-X. (October 12, 1984). Pages 4-5, and 24-25 discuss information requests regarding the insurance policies of potentially responsible parties.

THE INSURANCE POLICY - DETERMINING THE SCOPE OF THE COVERAGE

The standard liability insurance policy is broken down into three sections: 1) declarations; 2) statement of general liability; and 3) the standard coverage section. The declarations section contains general statements of the intent of the parties and the name of the insurer and the insured. The statement of general liability contains the definitions applicable to the policy and the provisions common to the various standard coverage sections. The standard coverage sections constitute the bulk of the policy and contain the insuring agreement and exclusions, including any pollution exclusion provisions. The standard coverage section usually includes the insurer's promise to pay on behalf of the insured and the insurer's duty to settle or defend claims against the insured alleging bodily injury or property damage covered under the policy. 3/

The interpretation of the insurance policy should begin with a review of the standard coverage section to determine the theories upon which EPA can proceed. Most insurance policies only obligate the insurance carrier to defend against any suit seeking damages or to pay on behalf of the insured such damages which are covered under the terms of the policy.

Thus, it is important to examine the scope of coverage of the insurance policy before referring an action to the Department of Justice which may have insurance aspects. Claims for injunctive or equitable relief are usually not included within the coverage of the insurance policy, and the referral for such relief need not include the insurer as a potential defendant. It may nevertheless be prudent to notify involved carriers of such a claim.

Where any CERCLA §107 damage claim is included as a basis for relief, the insurer may be identified as a potential defendant. Claims for punitive damages may also be covered under the policy and the Regions should include insurers as

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3/ The insurance carrier has a duty to defend the insured even if the claims are groundless, false or fraudulent.

defendants where punitive damages are sought. 4/ The referral package prepared by the Region should also include a discussion of the types of policies which were issued to the responsible party.

TYPES OF INSURANCE POLICIES

There are two types of insurance policies. The first is the traditional casualty insurance contract known as the Commercial General Liability Policy (CGL). The standard CGL policy covers accidental or sudden bodily injury and property damage. The second type of policy is the "claims-made" pollution liability policy or Environmental Impairment Liability (EIL) policy. The EIL policy covers the insured for liability for bodily injury and property damage resulting from gradual pollution, or clean up costs incurred by the insured. EIL pollution liability policies enable owners and operators of hazardous waste treatment, storage, and disposal facilities to comply with RCRA's financial responsibility requirements.

CGL Policies

There are four separate areas of coverage available under the CGL policies which may be applicable to CERCLA actions. The first is the premises and operations hazard policy. This policy provides coverage for liabilities resulting from a condition on the insured's premises or from the insured's operations in progress whether on or away from the insured's premises. This type of policy would cover the owner or operator of a facility, whether the hazardous waste facility was active or inactive, as long as the covered liability resulted in a condition which originated during coverage.

The second area of coverage under the CGL policy is the products and completed operations policy. This policy provides coverage for liabilities arising after products have left the physical possession of the insured and after the work performed has been completed or abandoned. This type of policy may cover the generator of hazardous substances if the waste can be characterized as a final product.

4/ Most policies are silent regarding coverage for punitive damages. Some states have allowed claims by the insured for punitive damages paid to the federal government.

OUTLINE OF INSURANCE ISSUES
TABLE OF CONTENTS

		Page
INTRODUCTION		
I.	Types of Policies Issued	3
	General Introduction	3
	A. The Comprehensive General Liability (CGL) Policy	5
	B. Development of the Pollution Exclusion	7
	C. The Environmental Impairment Liability (EIL) Policy (appearing in the late 1970's)	9
	D. The Insurance Services Office (ISO) Policy	9
II.	Judicial Construction of CGL and CGL/Pollution Exclusion Policies	
	A. Construction of CGL Policies Generally	10
	1. "Accidents" under pre-1966 policies.	11
	2. Definition of the "occurrence" under post-1966 policies. (Discussion of the "exposure," "manifestation," and "triple-trigger" theories for determining when an occurrence has taken place.	12
	3. Apportionment of liability among insurers and insureds.	17
	4. The scope of "property damage" coverage. (Discussion of the extent to which remedial activity is covered.)	17
	5. Statute of limitation questions.	18
	6. Defenses available to the insurer.	19
	B. Construction of OGL/Pollution Exclusion Policies	20

INTRODUCTION (continued)

		Page
III.	Construction of EIL and ISO Policies	24
	A. The EIL Policy	24
	B. The ISO Policy	25
IV.	Statutory Insurance Requirements	25
	A. RCRA Financial Responsibility Requirements	25
	B. CERCLA Financial Responsibility Requirements	29
V.	Potential Claims Against Insurers	31
	A. Claims Under Federal Law	31
	1. RCRA enforcement claims	31
	2. CERCLA enforcement claims	32
	B. Assigned or Subrogated Claims of the Insured: Assignment After Judgment, Assignment Before Judgment, Assignment of Claims for Breach of Duties, and Assignments After Bankruptcy	36
	C. Policy Provisions Allowing Direct Action	46
	D. Common Law Denial of Direct Action	47
	E. State Direct Action Statutes	48
	F. Other Procedures for Litigation Between the Insurer and the United States	49
	1. Intervention by the insurer in an action by the United States against the insured	49
	2. Declaratory judgment suits between the insurer and the insured -- including a discussion of whether the United States may be estopped from bringing a subsequent direct action claim by opposing insurer intervention in its enforcement action, or by declining to participate in a declaratory relief action between the insurer and the insured.	50

INTRODUCTION

Since the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1/] in 1980, the Environmental Protection Agency (EPA) and the Department of Justice (DOJ) have initiated more than 100 enforcement actions against the owners and operators of hazardous waste facilities, generators who arranged for the disposal of hazardous substances, and transporters who handled hazardous substances. Many of these cases, some of which were built upon prior claims under the Resource Conservation and Recovery Act (RCRA),[2/] involve claims for millions of dollars of response costs. Defendants in these cases generally have sought legal representation and indemnification from their insurance carriers. It is expected that the number of collateral actions involving the insurance carriers of RCRA and CERCLA defendants will continue to grow, particularly in cases involving multiple parties.[3/]

The first purpose of this handbook is to provide a basic understanding of insurance law and potential claims for relief against insurers which will allow EPA and DOJ enforcement

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1/ 42 U.S.C. §§ 9601-9656.

2/ 42 U.S.C. §§ 6901, et seq, most commonly 42 U.S.C. § 6973.

3/ Most insurance policies are effective on an annual basis, and generators commonly changed carriers during the disposal period or had several policies in effect at the same time. Therefore, large RCRA/CERCLA lawsuits can involve multiple insurance carriers and multiple policy periods.

lawyers to litigate these claims, as well as respond to defenses raised by insurance carriers.

The second purpose of this handbook is to offer an understanding of the insurance requirements of RCRA and CERCLA. Under the financial responsibility regulations promulgated pursuant to Section 3004(6) of RCRA, each owner or operator of a hazardous waste management facility must maintain liability insurance against both sudden and accidental occurrences.[4/] An owner or operator of a hazardous waste facility may also satisfy post-closure care financial assurance requirements by obtaining post-closure insurance.[5/] The handbook will review these regulatory requirements and their enforcement through compliance actions, and will also briefly address the insurance program provided for in Section 108 of CERCLA, which has yet to be implemented.

Finally, the handbook is intended to serve as a basic reference resource. Some of the best articles and notes on insurance issues are included as appendices and, in the case of some issues, are referenced in lieu of primary discussion. In addition, an alphabetical compendium of selected cases appears at the back of the handbook.

4/ 40 C.F.R. 264.147.

5/ 40 C.F.R. 264.143(e)

I. Types of Policies Issued

General Introduction

The standard liability insurance policy is broken down into three sections: (1) declarations; (2) the statement of general liability; and (3) the standard coverage sections. The declarations section contains general statements of the intent of the parties and the names of the insurer and the insured. The statement of general liability contains the definitions applicable to the policy and the provisions common to the various standard coverage sections. The standard coverage sections constitute the bulk of the policy and contain the insuring agreement and exclusions, including any pollution exclusion provisions.[6/] The standard coverage section usually includes the insurer's promise to pay on behalf of the insured and the insurer's duty to settle or defend claims against the insured alleging bodily injury or property damage covered under the policy.[7/]

The interpretation of the insurance policy should begin with a review of the standard coverage section. Most insurance policies only obligate the insurance carrier to

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6/ See pp. 20-24 for a detailed discussion of the pollution exclusion.

7/ The insurance carrier has a duty to defend the insured even if the claims are groundless, false or fraudulent. See Jackson Township v. Hartford Acc. & Idem. Co., 186 N.J. Super. 156, 160 (1982) (included in the Compendium).

defend against any suit seeking "damages" or to pay on behalf of the insured "damages" covered under the terms of the policy. Thus, it is important to examine the scope of coverage of the insurance policy in reviewing any potential referral or suit against a carrier.

Claims for injunctive or other equitable relief usually are not included expressly within the coverage of the insurance policy. Nonetheless, several courts have sustained claims to recover costs of abatement or response incurred by the insured. See discussion below at pp. 17-18. CERCLA Section 107 damages and response cost claims generally will be covered, or a cognizable claim may be made. Claims for penalties under CERCLA Section 106(b) or punitive damages under CERCLA Section 107(c)(3) may also be covered under the policy, although some insurance agreements specifically exclude coverage for punitive damages.[8/] The referral package prepared by EPA should include, if information is available, a discussion of the policies which were issued to the responsible party and copies of the policies.

There are two basic types of insurance policy. The first is the traditional casualty insurance contract known as the Comprehensive General Liability Policy (CGL). The standard CGL policy covers accidental or sudden bodily injury and property damage from an "accident," or "occurrence," during

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8/ Most policies are silent regarding coverage for punitive damages. Some states have allowed claims by the insured for punitive damages paid to the federal government.

the policy period, regardless of when the claim is actually made. Since about 1970, CGL policies generally have attempted to exclude coverage of any hazardous substance injuries that were not "sudden and accidental" in nature and contain a "pollution exclusion" to that effect. These clauses have not succeeded in excluding coverage in a broad range of situations involving hazardous waste "damage."

The second type of policy is the "claims-made" pollution liability, or Environmental Impairment Liability (EIL) policy. The EIL policy covers the insured's liability for bodily injury and property damage resulting from gradual pollution or cleanup costs incurred. It is called a "claims-made" policy because it covers only claims made during the term of the policy. The EIL policy is analogous to health or life insurance, where the claimant is not required to make a showing of accidental injury. One class of claims-made pollution liability policies is specifically designed to enable owners and operators of hazardous waste treatment storage and disposal facilities to comply with RCRA's financial responsibility requirements. For brief descriptions of the various types of policies which have been issued and key typical clauses, see Appendix A.[9/]

A. <u>The Comprehensive General Liability (CGL) Policy</u>

There are three types of coverage available under CGL policies. The first is premises and operations hazard

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9/ T. Smith, Jr., "Environmental Damage Insurance -- A Primer," reported at VII Chem. & Rad. Waste Lit. Rptr. 435 (1983).

coverage. This coverage is for liabilities resulting from a condition on the insured's premises or from the insured's operations in progress, whether on or away from the insured's premises. This type of policy would cover the owner or operator of a facility,[10/] whether the hazardous waste facility was active or inactive, as long as the disposal, storage or treatment was still in progress.

The second and third areas of CGL coverage are product hazard coverage and completed operations hazard coverage. These two, originally combined, are now separate and distinct. Product hazard coverage covers injuries arising out of product use, and is probably irrelevant to virtually all CERCLA claims, unless the court can be persuaded to view a pollutant as a product. In addition, the event of release probably must take place after relinquishment of control by the generator, and away from the generator's premises. Completed operations coverage may afford a somewhat broader basis for recovery, but is nontheless subject to limitations which would require appropriate facts and careful pleading. See Appendix G, pp. 562-563 for a summary discussion of key facts of both product hazard and completed operations coverage.

The standard coverage section of a general liability policy sets out the scope of the insurance agreement and the exclusions applicable to claims made by the insured.

10/ CERCLA Section 107(a), 42 U.S.C. 9607(a).

The exclusions to the scope of the insurance coverage must be clearly and precisely drafted.[11/] The exclusion which insurers invoke against claims for damages created by hazardous wastes is the pollution exclusion. The standard pollution exclusion reads:

> "This insurance does not apply ... to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, release or escape is sudden and accidental." (Emphasis added.)

The historical development of this exclusion to the standard liability policy provides a key to understanding recent interpretations of the applicability of the pollution exclusion to hazardous waste cases.

B. Development of the Pollution Exclusion

The first standard form for general liability insurance policies was developed in 1940. The model policy provision was drafted to include liability for all claims made by the insured that were "caused by accident." This provision was widely interpreted by the courts to include coverage for common law nuisance claims for environmental damage if

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11/ Because the insurer selects the language for the policy, the exclusions are generally interpreted in favor of the insured. An exclusion must be drafted with clear and exact language to be given effect by the courts. See e.g. Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S. 2d 603 (N.Y. App. 1980) (included in the Compendium).

the pollutants were suddenly and accidentally discharged.[12/]

In 1966, the Insurance Rating Board developed a new model contract which covered claims "caused by occurrence" rather than claims "caused by accident." The Board defined occurrence broadly to include "an accident," including continuous or repeated exposure to conditions, which results, during the policy period, "in bodily injury or property damage neither expected or intended from the standpoint of the insured." The new language required a finding that the damages were not foreseeable or intended. However, the courts continued to hold insurance companies liable for environmental damages even where the pollution was foreseeable if the damages were accidental.[13/] In 1973, comprehensive general liability policies were revised to include the pollution exclusion clause. See p. 7 for the text of the exclusion. The courts which have interpreted the pollution exclusion clause have agreed on three relevant points: (1) the insurer has the burden of proving noncoverage; (2) the exclusion applies to the intentional polluter; and (3) the exclusion does not apply to entities which neither expect nor intend their conduct to result in bodily injury

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12/ See Appendix G, Hourihan, "Insurance Coverage for Environmental Damage Claims" 15 Forum 551, 552 (1980).

13/ Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App. 2d. 178, 289 N.E. 2d 360 (1972).

or property damage. See discussion at pp. 20-24.[14/]

C. The Environmental Impairment Liability (EIL) Policy

Regulations promulgated pursuant to RCRA (see notes 4 and 5) have prompted several insurance carriers to offer first party insurance coverage -- that is, coverage for injuries caused by the insured, obtained by the insured.

The most common of these "claims-made" policies is the EIL policy, which generally provides insurance coverage for personal injury and property damage only from gradual pollution, but not that which is sudden and accidental. Off-site cleanup costs, including those incurred to avert a loss, are typically covered; on-site cleanup costs are not. Also typically excluded from EIL policies are coverage of oil and gas drilling, liability arising from nuclear fuel, damage to property owned or occupied by the insured, fines or penalties, punitive damages, costs of cleaning up pre-existing conditions at any site owned or leased by the insured, and costs of maintenance or routine cleanup.

D. Insurance Services Office (ISO) Policy

Another type of "claims-made" policy is the ISO pollution liability policy -- also developed in response to RCRA regulatory insurance requirements. ISO policies

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14/ For a detailed history of the development of the pollution exclusion, see Appendix D, S. Hurwitz & D. Kohane, "The Love Canal - Insurance Coverage for Environmental Accidents," Insurance Counsel J., July 1983, p. 378.

provide indemnification and defense coverage for pollution-caused bodily injury and property damage and reimbursement coverage for pollution cleanups imposed by law or voluntarily assumed with the consent of the insured. Insurance coverage under an ISO policy is also extended to sites used by the insured for storage or treatment but which are operated by others. Costs of defense are provided apart from the limits of liability. The policy excludes from coverage damages which are expected or intended by the insured, costs of cleanup for sites owned, operated or used by the insured, liability from abandoned sites, or liability arising from the intentional violation of statutes or regulations, but does cover both gradual and sudden and accidental damages and injuries.

Despite an increase in "claims-made" environmental insurance policies, coverage for pollution-related damages under an EIL or ISO policy is still rare. It is much more likely that a potential EPA hazardous waste enforcement action will involve a general liability policy (CGL).

III. Judicial Construction of CGL and CGL/Pollution Exclusion Policies

A. Construction of CGL Policies Generally

Decisions generally construing CGL policies have focused on several issues: whether a covered "accident" or "occurrence" has taken place, whether damage to the affected "property"

is covered, what statute of limitations should be applied and in what manner, what defenses are available to insurers, and how should liability be apportioned among insurers and insureds. A discussion of these issues will be followed by a separate discussion of pollution exclusion clause construction.

1. "Accidents" under pre-1966 policies.

CGL policies written prior to 1966 insured against damage or injury "caused by accident." Early decisions considering when events giving rise to an injury were covered focused on whether or not the event was ". . . [a]n event that takes place without one's foresight or expectations; an undesigned sudden and unexpected event, chance, contingency." United States Fidelity & Guaranty Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754, 757 (1951) (included in the Compendium), quoting from Webster's International Dictionary. Thus, cases addressing injuries arising out of consequences of the insured's business which were typical and obvious tended to deny coverage while cases involving unintended consequences (even those arising out of failure to foresee that which should have been seen) tended to affirm coverage. Two articles address these issues. Appendix E, J. Goulka, "The Pollution Exclusion," VI Chem. & Rad. Waste Lit. Rptr. 745, 745-748, (1983) contains a succinct introduction to these cases. Appendix F, C. Mitchell and J. Tesoriero, "When Does the Occurrence Exist Under the General Commercial Liability

Policy?," VII Chem. & Rad. Waste Lit. Rptr. 457 (1984), provides an additional detailed background on the history and development of both the "accident" and "occurrence" clauses.

2. "Occurrences" under post-1966 policies.

In 1966, most CGL policies began to insure against damages and injuries arising out of an "occurrence" during the policy period -- leaving open the central question of when an "occurrence" has taken place and the related issue of whether sequential or multiple occurrences have taken place. The former question is critical in evaluating which policy or policies may provide coverage and occasionally whether the statute of limitation may have run on the claim. The latter question is critical to these issues, to what policy limits or multiples of limits may apply, and to issues of apportionment among carriers.[15/]

CGL policies generally define an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint

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15/ If insurance coverage exists for the entire relevant period of time, but the plaintiff cannot establish when the damage began or how it was apportioned during the period of time, courts will normally only require the plaintiff to prove that damages occurred, and leave to the insurance companies the burden of allocating the damages among themselves. See Appendix G, Hourihan, "Insurance Coverage for Environmental Damage Claims," 15 Forum 551, 559 (1981).

of the insured." The theories upon which courts have determined whether and when a covered "occurrrence" has happened are several, having evolved to meet generic fact patterns. A discussion of those theories follows. See generally Appendix F and Appendix O, Charles Maher, "Asbestos Extravaganza," 5 Calif. Lawyer 60, 62-63 (June 1985).

In simple property damage cases not involving slow accumulation of damage, the general rule is that there is no "occurrence" until the actual harm for which relief is sought manifests itself. National Aviation Underwriters, Inc. v. Idaho Aviation Center, Inc., 93 Idaho 668, 471 P.2d 56 (1970). See also Annot., 57 A.L.R. 2d 1385 (1958). This rule is generally known as the manifestation theory.

On the other hand, in cases where damages are sought for sickness or disease resulting from long term exposure to toxic substances, courts have found that actual injury occurred during the policy period in which exposure alone occurred. Insurance Company of North America v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230 (E.D. Mich. 1978), aff'd 633 F.2d 1212 (6th Cir. 1980). This rule is generally called the exposure theory. In addition, in contrast to ordinary property damage cases where the manifestation theory applies, in property damage cases where damages slowly accumulate, courts have generally applied the exposure theory in determining insurance coverage. So long as there is any tangible damage (even if minute)

resulting from exposure, the courts have allowed coverage from that time, although the damage may not manifest itself until much later. See, e.g., Champion International Corp. v. Continental Casualty Co., 546 F.2d 502 (2d cir. 1976), cert. denied, 434 U.S. 819 (1977); Porter v. American Optical Corp., 641 F. 2d 1128 (5th Cir. 1981); Union Carbide Corp. v. Travelers Indemnity Co., 399 F.Supp. 12 (W.D. Pa. 1975); and Gruol Construction Co. v. Insurance Co. of North America, 11 Wash. App. 632 524 P.2d 427 (Wash. Ct. App. 1974).

Thus, it appears that application of the exposure theory is appropriate in the context of CERCLA hazardous waste litigation, since tangible injury and damage to the environment can occur soon after exposure to hazardous wastes, although damage may not manifest itself until much later. At least one court has held that where a landfill leaches toxic waste into groundwater over a number of years and harm results, the exposure theory should be applied.[16/] Application of the exposure theory in the CERCLA context means that coverage would be triggered under the insurance policies from the time when the environment was first exposed to the hazardous waste. Presumably, under the exposure theory, all policies from the time of disposal forward would be implicated, so long as some tangible damage to the environment could be shown to have occurred at the time of exposure and to have continued thereafter.

16/ Jackson Township v. American Homes Assurance Co., Docket L-29236-80 (N.J. Super.) (unreported), cited in Jackson Township v. Hartford Acc. & Indemnity Co., 186 N.J. Super. 156, 165-166 (1982) (included in the Compendium).

Notably, application of the exposure theory to trigger insurance coverage does not necessarily rule out application of the manifestation theory to trigger subsequent coverage. In some cases, in order that the purpose of the policy not be undercut and in order to protect the reasonable expectations of the insured, the insurance coverage during the period of manifestation of the injury or damage is also triggered. See Keene Corporation v. Insurance Company of North America, 667 F.2d 1034, 1045 (D.C. Cir. 1981). This approach is commonly known as the "tripple-trigger" or "continuous injury" theory.

The application of the exposure, manifestation, and triple-trigger theories has frequently risen in the analogous context of the asbestos-related disease cases. In those cases dealing with a slowly progressive disease in which tissue damage occurs shortly after initial inhalation (exposure), the courts have generally favored the more generous exposure and triple-trigger theories. See, Porter v. American Optical Corp., supra; Insurance Co. of North America v. Forty-Eight Insulations, Inc., supra; and Keene Corp. v. Insurance Company of North America, supra. (applying both the exposure and manifestation theories to trigger maximum coverage under the policies). One district court, however, has adopted solely the manifestation theory in an asbestos related disease case. See Eagle-Picher Industries v. Liberty Mutual Insurance Co., 523 F.Supp. 110 (D. Mass. 1981).

Therefore, although only one unreported state trial court decision has addressed this issue in the hazardous waste context, there is strong analogous authority to support application of the more expansive exposure theory to trigger insurance coverage in waste cases. Moreover, there is some analogous authority to support application of both the manifestation and exposure theories to trigger insurance coverage. Consequently, once a pollution incident has been determined to constitute an "occurrence" not excluded from coverage under a pollution exclusion clause, there should be little problem in triggering coverage under the maximum number of policies by application of these theories..

Finally, the question must be answered of how many "occurrences" have taken place, where the injury continues over a period of time and may manifest itself in distinct and separate kinds of damages. Courts determine the frequency of the "occurrences," for purposes of applying a policy's per occurrence limit or deductible provisions, by applying one of several tests.[17/] For a discussion of each of these tests, <u>see generally</u> Appendix G, pp. 559 <u>et</u>. <u>seq</u>.

_/ Generally, these tests include: the "effect test" (looking to the vantage of the injured party and commonly finding more than one "occurrence"); the "causation test" (widely accepted view based on examination of cause); the "time and space test" (focusing on proximity of causative factors in time and space), the "operative hazard test" (examining the number of distinct causative acts); and the "average person test" (which is what it seems -- the favorite of judges not enamored with more abstract, rationalized standards).

and Riehl v. Travelers Ins. Co., Civ. No. 83-0085 (W.D. Pa. Aug. 7, 1984), VIII Chem. & Rad. Waste Lit. Rptr. 839 (included in the Compendium) (coverage of CERCLA potentially reponsible party's abatement costs). For a more detailed discussion of this issue, see Appendix I, M. Rodburg and R. Chesler of Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan & Meanor, "Beyond the Pollution Exclusion: [etc.], (1984), pp. 364-369; and Appendix J, K. Rosenbaum, "Insurance, Hazardous Waste, and the Courts: Unforeseen Injuries, Unforeseen Law," 13 ELR 10204, 10205-10207 (July 1983).

5. Statute of limitation questions.

In state common law suits for injuries or damage, the court's choice among exposure, manifestation, and triple-trigger theories of occurrence may have a substantial relationship to the running of the applicable statute of limitations. Fortunately, this choice of theories to determine when injury or damage "occurs" within the meaning of a comprehensive general liability policy would not determine when the statute of limitations should commence running under CERCLA.[18/] Otherwise, the date that injury

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18/ Under Section 112(d) of CERCLA, 42 U.S.C. 9612(d):

> No claim may be presented, nor may an action be commenced for damages under this title, unless that claim is presented or action commenced within three years from the date of discovery of the loss or the date or enactment of this Act, whichever is later . . .

3. Apportionment of liability among insurers and insureds.

Determinations concerning the number and duration of "occurrences" can have a substantial impact upon the extent to which multiple carriers of a single or many insured parties may be liable -- a problem greatly compounded by the technical complexity and large numbers of defendants typical in hazardous waste litigation. For a thorough treatment of the theories for determining when "occurrences" take place and the consequential application of those theories to apportionment problems, see Appendix H, Note, "The Applicability of General Liability Insurance to Hazardous Waste Disposal," 57 So. Cal. L. Rev. 745 (1984).

4. The scope of "property damage" coverage.

Courts have become progressively more willing to extend covered "property damage" to costs of voluntary and compulsory remediation -- especially where the insured is responding to conditions which may result in further damage to property, health or the environment, or where a governmental entity may incur costs and seek eventual reimbursement. See Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275 (1975) (included in the Compendium) (coverage of on-site spill remediation required by state law); US Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579 (1983) (included in the Compendium) (coverage of investigative and remedial costs for state-mandated groundwater cleanup, founded upon holding that groundwater was not property of the insured);

or damage is deemed to occur for purposes of statutes of limitations is generally the date of manifestation. See, e.g., United States v. Kubrick, 444 U.S. 111, 123-24 (1979); Urie v. Thompson, 337 U.S. 163, 170-71 (1949).

6. Defenses available to the insurer.

Where an injured person may sue the insurer directly, before or after judgment against the insured, that suit is generally subject to all the defenses the insurance company has against the insured, including the defense that the insurance company has not received notice of the underlying lawsuit as per the policy terms and deadlines, and the defense that the insured has not cooperated with the insurance company. Generally, judgment creditors stand in the shoes of the insured and have rights no greater and no less than the insured's rights would be if it had paid the judgment and then sued its insurance company to recover the amount paid. Greer v. Zurich Insurance Co., 441 S.W. 2d 15,30 (Mo. 1969); accord McNeal v. Manchester Insurance and Indemninity Co., 540 S.W. 2d 113, 119 (Mo. Ct.App. 1976) (rights of the injured person are derivative and can rise no higher than those of the insured). See also Appendix L, Appleman, Insurance Law as Practice §§ 4813-4817 (hereafter "Appleman").

Problems with notice, etc., may present considerable difficulties during attempts by the United States to recover for CERCLA costs against insurance companies.

B. Construction of CGL/Pollution Exclusion Policies

In response to the judicial interpretation of the new "occurrence" language in CGL policies the insurance industry developed a specific exclusion to its policies which was meant to clarify insurance coverage for claims for pollution damage. See pp. 7-9 for exclusion language and history. This exclusion, referred to as the "pollution exclusion," has now been incorporated into the printed provisions of most commercial insurance forms. It was intended by the Insurance Rating Board not to restrict coverage, but merely to clarify coverage by the use of the new language. The pollution exclusion disallows claims for bodily injury or property damage due to a release of toxic chemicals, waste materials, pollutants or contaminants into the environment unless the release is "sudden and accidental." There is a split of authority regarding the meaning of these terms. Several courts have held that they are ambiguous, and have construed the clause broadly in favor of the insured. In these cases, coverage of the polluter has been upheld. In contrast, some recent decisions have held that the exclusion may apply to the knowing, frequent hazardous waste polluter, and that there is no ambiguity in the "sudden and accidental" clause in such cases.

Long-standing principles of insurance contract construction include the requirement that to be effective, an exclusion must be conspicuous, plain, and clear, and must be construed strictly against the insurer and liberally in

favor of the insured. See, e.g., Pepper Industries, Inc. v. Home Insurance Co.; 134 Cal. Rptr. 904, 67 C.A.3d 1012 4th Dist. (included in the Compendium). Any ambiguities must be resolved in favor of the insured. See, e.g., Abbie Uriguen Oldsmobile-Buick, Inc. v. United States Fidelity Ins. Co., 95 Idaho 501, 511 P.2d 783 (Idaho 1973) and note 11, supra. The courts that have considered the pollution exclusion clause have almost unanimously held it to be ambiguous, since it is fairly susceptible to two different interpretations. As such, they generally have resolved that ambiguity in favor of the insured. See, e.g., Union Pacific Insurance Co. v. Van Westlake Union, Inc., supra; Niagara County v. Utica Mutual Insurance Co., 103 Misc. 2d 814, 427 N.Y.S. 2d 171 aff'd 439, N.Y.S. 2d 538 (1981) (included in the Compendium); and Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So.2d 95, 99 (Ala. 1977) (included in the Compendium).

The terms of the pollution exclusion clause focus on the insured's intent in the actual discharge of the pollutant. The definition of "occurrence," on the other hand, focuses on the insured's expectation or intent with regard to causing damage or harm. The majority of courts, taking a broad view of insurance carrier's liability, have interpreted the pollution exclusion clause, together with the definiton. of "occurrence," to provide coverage except where there is an intentional consequence, caused by a polluter who expects or intends his conduct to cause damage. See, e.g., Allstate

Insurance Co. v. Klock Oil Co., supra (included in the Compendium); Union Pacific Insurance Co. v. Van's Westlake Union, Inc., 34 Wash. App. 208, 664 P.2d 1262 (Wash. 1983); Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co., 186 N.J. Super. 156, 451 A.2d 990 (N.J. Super App. Div. 1982) (included in the Compendium).

In Lansco Inc. v. Department of Environmental Protection, supra at p. 282 (included in the Compendium), the court found that the term "sudden," rather than meaning "brief or of short duration," means "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for." The term "accidental" means happening "unexpectedly or by chance." The court therefore concluded:

> . . . under the definition of "occurrence" contained in the policy, whether the occurrence is accidental must be viewed from the standpoint of the insured and since the oil spill was neither expected nor intended by Lansco, it follows that the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party.

Similarly, in Union Pacific Insurance Co., supra, a massive gasoline leak occurred at the insured's gas station. Approximately 80,000 gallons of gasoline leaked out of a small hole in an underground gasoline pipe over a period of months. Despite the policy's requirement that an occurrence be "sudden" or else subject to the pollution exclusion clause, the court held that the leaking from the line was not expected nor intended, nor was the resulting damage. Therefore, the pollution exclusion clause did not

exclude coverage. 664 P.2d at 1266. See also Allstate Insurance Co., supra at 605, where the court states that the discharge or escape of gasoline could be both sudden and accidental, even though undetected for a substantial period of time, since "sudden," as used in pollution exclusion clauses, "need not be limited to an instantaneous happening."

A few courts have refused to find any ambiguity in the terms "sudden and accidental" where the insured knowingly discharges a substance as a normal feature of operations, but has no expectation of intent to cause damage. In Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (included in the Compendium) the court determined that no insurance coverage was provided to Great Lakes in connection with a CERCLA action by the United States against Great Lakes and others for hazardous waste contamination. Notably, the district court and the First Circuit focused on two documents in deciding whether insurance coverage was triggered: (1) the comprehensive general liability insurance policy; and (2) the United States' complaint against Great Lakes. Because the United States' complaint alleged that Great Lakes was liable for contamination which "has taken place as a concomitant of its regular business activity . . . ", the First Circuit determined that no sudden or accidental occurrence triggering coverage was alleged. The court found that there is no ambiguity in the policy "when the policy is read against the complaint." Thus, where insurance is or may be a

factor, care must be taken to avoid counterproductive pleading.

The U.S. District Court for the Eastern District of Michigan followed the Great Lakes decision in American States Insurance Co. v. Maryland Casualty Co. 587 F. Supp. 1549 (E.D. Mich. 1984) (included in the Compendium). The court held that the insurance companies did not have a duty to defend or indemnify the company because the underlying National Drum litigation involved the continued, non-accidental dumping of waste at the site.

In summary, the general and widely accepted view is that CGL policies with pollution exclusion clauses provide coverage for pollution incidents where either the discharge itself or the resulting damage is unexpected or unintended. But, under the First Circuit's decision in Great Lakes Container, supra, the discharge must be "accidental." For example, coverage exists for pollution incidents which involve gradual seepage or leaking which is unexpected or unintended.

III. Construction of EIL and ISO Policies

A. The EIL Policy

The Environmental Impairment Liability (EIL) policy was developed to provide coverage for liabilities not thought to be covered by CGL policies following development of the pollution exclusion -- that is, claims for property damage and personal injury such as bodily injury, mental anguish, disability, death at any time -- present or in

the future -- caused by non-sudden, non-accidental "environmental impairment." These policies have not been the subject of significant judicial construction. For an excellent discussion of their terms, issuance and use, see Appendix K P. Milvy, "Environmental Impairment Liability Insurance and Risk Assessment," The Environmental Forum, Oct. 1982, p. 30.

B. The ISO Policy

The Insurance Services Office (ISO) policy is generally more limited. The EIL policy -- restricting coverage to damages and losses arising out of a "pollution incident," which includes only "direct" releases that result in "injurious amounts" of pollution -- is generally believed to cover only fortuitous damages, not those which are "expected or intended." These policies have not been the subject of significant judicial construction, but their terms are discussed in substantial detail and contrasted with those of EIL policies at Appendix A, pp. 449-453.

IV. Statutory Insurance Requirements

A. RCRA Financial Responsibility Requirements

Under section 3004(6) of RCRA, EPA must establish standards "as may be necessary or desirable" for financial responsibility, including financial responsibility for corrective action, applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities.[19/]

19/ 42 U.S.C. § 6924(a)(6).

The 1984 amendments to RCRA added in section 3004(t) that financial responsibility may be established by any one or a combination of the following: insurance, guarantees, surety bonds, letters of credit, or qualification as a self-insurer.[20/] RCRA also requires owners and operators of facilities with interim status to certify that the facilities are in compliance with financial responsibility requirements.[21/]

The regulations require each facility owner or operator to certify financial assurance for both closure and post-closure activities and to maintain liability insurance against both sudden accidental and non-sudden accidental occurrences. The requirements constitute Subpart H of Parts 264 and 265 of 40 C.F.R. Part 264 contains standards that apply to interim status facilities. RCRA also provides for interim authorization of state programs that are substantially equivalent to the federal program. Many states have some type of financial requirements for closure and post-closure, but they vary considerably from state to state.

The first step to establish financial assurance for closure and post-closure is to estimate the cost of closure and the annual cost of post-closure monitoring and maintenance.

20/ 42 U.S.C. §6924(t).

21/ 42 U.S.C. Section 6925(e)(2)(B) and (e)(3)(B).

The amount of financial assurance must at least equal the adjusted cost estimates. The owner and operator may use one or more of several mechanisms allowed by the regulations to meet the requirements. As noted above, the possible mechanisms include trust funds, surety bonds (that either guarantee payment into a trust fund or guarantee performance of closure or post-closure), letters of credit, and insurance; or the owner or operator may meet the requirement by satisfying a financial test that provides a corporate guarantee of closure or post-closure.[22/] To meet the financial assurance requirements, an owner or operator may use more than one of the options, except the financial test mechanism. One option may be used to assure funds for all facilities of one owner or operator. The most often used mechanism is the financial test (about 80 percent) and the least used is insurance (about 2.7 percent). EPA will release the facility from the financial assurance requirements after receiving certification that closure has been accomplished as set out in the closure plan.

Closure and post-closure insurance must satisfy a number of requirements. The owner or operator must submit a certificate of insurance to the Regional Administrator. The policy must be insured for a face amount at least equal to the

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22/ 40 C.F.R. 264.143, 265.143.

closure or post-closure cost estimate, and it must guarantee that the insurer will pay for the closure or post-closure activities. If the cost of closure or post-closure is significantly greater than the face amount of the policy, EPA may withhold reimbursement of funds. The owner or operator may not terminate the policy without EPA approval, nor may the insurer cancel the policy except for failure to pay the premium. Even upon failure to pay the premium, the insurer cannot cancel the policy if within 120 days of notice of failure, the facility is abandoned, interim status is terminated, closure is ordered, or the owner or operator is named a debtor in a bankruptcy proceeding.[23/]

In addition to the closure and post-closure financial assurances, the owner or operator must demonstrate financial responsibility for claims arising from its operation for personal injuries or property damage to third parties.[24/] For sudden accidental occurrences, the owner or operator must maintain liability coverage of at least $1 million per occurrence with an annual aggregate of at least $2 million. For non-sudden accidental occurrences, the owner or operator of a surface impoundment, landfill, or land treatment facility must maintain liability coverage of at least $3 million per occurrence with an annual aggregate of $6 million. The owner

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23/ 40 C.F.R. 264-143(e)(8), 40n C.F.R. 265-143(d)(8).

24/ 40 C.F.R. 264.147, 265.147.

or operator may demonstrate financial responsibility by having liability insurance, as specified in the regulations[25/] by passing a financial test for liability, or by using both mechanisms. Variances from these requirements are available if the owner or operator demonstrates that the levels of insurance are higher than necessary. Conversely, the Regional Administrator may impose higher levels of coverage if warranted.

The owner or operator must continuously provide liability coverage for a facility until final closure. Therefore, after final closure, claims for personal injury or property damage to third parties are no longer covered by insurance required by RCRA. However, upon eventual transfer of liability, CERCLA's Post-Closure Liability Trust Fund will assume "the liability established by this section or any other law for the owner or operator of a hazardous waste facility. . .".[26/]

B. CERCLA FINANCIAL RESPONSIBILITY REQUIREMENTS

CERCLA Section 108(a)[27/] requires that the owner or operator of each described vessel "carrying hazardous substances as cargo" maintain at least $5 million in "evidence of financial responsibility." Proof may be established by any combination of "insurance, guarantee, surety bond, or qualification as a self-insurer." This requirement is essentially an expansion of preexisting spill response

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25/ 242 C.F.R. 265.147(a)(1).

26/ 42 U.S.C. § 9607(K). The 99th Congress is considering eliminating the entire post-closure liability transfer scheme.

27/ 42 U.S.C. § 1321(p).

program requirements under the Clean Water Act.[28/] Insurance policies issued under these programs should be considered whenever a release from a vessel is involved. CERCLA Section 108(b)[29/] requires that the Administrator, no earlier than December 11, 1985, promulgate financial responsibility requirements for facilities not covered under the RCRA subtitle C program. Priority is to be given to "those classes of facilities" which "present the highest level of risk of injury." This program has not begun, but should be considered as a potential source of coverage after December 11, 1985.

Two articles discuss many of the above issues in greater detail. Appendix B, D. Jernberg, "Environmental Risk Insurance," FIC Quarterly, Winter 1984, pp. 123, et seq., briefly addresses the RCRA and CERCLA insurance schemes and follows with a detailed discussion of coverage under different policy types and examines various developments in the writing of exclusions. Appendix C, A. Light, "The Long Tail of Liability, [etc.]," 2 Va. J. Nat. Res. L. 179 (1982), discusses uncertainties concerning coverage as between RCRA program insurance and the CERCLA post-closure liability fund.

28/ 42 U.S.C. § 9608(a).

29/ 42 U.S.C. § 9608(b).

"for bad faith either in negotiating or in failing to negotiate the settlement of any claim." Thus, the United States may assert state direct action claims or assigned bad faith claims in addition to its federal direct action claim.

One likely enforcement issue occurs where the insured is in bankruptcy. RCRA Subsections 3004(t)(2) and (3) leaves open the question of whether the insurance proceeds are part of the estate in bankruptcy. Our probable position will be that if the judgment is not satisfied from the estate after a period of time specified by state law, which is likely since it is in bankruptcy, then the proceeds are not part of the estate and the government or other claimants may take action directly against the insurer for the judgment.

2. CERCLA enforcement claims.

The only express rights of action against insurance carriers under CERCLA are authorized at subsections 108(c) and (d), 42 U.S.C. 9608(c) and (d), and which provide:

> (c) Any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility as requried under this section. In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this subchapter. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but such guarantor may not invoke any other defense that such guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

> (d) Any guarantor acting in good faith against which claims under this Act are asserted as a guarantor shall be liable under section 9607 of this title or section 9612(c) of this title only up to the monetary limits of the policy of insurance or indemnity contract such guarantor has undertaken or the guaranty of other evidence of financial responsibility furnished under this section, and only to the extent that liability is not excluded by restrictive endorsement: Provided, that this subsection shall not alter the liability of any person under section 9607 of this title.

The authorization of a direct claim against a guarantor is limited to a "guarantor providing evidence of financial responsibility as required under this section" (emphasis added). Section 108 has two provisions requiring evidence of financial responsibility. Section 108(a) requires evidence of financial responsibility by the owner or operator of certain vessels and offshore facilities, in accordance with regulations promulgated by the President. Thus, once the President or his designee promulgates such regulations, a right of direct action is available against any insurer issuing insurance under those regulations to a covered vessel or offshore facility.[30/]

The second requirement for evidence of financial responsibility is in Section 108(b). Section 108(b)

30/ The Coast Guard takes the view that section 108(a) of CERCLA "implicitly" repeals or supersedes financial responsibility regulations under section 311(p) of the Clean Water Act, 33 U.S.C. 1321(p), and that under the provision section 302(c) of CERCLA, 42 U.S.C. 9652(c), the section

[FOOTNOTE CONTINUED ON NEXT PAGE]

establishes a framework for imposing financial responsibility requirements on onshore facilities, but on a prolonged schedule. Not later than December 11, 1983, the President is to identify the classes of facilities for which financial responsibility requirements will be developed. The actual requirements are to be promulgated no earlier than December 11, 1985. When the regulations are promulgated, they are to impose incremental financial responsibility requirements over a period of not less than three years nor more than six years from the date of promulgation. Thus, under the framework established in Section 108(b), financial responsibility requirements would not begin until at least December 11, 1985, and consequently, a direct claim against an insurer under Section 108(c) could not be made until after that date.[31/]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

311(p) regulations remain in full force and effect until such time as section 108(a) regulations are issued.

Financial responsibility requirements and direct cause of action provisions similar to those contained in section 108 of CERCLA are also found in section 311(p) of the Clean Water Act, 33 U.S.C. 1321(p), and in section 305 of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. 1815.

The authority to promulgate financial responsibility regulations required under CERCLA section 108(a) regarding vessels and offshore facilities was delegated to the Coast Guard by Executive Order 12418 (May 5, 1983), 48 Fed.Reg. 20891 (May 10, 1983).

31/ This entire provision may be qualified in the same manner as set forth in RCRA Section 3004(t) during reauthorization of CERCLA in 1985.

The next question is whether some other federal claim against insurers may be found or implied under CERCLA. The two sections of CERCLA most relevant to the possibility of a right of direct action against an insurer are Sections 107 and 108, 42 U.S.C. § 9607 and 9608. Section 107 is the main liability provision of CERCLA and does not by its terms include insurers among the list of responsible parties listed in Section 107(a). Section 107(e) preserves the validity of insurance agreements, but does not implicitly or explicitly authorize actions directly against insurers by a party other than the insured. As noted above, an analysis of the language of section 108 reveals a legislative intent to permit actions directly against financial responsibility insurers, but only under limited conditions.

A clear federal direct right of action under CERCLA against insurance companies appears to be dependent upon the issuance of financial responsibility regulations. As to the onshore facilities with which we deal most frequently, such regulations will not be promulgated until at least December 11, 1985. In the interim, there is only a potential for developing an interstitial federal common law, based on the need for a uniform approach to the assertion of claims generally allowed under state law. CERCLA section 302(c) preserves financial responsibility regulations issued under section 311(p) of the Clean Water Act and RCRA, as well as all state direct action claims which the United States may be entitled to assert.

B. Assigned or Subrogated Claims of the Insured Assignment After Judgment, Assignment Before Judgment, Assignment of Claims for Breach of Duties, and Assignments After Bankruptcy

This section will discuss whether and under what conditions a defendant or potential defendant in a RCRA or CERCLA case could assign its claim against its liability insurance carrier to the United States. As with other insurance issues, these are largely issues of State law. Accordingly, specific state authorities should be consulted before any strategic decisions are made.

Resolution of assignment questions depends to a substantial degree on the factual context of the case. This discussion assumes that the United States has a RCRA or CERCLA claim against a defendant and that the defendant has possible liability insurance coverage with respect to that claim. If the defendant is a "deep-pocket," i.e., it will be able to satisfy any judgment against it, the United States probably would not want to take more than a passive role with respect to insurance coverage issues. Acordingly, for purposes of further discussion, we can assume that the defendant has little if any assets to satisfy the CERCLA judgment and that the United States' primary hope for substantial recovery is from the insurance carrier.

Assignment After Judgment

Fundamental issues regarding the prosecution of direct action claims against an insurer are usually dependent on

whether a judgment has yet been entered against the insured defendant on the claim. If it has, there are a number of possible methods for pursuing claims directly against the insurance carrier. These may include, depending on the jurisdiction and the insurance policy involved, proceeding as a third party beneficiary under the policy, as a judgment creditor garnishee, as an assignee, or proceeding under applicable statutory provisions allowing direct suit against the insurance carrier. See A. Windt, Insurance Claims and Disputes 365 (1984). Of course, if the insurance carrier has defended its insured without a reservation of its right to deny coverage, it can be expected to pay the judgment, to the extent of policy limits, without the need for further proceedings.

In the absence of a policy provision providing for direct action by the injured party, the United States could proceed after judgment via garnishment or applicable statutory provisions allowing direct claims against the insurer. Alternatively, an assignment could be taken of the insured's rights against its insurer, in partial or full settlement of the United States' claim against the insured.

Liability insurance policies generally have a provision prohibiting assignments. The following provision is typical.

> Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon.

Nevertheless, courts have almost uniformly held that the prohibition is one against assigning the general coverage

provided by the policy before loss, and that it does not encompass a prohibition against assignment after a loss has occurred. The basis for this distinction has been explained as follows:

> Although there is some authority to the contrary, the great weight of authority supports the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply to assignments before loss only, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising thereunder, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim.

16 Couch on Insurance 2d §63:40 (Rev. ed.); accord, 7 Appelman, Insurance Law & Practice §4259; Maneikis v. St. Paul Insurance Co., 655 F.2d 818, 826 (7th Cir. 1981) ("Policy provision [against assignments], however, can only prohibit assignment of policy coverage, not assignment of an accrued cause of action."); International Rediscount Corp. v. Hartford Accident & Indemnity Co., 425 F.Supp. 669 (D. Del. 1977); and Brown v. State Farm Mutual Automobile Insurance Association, 1 Ill. App. 3d 47, 272 N.E. 2d 261, 264 (1971)

Following an assignment, the assignee stands in the shoes of the insured and will be subject to any defenses that the insurer had against the insured prior to assignment. See A. Windt, supra, at 367. Thus, the insurer can assert that the claim is not within the coverage of the policy or that policy conditions have not been complied with. Therefore,

the value of any assignment should be examined carefully prior to its acceptance as consideration for settlement.

Assignment Before Judgment

While an assignment after judgment is generally allowed, assignments before judgment present special problems and may not be appropriate in certain situations. At least two problems arise in the prejudgment context.

First, liability policies generally require the insured to cooperate with the insurer. Assignment of a claim under the policy against the insurer could be construed as a violation of the cooperation requirement. Such a construction would be likely if the insurer has agreed to defend and has not denied coverage. The cooperation clause of a liability insurance policy will be deemed violated where the insured, by collusive conduct, appears to be assisting the claimant in the maintenance of his action. 14 Couch on Insurance, supra, §51.115; and Brown v. State Farm Mutual Automobile Insurance Association, supra, 272 N. E.2d at 264 ("[C]ollusion in respect to liability is, of course, a direct violation of the non-cooperation clauses of the insurance policies, and if established is a defense to the insurer's liability.").

However, in a situation where the insurer has denied coverage and has refused to defend, an assignment should not violate the cooperation requirement. It has generally been held that there is no duty to cooperate once the insurer has denied coverage. 14 Couch on Insurance, supra, §51.121; A. Windt, supra, at 97; Shernoff & Levine, Insurance: Bad Faith

Litigation, §3.06[3] (1984); and see Critz v. Farmers Insurance Group, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964). In Critz, the court rejected the argument that an assignment of rights against the insurer violated the cooperation agreement of the policy in a situation where the insurer had itself failed to comply with the policy. 230 Cal. App. 2d at 801. The Court stated:

> Whatever may be [the insured's] obligation to the carrier, it does not demand that he bare his breast to the continued danger of personal liability. By executing the assignment, he attempts only to shield himself from the danger to which the company has exposed him. He is doubtless less friendly to his insurer than he might otherwise have been. The absence of cordiality is attributable not to the assignment, but to his fear that the insurer has callously exposed him to extensive personal liability. The insurer's breach so narrows the policyholder's duty of cooperation that the self-protective assignment does not violate it.

The other obstacle to an assignment before judgment is the standard policy provision -- called the "no action" provision -- requiring a judgment against the insured, or a settlement consented to by the insurer, before suit is commenced against the insurer. One such provision provides:

> Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

See generally, 11 Couch on Insurance, supra, §§44:318-44:323. Again, in situations where the insurer has agreed to defend its insured, this provision will likely prohibit any pre-judgment assignment. However, an assignment may be possible if the insurer refuses to defend.

As noted above, the standard policy provision requires, as a predicate to the insurer's liability, a judgment or a settlement among the claimant, the insured and the insurer. If the situation which creates the desire for an assignment is one where the insurer refuses to settle, a settlement without the insurer's consent would not ordinarily create a basis for liability by the insurer. However, it has been held that if the insurer refuses to defend the insured, the insured may enter into a reasonable settlement and, thereafter, seek reimbursement from its insurer. This rule is stated by Appleman as follows:

> If an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured person's claim, and is then entitled to reimbursement from the insurer, even though the policy purports to avoid liability for settlement made without the insurer's consent.

7C Appleman, supra, §46.90. In such a situation, the insured may, as part of a settlement, "simply assign certain rights to the plaintiff." Id. See also id. §4714. In other words, the settlement can include an assignment.

Maneikis v. St. Paul Insurance Co., 655 F.2d 818 (7th Cir. 1981) illustrates this point. There, Maneikis initially sued an attorney, Solotke, who represented him

in a prior business matter. Solotke's professional liability insurer, St. Paul Insurance, denied coverage and refused to defend, claiming the matter sued upon was not within scope of the policy. Thereafter, Maneikis and Solotke entered into a settlement agreement of $200,000 to be satisfied by Solotke's payment of $50,000 and his assignment to Maneikis of his rights against St. Paul. Maneikis sued St. Paul on the assignment. The trial court granted summary judgment to St. Paul. The Seventh Circuit reversed. It found that the policy provision prohibiting assignments did not apply to assignments of an accrued cause of action and that an "insurer's wrongful refusal to defend permits the insured to negotiate a reasonable settlement." Id at 827. See also Carter v. Aetna Casualty and Surety Co., 473 F.2d 1071 (8th Cir. 1973); Critz v. Farmers Insurance Group, supra; Samson v. Transamerica Insurance Co., 30 Cal. 3d 220, 240-41, 178 Cal. Rptr. 343, 636 P. 2d 32 (1981); Shernoff & Levine, supra, §3.06(3) ("It has also been held that when the insurer denies coverage and refuses to defend its insured, the insured need not notify the insurer of any assignment of his or her rights against the insurer prior to judgment."); and 14 Couch on Insurance, supra, §51.72. Couch states the rule as follows:

> If the insurer unjustifiably refuses to defend an action against the insured, on the ground that the action was based upon a claim not covered by the policy, it cannot successfully invoke the no trial clause to bar liability, for the reason that when the settlement by the insured after the unjustified refusal to

> defend was made in absolute good faith in order to avoid the chance of an adverse verdict for a much larger sum, it would seem grossly unjust, if not contrary to public policy, to insist that there must be in every case an actual trial and verdict.

To summarize, where the United States has not yet obtained a judgment and where a defendant's insurer has refused to defend,[32/] a settlement could be considered with the defendant which included, among other things, assignment of the defendant's claims against its insurer. Specific state authority should, of course, be consulted before such an assignment is negotiated and accepted.

Assignment of Claims for Breach Duties

Another fact situation in which the assignment issue frequently arises—involves bad faith refusal to settle.

It is generally held that an insurance carrier which in bad faith refuses to settle a claim within policy limits may thereafter be liable to the insured if a judgment is entered beyond the policy limits. This subject is discussed at length in 7C Appleman, supra §§4711-15. See, e.g., Critz v. Farmers Insurance Group, supra.

For example, assume that plaintiff sues defendant for $50,000. Defendant has an insurance policy with a $25,000

32/ An insurer may frequently defend its insured with a reservation of its right to ultimately deny coverage. There is a division in authority as to whether such a reservation of rights, or non-waiver agreement, must be consented to by the insured. See 14 Couch on Insurance, supra, §651:89. As noted above, if there is a defense by the insurer with reservation of rights, it may be questionable whether the defendant could enter into a settlement without the insurer's consent and still preserve its rights against the insurer.

policy limit. During the course of litigation, plaintiff offers to settle for $25,000. If the insurance carrier in bad faith refuses to accept the settlement and judgment is thereafter entered for $50,000, the insurer will be, if its bad faith is established, liable to pay the entire $50,000 and may also be subject to a punitive damage award.

In the situation described, one assignment issue arises if the insurer, after judgment, pays plaintiff $25,000 but refuses to pay the other $25,000. Can the defendant assign its bad-faith-refusal-to-pay claim to plaintiff in satisfaction of the judgment against it? Most courts have said yes.

Brown v. State Farm Mutual Automobile Insurance Association, supra, illustrates this situation. There, an insured was sued for $40,000. It had an automobile liability policy for $20,000. After discovery, the plaintiff offered to settle for $20,000. The offer was refused. Judgment was entered for $40,000. The insurer then paid $20,000. The insured's only assets were $5,500 and a potential claim against the insurer for bad faith refusal to settle. Those assets were assigned to plaintiff, who then sued the insurer. The Illinois appellate court allowed the assignment stating: "We find no valid reason in public policy why the cause of action should not be assignable." 272 N.E. 2d at 264; accord, Murphy v. Allstate Insurance Co., 17 Cal. 3d 937, 132 Cal. Rptr. 424, 533 P.2d 584, 587 (1976) ("The insured may assign his cause of action for breach of the duty to settle without

consent of the insurance carrier, even when the policy provisions provide to the contrary.").

Bad faith refusal to pay claims may well arise in CERCLA cases, particularly as the requirements of CERCLA become more clearly established. In situations where the claim of the United States exceeds policy limits and the insured has little if any assets of its own, it may be advisable for the United States to consider making a less-than-policy-limits settlement offer. If the offer is refused and a judgment beyond policy limits is obtained, the United States can then consider taking an assignment of the insured's claim against the insurer for wrongful refusal to settle.

Finally, assignments in the excess liability context, i.e., where a judgment exceeds policy limits, are apparently quite common and allow the judgment creditor to seek full reimbursement from the insurer. One treatise describes the situation as follows:

> A common practice by which the injured third-party claimant achieves full compensation, and the insured is absolved from the liability judgment, is an assignment by the insured of his rights against the insurer to the insured's judgment-creditor. In exchange for the assignment, the claimant signs a covenant not to execute above the policy limits against the insured. The assignment thus becomes a convenient way for the insured to fully satisfy the injured party. In situations where the insured is basically 'judgment proof,' it may well net the injured party far more than execution of the judgment against the insured. One disadvantage of this technique for the claimant is that the risks of collectibility and litigation against the insurer fall upon the claimant.

1 Long, Law of Liability Insurance §5.46.

allows a party who has obtained judgment under the policy to proceed against the insurer. It provides:

> Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy.

Where such provisions are present, they are probably required by statute.

D. Common Law Denial of Direct Action[33/]

Common law generally denies claims by injured persons against a tortfeasor's insurer. Appleman, § 4861. Liability and indemnity policies (the first covers the insured's liability, the second primarily serves to cover the insured's losses) typically contain clauses barring joinder of the insurer in actions against the insured, which are upheld in the absence of a statute to the contrary. Appleman, § 4861. Similarly, most jurisdictions do not allow the insurer to intervene in an action against the insured. Appleman, § 4861. See, e.g., United States v. Northeastern Pharmaceutical and Chemical Co., Inc., Civ. No. 80-5066-CIV-S-4 (W.D. Mo., May 3, 1983) (included in the Compendium) (denying insurer intervention in a RCRA § 7003 and CERCLA §§ 106 and 107 action).

33/ The discussion under this heading and the next is derived largely from two sources: Appleman, Insurance Law and Practice (1981, Supplemented 1984), §§ 4861, et. seq. ("Appleman") (Appendix L), and American Insurance Association, Statutes Affecting Liability Insurance (1981) (AIA Survey) (A summary of direct action rules in the 50 states, Guam and Puerto Rico is presented at Appendix M.).

There is one notable exception to the common law rule regarding direct action. Some jurisdictions allow direct actions, in the absence of a direct action statute, where the policy is required. Alabama recognizes such an exception, while Arizona does not. In Illinois, it is recognized in actions on employer's liability and compensation policies. Appleman, § 4862. This exception is sometimes qualified for specific forms of insurance. See Appendix M. Since states operating approved RCRA regulatory programs will probably require insurance under state law, this exception may be significant.

E. State Direct Action Statutes

As of 1981, twenty-seven states, Puerto Rico and Guam had adopted some form of direct action statute. See Appendix M. These statutes may allow joinder of insurers, independent prejudgment litigation against insurers, post-judgment suits to recover directly from insurers, or some combination of these options. These statutes typically provide that liability policies must contain provisions allowing such suits, or provide that such suits may be brought notwithstanding a policy clause to the contrary.[34/]

Frequently, authorized direct action claims are limited by category or are otherwise conditioned. For example,

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34/ The first direct action suit brought by the United States to recover from the insurer of a RCRA/CERCLA judgment debtor is United States v. Continental Insurance Co., Civ. No. 85-3069-CV-5-4 (W.D. Missouri, filed March 1985). The complaint is presented as Appendix N.

sixteen states allow post-judgment suits against insurers only if the judgment has not been be met by execution upon the insured. Only Louisiana, Guam and Puerto Rico allow broad prejudgment direct actions. See Appendix M, and the AIA Survey, which contains details of individual state statutes.

Due to the extraordinary variety of state statutes on this subject, the United States may be served best by arguing the necessity of a uniform federal common law rule for direct action in RCRA and CERCLA cases, as has been done successfully for the similarly diverse issues of joint and several liability and contribution. See United States v. A & F Materials, 578 F. Supp. 1249, 1255-56 (S.D. Ill. 1984); United States v. Chem-Dyne, et al., 572 F. Supp. 802, 807 (S.D. Ohio 1983; and Wehner v. Syntex Agribusiness, Inc., Civ. No. 83-642 (2) (E.D. Mo. April 1, 1985) IX Chem. & Rad. Waste Lit. Rptr. 879.

F. Other Procedures for Litigation Between Insurers and the United States

1. Intervention by the insurer in an action by the United States against the insured.

As indicated at p. 47, supra, the courts generally have not allowed insurers to intervene in suits against the insured. This has proven true in all cases in which the question has been tested under RCRA and CERCLA. On the other hand, if all parties to the litigation support permissive intervention in an action by the United States under an

environmental statute, there is no obvious reason why intervention must be denied.

2. Declaratory judgment suits between the insurer and the insured.

Private and governmental civil suits under RCRA and CERCLA have spawned several suits for declaratory relief between insurers and purportedly insured waste site owners and operators, transporters and generators. A private attorney reportedly stated in April, 1985 that Aetna Casualty Ins. Co. (one of the major carriers in the field) was then receiving an average of two hazardous waste related claims per day. In several state court cases involving coverage disputes between CERCLA responsible parties and their insurers, efforts have been made to join the United Staes as a third party defendant on the grounds tht it is an interested party. None of these efforts has succeeded.

Sovereign immunity bars any suit against the United States in the absence of a specific congressional waiver. There is no statute providing that the United States can be named as a defendant in one of these cases. The type of relief sought does not seem to affect the applicability of the immunity one way or the other; and the cases generally hold that the doctrine is absolute. Thus, the state courts do not have jurisdiction over the United States in these insurance suits. Block v. North Dakota, 103 S.Ct. 1811, 1816 (1983); United States v. Sherwood, 312 U.S. 584, 586 (1941).

Success by the insured in coverage litigation probably precludes the insurer from contesting some or all questions of coverage in a subsequent direct action by the United States. The doctrine of collateral estoppel, or issue preclusion, holds that where an issue of fact or law was actually litigated and determined by a valid and final judgment, that determination is conclusive in a subsequent action involving the same parties or at least the same party as is sought to be held, whether it is on the same or on a different claim. Wright, Law of Federal Courts § 100A (4th ed. 1983) [hereinafter Wright], and cases cited.

If the United States is not a party to the litigation, could it be bound? Ordinarily, persons who were not parties to the first action will not be estopped. 18 C. Wright, A. Miller & E. Cooper, Federal Practice, Procedure, and Jurisdiction §§ 4448-4449 (1981) and [hereinafter Wright and Miller] and cases cited. Where a defendant is not subject to the jurisdiction of a court, it can not be a party and thus can not be bound by collateral estoppel. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Oil & Gas Ventures First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 753-54 (S.D.N.Y. 1966); and 18 Wright & Miller § 4449. Thus, if a court could not exercise jurisdiction over the United States, the United States could not be considered a party and could not be estopped by any decision by the court.

However, nonparties to suits can sometimes be held to be collaterally estopped -- if the nonparty actively participated in the prior case, and was a party in everything but name; if the nonparty's interests were specifically represented in the first action, e.g. a trustee or guardian was involved in the first suit; if the nonparty had some actual duty to either enter the lawsuit or give some notice that it was not interested in the suit and would not consider itself bound by it; or, if there was a sufficient party to the suit, e.g., they held successive interests in the property that was the subject of the suit. 18 Wright & Miller § 4449 and cases cited.

The first two exceptions do not seem applicable to the United States. The latter two exceptions to the nonparty rule might conceivably apply. The first of these latter exceptions would extend preclusion to those persons that had an opportunity to participate in the litigation, that did not do so, that did not inform the actual parties that they might raise the issue in the future, and thus lead the parties to believe that they were not interested in the litigation. This exception is primarily espoused in the works of commentators and is really a form of equitable estoppel. See, e.g., 18 Wright & Miller §§ 4452 and 4453; and Restatement (Second) of Judgments § 62 (1981). But the rules for applying equitable estoppel against the United States are unique. It is by no means clear that the United States can be estopped under any circumstances. Some Circuit Courts of Appeal have

stated that estoppel cannot lie against the federal government. Hicks v. Harris, 606 F.2d 65, 68 (5th Cir. 1979). Other Circuits have allowed the United States to be estopped under certain limited circumstances, i.e., where there has been a misrepresentation that rises to the level of "affirmative misconduct." Community Health Services of Crawford County, Inc., v. Califano, 698 F.wd 615, 620-21 (3rd Cir. 1983); Mendoza-Hernandez v. INS, 664 F.2d 635, 639 (7th Cir. 1981). These decisions allowing estoppel may not be in keeping with the Supreme Court's latest pronouncement on the issue, Schweiker v. Hansen, 450 U.S. 785, 788-91 (1981). But even if these decisions still are valid, getting a case dismissed because a court has no jurisdiction and later raising the same issue in a court of competent jurisdiction does not seem to be "affirmative misconduct" -- at least where there are no representations accompanying the dismissal of the first case that the issue will not be raised later.

Even if this exception could be refuted successfully, it may be a better idea simply to moot it, since the United States could do so with a minimum of effort. All that would have to be done is to notify the parties after the United States is dismissed that it will not consider itself bound by any determinations in the case.

The second potentially applicable exception to the nonparty rule holds that where there is some legal relationship between the nonparty and a party, such as where one is a predecessor in interest to the same claim or property, the

nonparty can be bound in later suits. An insurance company would seem to have a basis for estopping the United States from retrying the insurance company's liability under its contract on this basis only if the United States actually has taken an assignment of the assured's claim against the carrier and has no independent rights of action.

The preclusive effect on a nonparty judgment creditor of a finding of no coverage in a suit between the insurance company and its insured was addressed in Hocken v. Allstate Insurance Co., 147 S.W.2d 182 (Mo Ct. App. 1941). Hocken filed suit against the insured for personal injuries suffered as a result of a car accident and recovered a judgment for $2,500. While Hocken's suit was pending, the insurance company filed suit against the insured and Hocken seeking a declaration that the policy was void due to fraudulent misrepresentations by the insured in the procurement of the policy. For undisclosed reasons, the insurance company dismissed Hocken as a party and judgment was rendered against the insured prior to the entry of a judgment for $2,500 in Hocken's favor in the underlying personal injury suit.

Hocken later brought a garnishment proceeding against the insurance company to recover the $2,500 judgment. In its defense, the insurer contended that the declaratory judgment against the insured was not subject to collateral attack but was binding on Hocken because she was in privity with the insured, having derived her rights against the insurance company solely through the insured. The trial

reversed and remanded the case for a new trial on the issue of coverage.

The crux of the appellate court's decision was its holding that, contrary to the insurance company's assertion, the injured party was not a privy to the suit between the insurance company and the insured. It reasoned that Hocken was not privy because she acquired whatever rights she possessed under the policy prior to the institution of the declaratory judgment action. 147 S.W.2d at 186. "After those rights came into existence the insured could not by any act, or by the submission to the rendition of judgment against him, lessen the interest vested in [the injured party]." Id.

Hocken's rights were acquired before the institution of the declaratory judgment action because under Missouri law the injured party acquires its rights to the insurance coverage at the time of the accident or the occurrence of the injury. "It is true that those rights were originally derived through the insured, but by operation of law they are fixed and independent of any control by the insured, so that as to all acts and relations subsequent to the accident, which gave rise to plaintiff's rights, they were not in privity." Id. at 188. See also Mathison v. Public Work Supply District, 401 S.W. 2d 424, 431 (Mo. 1966) ("to make one "privy" to an action he must have acquired his interest in the subject of the action subsequent to the commencement of the suit or rendition of judgment").

The rights of the United States against an insurer in an environmental case, under this analysis, would be acquired at the time of the accident or occurrence giving rise to liability.

Courts in other st[illegible]e in accord with the logic and holding in Hocken. In United Farm Bureau Mutual Insurance Co. v. Wampler, 406 N.E.2d 1195 (Ind. Ct. App. 1980), an injured party sought to execute a judgment against the insured by proceeding against the insurer. The insurance company asserted that a previous judgment against the insured on the issue of coverage was res judicata as to the injured party. The court held that the injured party was not in privity with the insurer or the insured and not bound by the outcome of the declaratory judgment. Id. at 1197. The court relied on 7 Am.Jur. 2d, Automobile Insurance §§(1963):

> A judgment determining, as between an automobile liability insurer and the insured or a person claiming to be insured, a question of coverage in favor of the insurer does not, as a matter of res judicata, preclude the injured person from litigating the question of coverage in a subsequent action or proceeding instituted by him against the insurer, since the injured person is not in privity with any of the parties in the former proceeding.

In Gladon v. Searle, 412 P.2d 116 (Wash. 1966), while a suit by an injured party against the insured was pending, the insurance company commenced an action against the insured for a declaratory judgment as to coverage. The company did not notify or attempt to join the injured party, and a default judgment was entered in favor of the insurer

after the insured failed to answer the suit. The injured party subsequently recovered a default judgment against the insured and filed a garnishment action against the insurance company. Judgment was entered against the insurer, which appealed. The court held that "third party claimants in an action of this nature are not bound by a declaratory judgment in which they were not made a party." Id at 118.

The insurance company in Sobina v. Busby, 210 N.E. 769 (Ill. App. Ct. 1965), sought to use a judgment from a suit between the insurance company and the insured as a defense in an action by the injured parties against the company to recover on a judgment entered against the insured. Citing Hocken, supra the court observed, "There is ample authority holding that the plaintiffs in the underlying tort action are not in privity with the insured, that the insurance policy is one against liability and not against loss, that the plaintiffs' rights accrued at the time of the accident and were not cut off in a later decree entered in proceedings to which the plaintiffs were not parties." Id. at 772-73.

Southern Farm Bureau Casualty Insurance Co. v. Robinson, 365 S.W.2d 454, 456 (Ark. 1963), addressed the following question:

> Can a default declaratory judgment between an insurer and an insured, instituted while suit is pending in a foreign jurisdiction between the insured and an injured person, which suit the insurer is defending, destroy the rights of the injured person who was not a party of the declaratory judgment proceedings?

The court said "No," and explained that the rights of the injured party arose at the time of the injury and are antagonistic to the rights of both the insurer and the insured. Id. at 457; see also 46 C.J.S. Insurance §1191, p. 123 ("The rights of the injured person who may maintain an action against insurer are to be determined as of the time of the accident out of which the cause of action grew . . . .)" and Shapiro v. Republic Indemnity Co., 341 P.2d 289 (Cal. 1959). In Shapiro, the injured parties recovered a judgment against the insured and then brought an action against the insurer on a public liability insurance policy that covered the insured. The insurer argued that its liability must be determined according to the policy as it was reformed in a postaccident action between the insurer and the insured. The court held that, as third-party beneficiaries of the insurance policy, the injured parties had an interest that could not be altered or conditioned by the independent action of the insurer and the insured in reforming the policy. Id. at 291; accord Boulter v. Commercial Standard Insurance Co., 175 F.20 763, 768 (9th Cir. 1949)(applying California law).

The New Jersey Supreme Court has also rejected the argument that, because the injured person stands in the shoes of the insured, a judgment in a suit between the insured and the insurer is conclusive against the injured party. Dransfield v. Citizens Casualty Co., 74 A.2d 304, 306 (N.J. 1950). The court in Dransfield reasoned that the

injured person has a cause of action the moment he or she is injured and is not in privity with the insured. Virginia likewise has held that, even though a judgment creditor stands in the insured's shoes, the injured party is not barred by a plea of res judicata. Storm v. Nationwide Insurance Co., 97 S.E.2d 759 (Va. 1957). "The insured and the Company may not litigate and have [the injured party's] rights against the Company, which had their inception at the time of her injury, determined in an action to which she is not a party." 97 S.E.2d at 764. See also Bailey v. United States Fidelity and Guaranty Co., 103 S.E.2d 638, 641 (S.C. 1937) (injured party would not be privy, and therefore not bound by judgment in a suit to which he was not a party, where her rights were acquired at time of injury and prior to the rendition of the judgment).

The commentators agree with this line of cases. Couch states, "A judgment determing as between an automobile liability insurer and the insured or a person claiming to be insured, a question of coverage in favor of the insurer does not, as a matter of res judicata, preclude the injured person from litigating the question of coverage in a subsequent action or proceeding instituted by him against the insurer, since the injured person is not in privity with any of the parties in the former proceeding." Couch, Cyclopedia of Insurance law, §45:945 (2nd ed.). Likewise, Appleman notes that "an injured person can neither be bound by a judgment in favor of the insured in a suit brought by another claimant, nor by

a judgment in favor of the insurer, in an action brought upon the policy by the insured." Appleman, §11521; see also 69 ALR2d 858, 859.

One Ohio case that is inconsistent with all of these other cases. In Conold v. Stern, 35 N.E.2d 133 (Ohio 1941), an injured party recovered a judgment against the insured for personal injuries sustained in an automobile collision. The judgment creditor then brought an action against the insurer to recover the amount of the judgment. The insured company averred as a defense a judgment in an action between the insurer and a different party also injured in the same collision in which the court held the policy null and void due to the insured's failure to cooperate. The court held that a judgment in favor of the insurer in an action by an injured party on the question of noncooperation was res judicata in favor of the insurer in a later action by another person injured in the same accident. Id. at 140-41. The court reasoned that the right of the insured against the insurer was fully litigated in the suit by the first injured party and the declaratory judgment against the insured is a bar against another injured party whose right, if any, against the insurance company is derived from and dependent upon a valid right of the insured against the insurance company.

The decision in Conold nowhere mentions the issue of privity or when the rights of the injured party arise, but focuses solely on the rights of a judgment creditor being derivative of the rights of the insured. Also, the case

involves an action by an injured party where judgment has been entered in favor of the insurer in a similar action by another person injured in the same accident. Most importantly, although the more recent case of Celina Mutual Insurance Co. v. Sadler, 217 N.E.2d 255 (Ohio Ct. App. 1966), suggests that the holding in Conold is still the law in Ohio, Conold has not been followed by the courts of any other state. Accordingly, although Conold should caution the United States against remaining a nonparty to an action in Ohio between an insured another party injured by the insured, it should not affect the decisions of the United States in other states.

Yet another exception to the estoppel rule may be applicable to our cases. When collateral estoppel would violate general notions of public policy, or would work an injustice, it is not to be applied. Specifically, where the government is involved in a case designed to protect the public, it should not be estopped by previous cases to which it was not a party. Porter & Dietsch, Inc., v. FTC, 605 F.2d 294, 299-300 (7th Cir. 1979); Defenders of Wildlife v. Andrus, 77 FRD 448, 454 (D.D.C. 1978); Restatement (Second) of Judgments § 28 (1981); and 18 Wright & Miller § 4426. Hazardous waste cases appear particularly apposite for applying this principle. The United States is attempting to fund the containment and removal of very serious threats to health and the environment. It should not be hampered in these efforts by estoppel arising out of litigation. Moreover, the line of cases discussed in the context of whether the

United States could be considered as having a relationship with some party, and thus be bound by his failure in litigation, is buttressed by the unique public responsibilities of the government.

Finally, although it is doubtful that the United States will want to intervene in declaratory judgment actions between liable parties and their insurers, it is not at all clear that the court would allow such intervention in the absence of a preexisting judgment and an independent direct action claim. See Independent Petrochemical Corp., v. Aetna Casualty and Surety Co., Civ. No. 83-3347. (S.D. Ohio, March 8, 1985) 22 ERC 1523, IX Chem. and Rad. Waste Lit. Rptr. 911 (included in the Compendium), denying Rule 24(a)(2) intervention to individuals asserting unresolved personal injury claims against the bankrupt IPC; but cf. Re-Solve v. Canadian Universal Ins. Co., (Mass. Super Ct., CA No. 14767, May 14, 1984), discussed at IX Chem. & Rad. Waste Lit. Rptr. 822 (allowing the Commonwealth of Massachusetts to intervene in an action between a polluter and its insurer).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

OSWER # 9850.0

NOV 22 1985

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Endangerment Assessment Guidance

FROM: J. Winston Porter
Assistant Administrator

TO: Addressees

PURPOSE

This memorandum clarifies the requirement that an endangerment assessment be developed to support all administrative and judicial enforcement actions under Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Section 7003 of the Resource Conservation and Recovery Act (RCRA). Before taking enforcement action under these provisions to abate the hazards or potential hazards at a site, the Environmental Protection Agency (EPA) must be able to properly document and justify its assertion that an imminent and substantial endangerment to public health or welfare or the environment may exist. The endangerment assessment provides this documentation and justification. The endangerment assessment is not necessary to support Section 104 actions.

This memorandum also provides guidance on the content, timing, level of detail, format, and resources required for the preparation of endangerment assessments.

WHAT IS AN ENDANGERMENT ASSESSMENT

An endangerment assessment is a determination of the magnitude and probability of actual or potential harm to public health or welfare or the environment by the threatened or actual release of a hazardous substance (for a CERCLA action) or a hazardous waste (for a RCRA action).

An endangerment assessment evaluates the collective demographic, geographic, physical, chemical, and biological factors which describe the extent of the impacts of a potential or actual release of a hazardous substance and/or hazardous waste.

In general, the endangerment assessment should identify and characterize:

(a) Hazardous substances and/or hazardous wastes present in all relevant environmental media (e.g., air, water, soil, sediment, biota);

(b) Environmental fate and transport mechanisms within specified environmental media, such as physical, chemical and biological degradation processes and hydrogeological evaluations and assessments;

(c) Intrinsic toxicological properties or human health standards and criteria of specified hazardous substances or hazardous wastes;

(d) Exposure pathways and extent of expected or potential exposure;

(e) Populations at risk; and,

(f) Extent of expected harm and the likelihood of such harm occurring (i.e., risk characterization).

WHY PERFORM AN ENDANGERMENT ASSESSMENT

Under Section 106(a) of CERCLA, if the President determines that there may be an imminent and substantial endangerment to public health or welfare or the environment from an actual or threatened release of a hazardous substance, the President may secure such relief as may be necessary to abate such danger or threat. Such relief may be in the form of a judicial action or an administrative order to compel responsible parties to respond to hazardous conditions.

Before an order can be issued or an action filed under §106 of CERCLA, EPA must be able to document and justify its assertion that an imminent and substantial endangerment to public health or welfare or the environment may exist. The endangerment assessment provides this documentation and justification. It is the basis for the findings of fact in administrative orders, consent decrees, and complaints.

In situations dealing with hazardous wastes or solid wastes under RCRA, rather than hazardous substances under CERCLA, Section 7003 of RCRA may be used as the authority under which EPA may issue orders or file civil actions. Section 7003 of RCRA requires a similar finding of imminent and substantial endangerment and, therefore, EPA must also document and justify such an assertion with an endangerment assessment before taking enforcement action.

1/ "Final Revised Guidance Memorandum on the Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act", September 26, 1984 signed by Courtney Price and Lee Thomas.

It is important to note that "imminent" does not mean immediate harm. Rather, it means an impending risk of harm. Sufficient justification for a determination of an imminent endangerment may exist if harm is threatened; no actual injury need have occurred or be occurring. Similarly, "endangerment" means something less than actual harm.

WHEN TO PERFORM AN ENDANGERMENT ASSESSMENT

At remedial sites subsequently targeted for CERCLA §106 or RCRA §7003 enforcement action, all of the elements of an endangerment assessment will be provided by completing the contamination assessment, public health evaluation, and environmental assessment during the RI/FS process. As such, these assessments are equivalent to the endangerment assessment for enforcement sites. The information from the contamination assessment, public health evaluation, and environmental assessment will be considered sufficient to issue an order although additional work may be needed prior to litigation (See Attachment 1 and the RI/FS guidance documents referenced on Page 6 of this guidance).

Where an RI/FS has not been initiated or completed, an endangerment assessment must be prepared to justify an administrative order or judicial action under CERCLA §106 or RCRA §7003. For example, orders issued to govern responsible party conduct of an RI/FS or to compel responsible party performance of immediate response actions will require an endangerment assessment prior to issuance. In both cases, the endangerment assessments will demonstrate that there may be an imminent and substantial endangerment which justifies either further investigative action to determine the appropriate remedy for a site or an immediate response action.

In isolated cases, EPA has negotiated with potentially responsible parties for the site remedy before it has developed the RI/FS. In these few cases, an endangerment assessment must be developed independently of the RI/FS and completed prior to issuance of the order or decree for remedial action.

An endangerment assessment is required for all future RCRA §7003 actions, as well as older RCRA §7003 cases to which CERCLA §106 authority has been or will be added. An endangerment assessment is not required for older RCRA §7003 cases already filed by the Department of Justice without an endangerment assessment. The litigation team, however, may determine on a case-by-case basis that the preparation of an endangerment assessment or its equivalent would substantially strengthen the government's case.

Endangerment assessments must be prepared for all RCRA §7003 or CERCLA §106 orders issued to another Federal agency for cleanup of a Federally-owned facility. Normally, EPA will seek response action at a Federal facility through a site-specific compliance agreement with the appropriate Federal agency or other responsible parties. If, however, a compliance agreement is not complied with by Federal owners or responsible parties, EPA may issue an order.

WHAT LEVEL OF DETAIL

The determination that an imminent and substantial endangerment to public health or welfare or the environment may exist is a legal prerequisite that must be met before an order can be issued or an action filed. It is EPA policy that endangerment assessments should be undertaken only to the extent "necessary and sufficient" to fulfill the requirements of legal enforcement proceedings. At any site, there is the potential for conducting studies beyond the level of detail needed for enforcement actions. The level of detail of the endangerment assessment should be limited to the amount of information needed to sufficiently demonstrate an actual or potential imminent and substantial endangerment. The level of detail to sufficiently demonstrate endangerment will vary from case to case based on the following factors:

- the type of enforcement action (e.g., AO for removal vs litigation);
- the type of response action (e.g., removal vs remedial); and
- the stage of response action (e.g., RI/FS workplan vs RI/FS completed).

The level of detail required to support a particular enforcement action will ultimately be determined on a case-by-case basis by Regional program personnel in consultation with Regional Counsel. As a general guide, the matrix on page 5 defines these levels of detail based on the factors listed above. The matrix should help the Regions to both (1) determine what constitutes an adequate endangerment assessment for a particular enforcement action, and (2) plan their intramural and extramural resources accordingly.

When endangerment assessments are developed to support administrative orders for private party RI/FS or removal actions, information already available about the site will generally be sufficient. Where sites are targeted for enforcement action after completion of an RI/FS, the endangerment assessments developed as part of the RI/FS will be more detailed and generally more quantitative as they will be based on information obtained from the remedial investigation. Such endangerment assessments will be used to support any subsequent CERCLA §106 orders or judicial actions seeking design and construction of site remedies.

The information gathered in an RI/FS is generally similar to the type of information needed for an endangerment assessment. However, RI/FS and endangerment assessments are developed for different purposes. RI/FS are used to determine appropriate response actions under CERCLA §104, while endangerment assessments are used for enforcement actions under CERCLA §106 or RCRA §7003. For sites with CERCLA §106 or RCRA §7003 enforcement potential, Regions should review the RI/FS workplan to determine whether information developed as part of the RI/FS will be sufficient for an endangerment assessment. In certain complex cases, additional information may be needed and a separate endangerment assessment workplan may be required.

Complexity	Type of Action	Data Base	Type of Assessment	Remarks
Level I	AO for removal action, AO for private party RI/FS, preliminary scoping	May be limited, probably consisting of information from the Preliminary Site Assessment, Site Inspection Report, and Hazard Ranking System evaluation, if completed. No health studies available; no demographic studies available. Preliminary sampling data will probably be available on pollutants present. Data on extent of release or concentrations of materials at the point of exposure may be available.	Qualitative assessment of exposure routes, population at risk, and probability of harm occurring. Critical pollutants and their toxicological properties can be readily identified and quantity of pollutants estimated. Reasonable and prudent to conclude that an exposure may exist because of the release.	For removal actions where the normal si ranking process has not been completed or undertaken, information for the assessment may be available from record searches, State sponsored investigations, written reports from inspections by government authorities, and notification in accordance with CERCLA §103.
Level II	Issuance of AO or consent decree for private party cleanup	Remedial Investigation complete or other quantitative data available on nature/extent of release. Data may be available on magnitude and demographics of population at risk. Possibly some preliminary health effects studies. Sources and specific materials associated with release are identified.	Semi-quantitative appraisal considering specific exposure routes and critical pollutants. The assessment should be able to identify any data gaps and recommend additional studies, if necessary.	This assessment must be able to support legal action in the event that it is challenged by a recalcitrant PRP. Should be conclusive enough that PRPs will be encouraged to make a firm commitment to complete remedial action, but not necessarily detailed and complete if based on RI/FS.
Level III	Litigation (site-by-site basis)	RI and FS complete. All required geological, hydrogeological, and health studies complete.	Detailed, quantitative review to identify potential health effects, critical exposure levels, and necessary follow-up health studies. Critical pollutants and routes identified, and existing exposures defined or estimated. This will constitute an appraisal to the best of expertise and knowledge and an estimate of the uncertainty.	May require enhancement assessment work in addition to information generated during RI/FS.

Note:
The matrix is flexible and may shift on a case-by-case basis as required to support a particular enforcement action.

The endangerment assessment should evaluate the adequacy, accuracy, precision, comprehensiveness, reliability, and overall quality of identified information and data.

Emergency actions do not require the same depth of assessment as planned or remedial activities. By definition, an immediate and significant risk of harm to human life or health or the environment will be present in an emergency, making the assessment of endangerment easier to prepare. Further, EPA is justifying only the need for immediate action, not the long-term remedial solution. Thus, the endangerment assessment may be much briefer, although the Regions should attempt to use as much available information as feasible. The Action Memorandum supporting the emergency action will normally be considered adequate to serve as an endangerment assessment in support of an enforcement action under §106 of CERCLA for an immediate response.

Attachment 2 is an abstract of a detailed paper on "Endangerment Assessments for Superfund Enforcement Actions", prepared by Technical Support Branch, CERCLA Enforcement Division, the Office of Waste Programs Enforcement (OWPE). This paper, previously distributed to the Regions, will provide technical assistance in preparing qualitative and quantitative assessments. OWPE is also preparing a handbook on preparation of endangerment assessments.

Methodologies used for performance of such aspects of the endangerment assessment as exposure and risk assessment should be consistent with the concepts and methods currently in use by the EPA Office of Research and Development (ORD).

Attachment 3 shows how the various toxicity, exposure, and risk evaluations are used to define the overall problems and hazards (endangerment) at a site. Although the use of these evaluations is possible at every site, the need for a detailed analysis, as outlined, is likely to be appropriate at only a limited number of sites to sufficiently demonstrate an actual or potential imminent and substantial endangerment.

The Office of Emergency and Remedial Response (OERR) has developed guidance manuals covering the performance of remedial investigations and feasibility studies. The chapters listed below from these documents and the OWPE handbook will provide guidance in preparing endangerment assessments:

<u>Guidance on Remedial Investigations Under CERCLA</u> (OERR, May 1985

Chapter 7 - Site Characterization
Chapter 9 - Remedial Investigation Report Format

<u>Guidance on Feasibility Studies Under CERCLA</u> (OERR, April 1985)

Chapter 5 - Evaluate Protection of Public Health Requirements

<u>Handbook on Preparation of Endangerment Assessments</u> (OWPE - Technical Support Branch, Summer 1985)

Attachment 4 is a list of references that can be used in preparation of the endangerment assessment.

FORMAT

The endangerment assessment generally should follow a standard framework as provided in Attachment 5 and use qualitative and/or quantitative terms as appropriate.

The Action Memorandum will normally be considered adequate to serve as the endangerment assessment document in support of an order under §106 for an emergency action.

The endangerment assessment document may be the order itself (where the order contains all of the elements of an endangerment assessment) or a separate document. In deciding whether to develop a separate document or to include the elements of the endangerment assessment in the order, Regions should consider the following factors:

1. Are the responsible parties more likely to consent to an order if the endangerment assessment is part of the body of the order, or a separate document?

2. Is the order likely to be issued unilaterally or on consent? A separate document will, of course, be more important in adversarial settings.

We strongly urge that the endangerment assessment in support of an administrative order for private party cleanup be a separate document. Where all of the elements of an endangerment assessment are in the RI/FS documents, a separate document may consist simply of a brief statement cross-referencing the appropriate elements of the RI/FS.

WHO SHOULD PERFORM AN ENDANGERMENT ASSESSMENT

The Regions have the responsibility to assure that endangerment assessments are performed. The Regions can draw on technical expertise available in their Regional offices, OWPE - Technical Support Branch, ORD, the Agency for Toxic Substances and Disease Registry (see MOU between ATSDR and EPA), and/or contractor personnel available through the Technical Enforcement Support (TES) or REM/FIT and TAT contracts.

Endangerment assessments used to justify administrative orders or judicial actions issued or filed before development of the RI/FS should normally be drafted by Regional personnel with the assistance of the TES contractor. The Regions and TES contractor also have the lead in preparation of endangerment assessments for older cases where an RI/FS has not been completed.

If responsible parties elect to perform the RI/FS, they will, in effect, perform an endangerment assessment because they will develop many or all of the elements of an endangerment assessment as part of the RI/FS. Regions should review the RI/FS workplan to determine whether information developed as part of the RI/FS will be sufficient to show that an imminent and substantial endangerment may exist. Because subsequent enforcement actions will rely on the endangerment assessment developed as part of the RI/FS, close Regional oversight should be given to this responsible party work.

The authority for determinations of imminent and substantial endangerment relating to emergency response actions costing up to one million dollars has been delegated to the Regions, subject to the directives issued by the Office of Solid Waste and Emergency Response. (See Delegation 14-1-A, Selection and Performance of Removal Actions Costing Up to $1,000,000 and the Memorandum "Waiver of Advance Concurrence Requirements for Certain Consent Administrative Orders, Gene A. Lucero, January 3, 1985).

When exercising the authority to determine that an imminent and substantial endangerment exists for the purposes of taking enforcement action, the Region must consult with OWPE as outlined in the November 30, 1984 Regional Assignment Memo (also see the Memorandum "Superfund Delegations of Authority - ACTION MEMORANDUM", Howard Messner, April 4, 1984). In contacting OWPE, Regional staff should be prepared to discuss the details of the endangerment assessment for each determination. In certain cases involving complex health and environmental endangerment issues, OWPE may request a copy of the draft endangerment assessment for review. OWPE will complete a review of this document within 14 days of receipt, to ensure consistent, timely response.

USE OF THIS GUIDANCE

The policy and procedures set forth here, and internal office procedures adopted in conjunction with this document, are intended for the guidance of staff personnel, attorneys, and other employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take any action at variance with the policies or procedures contained in this memorandum or which are not in compliance with internal office procedures that may be adopted pursuant to those materials.

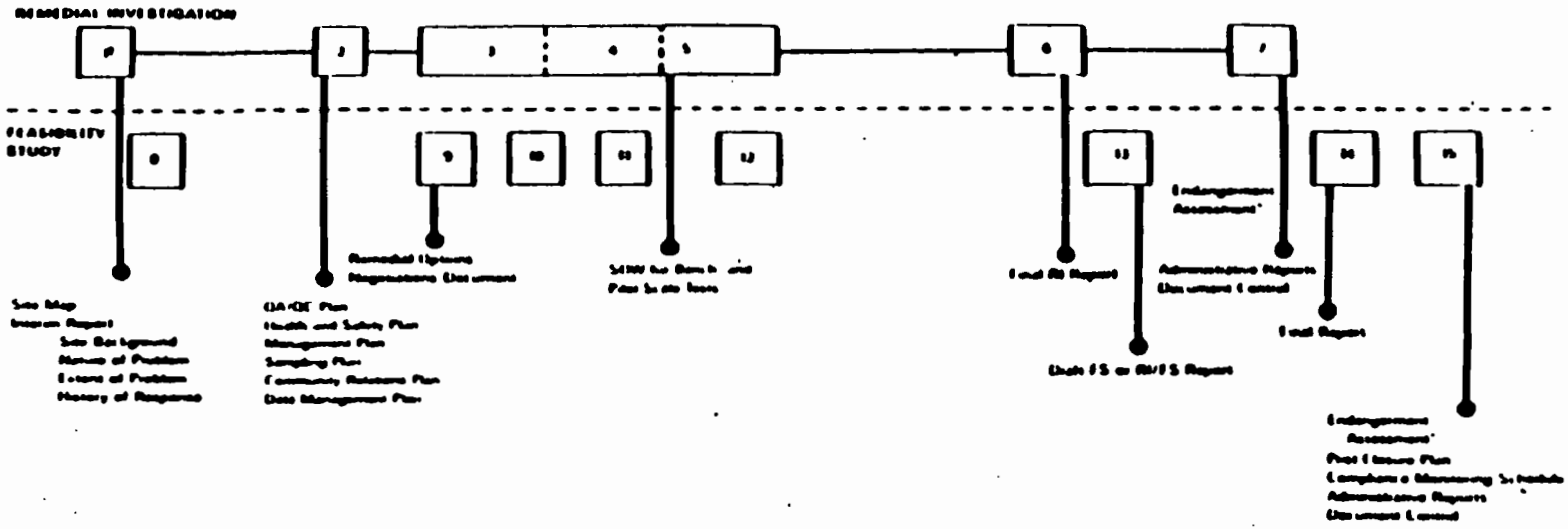
If you have any questions or concerns regarding this guidance, please have your staff contact Chuck Morgan (FTS-475-6690), Chief of the Environmental Health Sciences Section of OWPE or Linda Southerland (FTS-382-2035) of the Guidance and Oversight Branch.

Addressees:

Regional Administrators, Regions I-X
Directors, Environmental Services Division, Regions I-X
Regional Counsels, Regions I-X
Directors, Waste Management Divisions, Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Region III
Directors, Air & Waste Management Divisions, Regions II, VI
Director, Toxics & Waste Management Division, Region IX
Director, Hazardous Waste Division, Region X

Figure 1

RI/FS Process



Remedial Investigation

Model Statement of Work for Remedial Investigations	Guidance Document for Remedial Investigations Under CERCLA
Task #1 Description of Current Situation	CH 1 Introduction
Task #2 Plans to Management	CH 2 Scoping
Task #3 Site Investigation	CH 3 Sampling Plan Development
Task #4 Site Investigation Analysis	CH 4 Data Management Procedures
Task #5 Laboratory to Bench Scale Studies	CH 5 Health and Safety Planning for Remedial Investigations
Task #6 Reports	CH 6 Interim Reports
Task #7 Community Relations Support	CH 7 Site Characterization
	CH 8 Pilot and Bench Studies
	CH 9 Remedial Investigation Report Format

Feasibility Study

Model Statement of Work for Feasibility Studies	Guidance Document for Feasibility Studies Under CERCLA
Task #8 Description of Proposed Response	CH 1 Executive Summary
Task #9 Preliminary Remedial Technologies	CH 2 Develop a Range of Remedial Alternatives
Task #10 Development of Alternatives	CH 3 Conduct a Detailed Screen of Evaluation
Task #11 Initial Screening of Alternatives	CH 4 Evaluate Institutional Requirements
Task #12 Evaluation of Alternatives	CH 5 Evaluate Protection of Public Health Requirements
Task #13 Preliminary Report	CH 6 Evaluate Environmental Impacts
Task #14 Final Report	CH 7 Cost Analysis
Task #15 Additional Requirements	CH 8 Summarize Alternatives
	CH 9 Feasibility Study Report Format

* Standards of the Interim Guidance Document for Model Statement of Work for RI/FS under CERCLA Guidance Issued February 1988. See Appendix A.
Endangerment assessments may be prepared at any point in the RI/FS process in support of administrative actions.

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

OSWER # 9829.0

DEC 23 1985

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Policy for Enforcement Actions Against Transporters Under CERCLA

FROM: Gene A. Lucero, Director Gene A. Lucero
Office of Waste Programs Enforcement

Frederick F. Stiehl Frederick F. Stiehl
Associate Enforcement Counsel for Waste

TO: Regional Counsels
Regional Waste Management Division Directors

Background

Section 107(a)(4) of CERCLA imposes liability for response costs on:

> "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance..."

Substantial controversy has arisen over the interpretation of this provision particularly as it relates to interstate common or contract carriers. The Agency's practice has previously been to issue notice letters to all transporters. In some circumstances, civil judicial enforcement actions have named transporters as defendants prior to a determination of whether they selected the facility. More recently, the Agency practice has been to bring suit only against those transporters who have selected the facility or site.

Transporters involved at many Superfund sites have argued that CERCLA was intended to impart liability only when the transporters selected the facility or site to which the hazardous substances were delivered. Consequently, those transporters contend that interstate common or contract carriers, who under the authority of the Interstate Commerce Commission do not exercise control of the destination of shipments, are excluded from the liability provision of §107(a)(4). No judicial opinion has been rendered to date on the interpretation of this provision.

Policy

As part of the responsible party searches, Regional staff should gather and review all available information related to transporters and the nature of their involvement with the facilty or site at which the hazardous substances are located. This review should include all of the common sources of information such as site records and records from federal, state and local regulatory agencies. In addition, information related to the transporters should be obtained through §104(e) information request letters to the owner/operators, generators and to the transporters. Information request letters, and any subsequent interviews, should seek documentation as to the source, volume, nature and location of wastes transported. Regional staff should also seek to identify through this process the role of the transporter in the selection of the facility or site.

Notice letters informing transporters of potential liability under CERCLA will not be issued unless and until the information gathering process indicates that the transporter may have selected the site or facility to which the hazardous substances were delivered. (However, as indicated above, information request letters should be routinely sent to all transporters.) Issuance of notice letters to transporters is appropriate only when information obtained indicates that the transporter may have selected the site or facility.

Similarly, enforcement actions (whether administrative or judicial) would be brought under §106 or §107 only under the same circumstances. As a matter of policy, EPA will bring action only against transporters where information is available which indicates that the transporter selected the site or facility. However, in the event that information is inconclusive due to a lack of cooperation from transporters in providing information, EPA may bring action against any transporter to compel full response to information requests.

1986

OSWER # 9831.2

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

MAR 14 1986

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Reporting and Exchange of Information on State Enforcement Actions at National Priorities List Sites

FROM: J. Winston Porter
Assistant Administrator

TO: Addressees

Recent developments in the Superfund enforcement program prompt me to personally address the issue of reporting and exchange of information on State enforcement actions at National Priorities List (NPL) sites. I recently approved guidance on funding States during their oversight of Potentially Responsible Party (PRP) conduct of Remedial Investigations (RI), Feasibility Studies (FS) and Remedial Designs (RD). Furthermore, the current Superfund reauthorization language will allow State funding for a variety of other enforcement activities. These include such activities as oversight of PRP conducted Remedial Actions (RA), and negotiation, litigation and other efforts leading toward private party cleanup. This expansion of the program's funding authorities will inevitably increase State enforcement actions at NPL sites.

As States expand their involvement in the Superfund enforcement program, the Agency's oversight and review of their actions will become an increasingly important activity. We must ensure that State enforcement actions at priority sites are conducted in a manner consistent with Agency procedures and are adequate to allow for deletion from the NPL. We must also be able to determine, in addition to a State's enforcement efforts, whether Federal review and participation is necessary. This can only occur if we are kept informed of the progress and major decisions made at these sites.

CERCLA reauthorization will also increase the amount of interaction required with States in conducting Federal enforcement actions. Specifically, the House Bill mandates State participation in the following areas:

- Applying State standards and permits to on-site and off-site response actions carried out under Section 106;
- Regulations for State involvement in the CERCLA enforcement response process; and
- State concurrence of Section 106 enforcement actions.

The language in the House Bill is subject to revision. However, I believe the direction is towards increased State participation and will continue to be the case even if reauthorization takes some time to occur. This increased emphasis on State participation in Federal-lead enforcement actions coincides with our need to keep States equally informed and involved in our activities. The sharing of information needs to be reciprocal if we expect to be successful in our efforts to seek private party cleanups and NPL site deletions.

As you are aware, on October 2, 1984, EPA and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) signed a joint policy statement establishing a framework for coordinating Federal and State enforcement actions. Among the many issues recognized as needing to be dealt with in a cooperative manner was that "sharing of information between EPA and the States is key to developing a more effective relationship." The policy also encouraged that States "keep EPA informed of their activities, including consulting with the Regional office when issues arise that do not have clear cut solutions." I strongly encourage that you more actively implement the suggested approach toward sharing of enforcement information outlined in the policy.

Meanwhile, very little information is currently available that outlines the national picture of State enforcement actions at NPL sites. The information must be brought to a level that assures responsiveness to our own concerns, as well as to Congress and other interested parties. The Office of Waste Programs Enforcement (OWPE) recently reviewed the Case Management System (CMS) for information on State-lead enforcement sites. Of the 157 sites currently listed as State-lead enforcement only 44 have a negotiation activity listing (Removal, RI/FS, RD/RA or other). Of the 44 sites, 21 are listed as having initiated negotiations with PRPs to conduct the activity. Of the 21 sites, only 7 have information on the type of negotiation taking place (administrative order, judicial action, cost recovery, etc.). This is also the case for State-lead enforcement RI/FS. The system records only 5 sites as having obligations for State-lead enforcement RI/FS. Furthermore, the system does not provide any information on the progress in getting these site actions completed.

As an initial step toward getting a handle on State enforcement actions, OWPE conducted a survey during the recent first quarter Superfund Comprehensive Accomplishments Plan (SCAP) review. The survey confirmed those sites listed as State-lead enforcement in your Region, and categorized each site by the type of enforcement action taking place. I have attached the results of this survey for your information, and want OWPE to continue using the SCAP process to keep me informed of these ongoing actions. During the second quarter SCAP review we may ask for additional information on these sites. I have attached a list of some additional data

requirements that could be addressed, and would appreciate any comments you have on collecting this information. It would also be helpful if you could identify what information is routinely collected and exchanged in your Region.

I also want OWPE to continue working with ASTSWMO and the National Association of Attorneys General (NAAG) to outline our future State enforcement information requirements and the States' desires on information at Federal-lead sites. I will be calling on representatives from the Regions to assist in this effort. Without your active participation and support we will not be able to realize these long-term goals.

In the meantime, if you have any information to provide or concerns to address, please contact Jack Stanton (FTS-382-4811) or Tony Diecidue (FTS-382-4841) of OWPE.

Attachment

Addressees:

Directors, Waste Management Division, Regions I,IV,V,VII,VIII
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Region III
Director, Air and Waste Management Division, Region VI
Director, Toxics and Waste Management Division, Region IX
Director, Hazardous Waste Division, Region X
Regional Superfund Branch Chiefs, Regions I-X
Regional Counsels, Regions I-X

STATE-LEAD ENFORCEMENT

SITES SUMMARY

The following data elements represent a comprehensive list of information that could be collected on State-lead enforcement sites. The data is essentially equivalent to the information collected on Federal-lead sites. However, we will not collect State-lead enforcement data at the same level of detail. I want this list to serve as a reference for discussion and would like to receive your opinions on it.

- Pre-Enforcement

  - PRP Search (Start/Completion; Planned/Actual)
  - PRPs Identified (Number/Names)
  - Notice Letters Sent (Start/Completion; Planned/Actual)

- Enforcement - RI/FS

  - Negotiations (Start/Completion; Actual)
  - Settlement (Date)
  - Enforcement Actions -- Administrative/Judicial -- (Start/Completion; Actual)
  - PRP RI/FS (Start/Completion; Planned/Actual)
  - State Enforcement RI/FS (Start/Completion; Planned/Actual)
  - Remedy Selection (Date)
  - RI/FS Cost Recovery (Start/Completion; Planned/Actual)

- Enforcement - RD/RA

  - Negotiations (Start/Completion; Actual)
  - Settlement (Date)
  - PRP RD/RA (Start/Completion; Planned/Actual)
  - Enforcement Actions -- Administrative/Judicial -- (Start/Completion; Actual)
  - RD/RA Cost Recovery (Start/Completion; Planned/Actual)

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
** 1				
	MA	Norwood PCB/Grant Gear	D,F	Cost recovery negotiation; forward planning study
	MA	PSC Resources, Inc.	F	State lawsuit for cleanup; PRPs did removal
	NH	Kearsage Metallurgical	H	
	VT	Pine Street Canal	B	State is PRP

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and/or Fund Monies)
(B)	PRP lead RI/FS - settlement has been reached
(C)	PRP lead RI/RA - settlem has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RI/RA - negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

OSWER # 9831.2

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
**	2			
2	NJ	American Cyanamid	B,E	AO for RI/FS & PD, RA drafted - RCRA lead
2	NJ	Brady Metals	B,E	AO for RI/FS signed
2	NJ	Brick Township Landfill	H	AO for RI/FS signed
2	NJ	CPS Madison	F	AO contested, DOJ in court
2	NJ	Chemical	B	AO for RI/FS signed
2	NJ	Cooper Road	F	Delist candidate
2	NJ	Diamond Alkali	B,E	AO signed for RI/FS - remedy selection upcoming
2	NJ	Evor Phillips	A	AO-69 NJDEP funded candidate
2	NJ	Fairlawn Wellfield	B	AO RI/FS signed
2	NJ	Fort Dix	B	3 party agreement signed for RI/FS,(EPA,DEP,& DoD)
2	NJ	Hercules	D,E	Negotiations ongoing for supplemental RI,FS,RD,RA
2	NJ	Hopkins Farm	A	AO 69 RI/FS candidate, drop dead date 3/31
2	NJ	Imperial Oil	A	AO-69 RI/FS
2	NJ	JIS Landfill	F	LF being closed, GW decontaminated under jud order
2	NJ	Jackson Township Landfill	F	RI proposed under NJPDES permit
2	NJ	LF & Development	F	Unilateral AO for monitoring and liner installation
2	NJ	Monroe Township Landfill	B,C	AO for RI/FS RD, RA signed, delist candidate
2	NJ	PJP Landfill	F	
2	NJ	Pijack Farms	D	AO for RD, RA signed
2	NJ	Radiation Technology	B	ACO signed RI/FS
2	NJ	Sayreville Landfill	A	AO-69 RI/FS
2	NJ	Shieldalloy	B,C	AO signed RI/FS & cleanup
2	NJ	Spence Farm	C	AO for PD, RA signed
2	NJ	Universal Oil	B	AO for RI/FS signed
2	NJ	Upper Deerfield Landfill	B	AO drafted, settlement concluded
2	NJ	Ventron	B	AO signed for RI/FS
2	NJ	Vineland St. School	A	MOU signed with Dept of Human Services
2	NJ	Wilson Farm	A	AO-69 RI/FS candidate, drop dead date 3/31
2	NJ	Woodland Rt 532	A	AO-69 RI/FS
2	NJ	Woodland Rt 72	A	AO-69 RI/FS
2	NY	Anchor Chemical	D	Negotiations ongoing
2	NY	Claremont Polychemical	F	CO,company bankrupt EPA will probably assume lead
2	NY	Clothier (PAS Satellite)	A	Negotiations ongoing
2	NY	Colesville Landfill	D	Negotiations ongoing
2	NY	Cortese Landfill	D	Order, work in progress
2	NY	FMC-Dublin Road	D	Negotiations ongoing
2	NY	Fulton Terminal (PAS Satellite)	A	Negotiations ongoing
2	NY	Goldisc Recordings	B	Order, field work in progress
2	NY	Hertzel Landfill	D	State negotiations likely
2	NY	Hooker Chemical-Ruco Polymer	D	Negotiations ongoing
2	NY	Johnstown Landfill	D	Negotiations ongoing
2	NY	Kenmark Textile	D	Negotiations ongoing
2	NY	Liberty Industrial Finishing	B	RI order signed
2	NY	Ludlow Sand & Gravel	B	Order signed, work in progress
2	NY	Mercury Refining	B	Order signed, work in progress
2	NY	Nepera Chemical	B	Order signed
2	NY	Old Bethpage	H	Order signed, field work in progress
2	NY	Solvent Savers	H	Order signed, field work in progress
2	NY	Vestal Well 4 2	H	Order imminent
2	NY	Volney Landfill (PAS Satellite)	A	Negotiations ongoing

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and no fund funded)
(B)	PRP-lead RI/FS - settlement has been reached
(C)	PRP lead RD RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RD RA - negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

OSWER # 9831.2

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
03				
3	DE	New Castle Spill	B	
3	DE	New Castle Steel	B	
3	PA	ABM Wade	F	PRP cash out for RI/RA
3	PA	Broadhead Creek	A	
3	PA	Brown's Battery Breaking Site	A	MSCA, State preparing work plan
3	PA	Centre County Repone	D	
3	PA	Craig Farm Drums	D	
3	PA	Hranice Landfill		PRP refuses to do Any work, State taking no action
3	PA	Hunterstown Road Site	A	MSCA, State preparing work plan
3	PA	Kimberton	D	
3	PA	Lindane Dump	D	
3	PA	Lord Shope Landfill	D	
3	PA	Malvern TCE	D	
3	PA	Modern Sanitation	A	
3	PA	Old City of York	B	
3	PA	Osborne Landfill	B	
3	PA	Resin Disposal	D	
3	PA	Shriver Corner	A	MSCA, State preparing work plan
3	PA	Westinghouse Elevator Site	A	MSCA, State preparing work plan
3	VA	U.S. Titanium	F	

Key to Enforcement Codes

Code	Definition
(A)	State lead Enforcement RI/FS (State and no Fund Monies)
(B)	PRP lead RI/FS - settlement has been reached
(C)	PRP lead RI/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations are planned or ongoing
(E)	PRP lead RI/RA - negotiations are planned or ongoing
(F)	Other enforcement action planned or ongoing

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
**	4			
4	FL	Alpha Chemical Company	B	
4	FL	City Industries	E	
4	FL	Dubose Oil	F	PRPs doing RI/FS with no order
4	FL	Florida Steel	C	
4	FL	Rossoul-Rimerling Battery Disp	H	
4	FL	Pratt and Whitney	I	
4	FL	Schuylkill Metals Corp.	D	
4	GA	Hercules 009	B	
4	GA	Monsanto	F	Work being handled under RCRA
4	GA	Olin Corp. Augusta Plant (1,2,4)	F	Work being handled under RCRA
4	SC	Velsore Specialty Chemicals	B	
4	SC	Koppers Co., Inc.	E	
4	SC	Leonard Chemical Company, Inc.	F	PRPs doing RI with no order
4	IN	Murray-Ohio Dump	B	
4	IN	North Hollywood Dump	B	
4	IN	Velsicol, Hardeman	B	

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and/or Fund Monies)
(B)	PRP-lead RI/FS - settlement has been reached
(C)	PRP lead RD/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RD/RA - negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

OSWER # 9831.2

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
**	5			
5	IL	Galesburg/Koppers Co.	B	
5	MI	Avenue "E" G W Contamination	D	
5	MI	Chemcentral	B,F	CD for Removal, RD/RA
5	MI	Gratiot County Landfill	C	
5	MI	McGraw Edison Corp.	B	
5	MI	Motor Wheel Disposal	D	
5	MI	North Bronson Industrial Area		Undetermined
5	MI	Organic Chemical Inc.	F	
5	MI	Roto Finish Co.	E	
5	MI	SCA Independent Landfill	B	
5	MI	Southwest Ottawa County Landfill	B	
5	MI	Sparta Landfill		Undetermined
5	MI	Sparton Chemical Co.	B	
5	MI	Waste Management (Holland Lagoons)		Undetermined
5	MN	Agate Lake Scrapyard	A	
5	MN	Boise Cascade/Onan/Medtronics	C	
5	MN	East Bethel Demolition Landfill	A	4th NPL Update
5	MN	Freeway Sanitary Landfill	A	4th NPL update
5	MN	General Mills/Henkel Corp.	B	
5	MN	Joslyn Mfg. and Supply	B	
5	MN	Rock Refining	B	
5	MN	Ropper Coke	D	
5	MN	Kurt Manufacturing Company	B	
5	MN	NL/Taracorp	B,F	AOC for IRM
5	MN	Olmstead Co. Landfill	B	
5	MN	Pine Bend Sanitary Landfill	B	
5	MN	St. Augusta Sanitary Lf/St. Cloud Dump	A	4th NPL update
5	MN	St. Regis Paper Co.	B	
5	MN	Union Scrap	A	
5	MN	University of Minnesota (Rosemont)	B	
5	MN	Waite Park	D	4th NPL update
5	MN	Washington County Landfill	B	
5	MN	Whittaker Corp.	F	
5	MN	Windom Dump	B	
5	OH	Alsco Anaconda	D	
5	OH	Nease Chemical	F	
5	OH	TRW	F	5th NPL update
5	OH	Zanesville Wellfield	F	
5	WI	Delavan Municipal Well No. 4	F	
5	WI	Lauer I Sanitary Landfill	F	
5	WI	Omega Hills North Landfill	F	
5	WI	Waste Research and Reclamation	F	
5	WI	Wheeler Pit	D	

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and/or Fund Funded)
(B)	PRP-lead RI/FS - settlement has been reached
(C)	PRP lead RD/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RD/RA - negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

OSWER # 9831.2

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
**	6			
	6			

There are no State-lead Enforcement Sites in Region 6.

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and/or Fund Monies)
(B)	PRP lead RI/FS - settlement has been reached
(C)	PRP lead RD/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RD/RA - negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
**	7			
	7	IA	Vogel Paint and Var	B
	7	KS	Strother Field	B,D No section settled. 5n section being negotiated

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and/or Fund Monies)
(B)	PRP lead RI/FS - settlement has been reached
(C)	PRP lead RI/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RI/RA - negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
08	8 UT	Portland Cement 2 & 3	B	

Key to Enforcement Codes.

Code	Definition
(A)	State-lead Enforcement RI/FS (State and or Fund Remedial)
(B)	PRP-lead RI/FS - settlement has been reached
(C)	PRP lead RD/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RD/RA negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
**	9			
9	AZ	19th Avenue Landfill	F	PRP cash out for RI/FS
9	AZ	Motorola 52nd Street	U	
9	CA	Advanced Micro Devices	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Applied Materials	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Coast Wood Preserving	B	
9	CA	Fairchild Camera & Instruments San Jose	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Firestone Tire Manufacturers	U	
9	CA	Hewlett Packard II	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	IBM, General Products Division	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Intel Magnetics	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Intel Santa Clara 3	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Liquid Gold	B	
9	CA	Lorentz Barrel & Drum	A	
9	CA	Marley Cooling Tower	A	
9	CA	Monolithic Memories	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	National Semiconductor	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Precision Monolithic	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Signetics	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Teledyne	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Thompson-Hayward	F	PRPs doing RI/FS with unilateral order
9	CA	Van Waters & Rogers	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Westinghouse	A	So. Bay-MSCA/site investig./alternative analysis
9	CA	Zoecon Corp/Rhone Poulenc	A	So. Bay-MSCA/site investig./alternative analysis

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and/or Fund Monies)
(B)	PRP-lead RI/FS - settlement has been reached
(C)	PRP-lead RI/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RI/RA - negotiations planned or ongoing
(F)	Other enforcement action planned or ongoing

USWER # 9833.2

State-Lead Enforcement Sites Summary

Region	State	Site Name	Code	Comment
** 10				
10	WA	FMC Corp	F	
10	WA	Kaiser Aluminum	F	
10	WA	Pesticide Lab	F	

Key to Enforcement Codes

Code	Definition
(A)	State-lead Enforcement RI/FS (State and/or Fund Phoiea)
(B)	PRP lead RI/FS - settlement has been reached
(C)	PRP-lead RD/RA - settlement has been reached
(D)	PRP lead RI/FS - negotiations planned or ongoing
(E)	PRP lead RD/RA - negotiations planned or ongoing
(F)	Other enforcement action - planned or ongoing

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

9832.8

MAY 23 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Revised Hazardous Waste Bankruptcy Guidance

FROM: Richard H. Mays
Acting Assistant Administrator for
Enforcement and Compliance Monitoring

TO: Regional Counsels, Regions I-X

The Agency's recent experience in CERCLA and RCRA bankruptcy actions has identified the need for updated and revised guidance on the scope of EPA's enforcement actions against bankrupt parties. This memorandum is intended to update the May 24, 1984 guidance "CERCLA Enforcement Against Bankrupt Parties" and the guidelines on bankruptcy contained in the Cost Recovery Handbook "Procedures for Documenting Costs for CERCLA §107 Actions," January 30, 1985. The memorandum defines specific criteria for evaluating the merits of a potential bankruptcy referral; elaborates on the policy regarding settlement with bankrupt parties; reviews the recent judicial decisions in the areas of the automatic stay, abandonment, discharge, and claims of administrative expenses; and briefly describes new enforcement theories which have been asserted by the Agency in recent pleadings.

BANKRUPTCY REFERRALS

EPA has referred 22 hazardous substance cases to the Department of Justice for filing bankruptcy actions. After several years of litigation only two of these cases have resulted in recovery of funds from the debtor. The current docket of bankruptcy cases has consumed a disproportionate amount of attorney resources based on the expected recovery of funds to the Agency.

Additional scrutiny will be used in evaluating future referrals from the Regions which include bankruptcy claims. In all referrals regarding bankrupt parties, the Regions should include a justification for filing in the bankruptcy action. The referral justification should be based on at least one of the following five criteria:

1. EPA is likely to recover at least $5,000 by filing a simple proof of claim as a general unsecured creditor

Filing a proof of claim is a relatively simple and straightforward matter which may be appropriate when the Agency has a claim as a general unsecured creditor, for example in cases where the Agency has completed a response action before the bankruptcy is filed. Where there appears to be sufficient assets in the debtor's estate 1/ for a small distribution to the

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1/ Determining the extent of the assets in the estate can be based on the schedule of assets set out in the bankruptcy petition, the extent of assets and claims published following the initial meeting of creditors, the court's bankruptcy docket, and periodic filings available through the court clerk.

government on an unsecured claim, the trustee, debtor, or other creditors may well not undertake the trouble and expense to challenge a claim that does not otherwise threaten the estate. The chances of such an objection are particularly small where EPA's claim is liquidated and CERCLA liability is clear 2/. As a general rule, a proof of claim should be filed in cases where EPA does not anticipate that an objection will be raised by the creditors or the estate and where the filing of a proof of claim will lead to a recovery of at least $5,000 3/. In these cases, the Region should prepare an abbreviated referral package containing the proof of claim, supporting affidavits and cost documentation and a brief description of the assets in the debtor's estate.

2. EPA is likely to recover at least $20,000 of response costs through a more complex bankruptcy filing

As a general rule, prospective referrals of complex bankruptcy actions (such as a request for an administrative expense priority) that may lead to recovery of less than $20,000 are discouraged.

2/ Under Section 502(a) of the Bankruptcy Act a claim is deemed allowed unless objected to. Thus, filing a proof of claim, by itself, will often not lead to the type of extensive litigation that has characterized many of the Agency's bankruptcy cases so far.

3/ If costly obstacles or significant challenges at some point do in fact loom over EPA's proof of claim, the Agency can always withdraw its claim as a matter of right prior to the filing of an objection (Bankruptcy Rule 3006). Even after the filing of an objection to the proof of claim, EPA can withdraw its claim, subject to court approval. As long as the claim was filed in good faith, a court will be unlikely to deny the withdrawal of a claim where the government indicates that it is not in its best interests to pursue the claim.

Assuming a recovery of $20,000 or more, the Region should set out the extent of the assets in the debtor's estate, the number and extent of other claims, the status of other creditors (i.e., secured or unsecured), and the theories of recovery which will be asserted in the bankruptcy litigation. The Region should also evaluate the merits of EPA's claims, including the ability of the Agency to prove its CERCLA §107 claims based on available cost documentation.

3. The bankruptcy action has significant deterrence value

Under this justification, the Regions should establish that the bankrupt party may be seeking to avoid liability for Superfund cleanup through an unlawful declaration of insolvency. The referral should include a discussion of the past financial practices of the potential defendant and any indication of misrepresentation or fraudulent transfer of funds. A bankruptcy case may also be an appropriate candidate for referral if the case is made highly visible to the regulated community and will serve as a deterrent to other defendants who may contemplate using the bankruptcy courts as an obvious shield from potential Superfund liability to the government 4/. In these cases, the

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4/ The government has been successful in dismissing bankruptcy actions where the government was able to show under Rule 707(a) or 305(a) that the dismissal was in the public interest. In In re Commercial Oil (No. 85-01951 Bankr. N.D. Ohio) the Bankruptcy Court under rule 707(a) dismissed the petition in bankruptcy citing In re Charles George Land Reclamation Trust, 30 B.R. 918 (Bankr. C.D. Mass. 1983) which involved a sham bankruptcy filing in an attempt to avoid Superfund liability.

Region should attempt to estimate the extent to which the costs of litigation may be recoverable.

4. Equitable treatment of all responsible parties

In some circumstances the Region may wish to refer a case against a bankrupt party in the interest of equity and fair treatment of all parties. For example, it may be appropriate to pursue the bankrupt owner or operator of a facility who contributed significantly to the creation of the hazard, particularly in connection with a settlement with other viable responsible parties. In most cases, the Region should not consider a referral against bankrupt generators or transporters unless the case meets the criteria set out in justifications 1 or 2.

5. Favorable precedent or tactical litigation considerations

In rare cases there may be an overriding interest in pursuing a bankrupt party for the purposes of obtaining an important and favorable precedent 5/ or where there are tactical litigation issues relating to other actions in which the Agency is involved 6/.

5/ There may be cases where even though the potential recovery is small, there is good opportunity to develop the law in the area of environmental bankruptcy litigation. Moreover, cases where the Agency's claim is small may present the best factual situations for developing our legal arguments. For example, courts may be more willing to grant an administrative expense priority when the size of EPA's claim is small and will not keep other administrative claims from being paid.

6/ For example, filing a proof of claim may be a useful mechanism to insure that the United States receives copies of relevant pleadings filed in the bankruptcy and has access to participate in whatever discovery is conducted in the bankruptcy proceeding.

MULTIPLE CLAIMS

In several cases, the Regions have referred bankruptcy cases which address one claim against a debtor, but which do not mention other, sometimes unrelated, potential claims that may involve the same debtor. For example, referrals for the recovery of funds spent in an immediate removal may also have potential claims for CERCLA remedial action or RCRA corrective action. There can be conflicts in how the Agency would want to proceed on the various claims. Accordingly, it is essential that the full extent of all potential EPA claims against a debtor be disclosed to the Department of Justice before any formal action is taken in the bankruptcy. All litigation reports prepared by the Regions for bankruptcy cases should summarize all known and potential claims that EPA may have against the debtor.

SETTLEMENT WITH BANKRUPT PARTIES UNDER CERCLA

The Agency's settlement policy 7/ states that it may be appropriate for the Regions to enter into negotiations with bankrupt PRPs even though an offer may not represent a substantial portion of the costs of cleanup. The policy further states that the Regions should avoid becoming involved in bankruptcy proceedings

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7/ "Interim Hazardous Waste Settlement Policy" Vol. 50, No. 24 Federal Register (February 5, 1985) 5034-5044. See discussion at II. Management Guidelines for Negotiation, claims in bankruptcy Id. at 5036.

if there is little likelihood of recovery, and should recognize the risks of negotiating without creditor status. In general, the Regions have been given broad authority to settle with bankrupt parties.

When a Region elects to settle with a bankrupt party the following five options should be considered:

1. Confession of Judgment

In United States v. Metate Asbestos Corp. et al., No. 83-309-GLO-RMB (Order of July 12, 1985) the court approved the entry of a consent decree and civil judgment against certain of the defendants in bankruptcy for $7,085,000. The order granted judgment jointly and severally in the District Court proceeding in settlement of claims against the bankrupt parties. In this case, due to the extremely limited assets of the bankrupt individuals, it is doubtful that the United States will recover a substantial portion of the $7 million. This form of settlement (i.e., a confession of liability and judgment) is only encouraged in a Chapter 11 reorganization action where a specific provision for enforcement of the judgment is set out in the confirmed plan of reorganization. 8/

8/ Unless otherwise provided for in the plan of reorganization, the confirmation of the plan discharges the debtor from all debts arising before the date of confirmation, 11 U.S.C. §1141(d)(1). In addition, 11 U.S.C. §524(a) provides that a discharge voids judgments on discharged debts and enjoins any legal action to collect such debts from the debtor or the property of the debtor.

2. Written agreement with trustee and other creditors regarding satisfaction of claim with appropriate reservations

It is also possible for the Agency to enter into an agreement with the trustee for the debtor regarding a future payment of funds upon dissolution of the estate. For example, in one case in the Northern District of Florida the Agency is contemplating entering into a stipulation with the trustee and the mortgage holder on the contaminated property. As a condition of settlement, EPA will agree to release the debtor from liability and allow the cleaned up property to be sold or leased. EPA and the mortgage holder would split the proceeds from the sale or lease of the property thereby recovering a substantial portion of the Agency's cleanup costs.

In a second case, in the Eastern District of North Carolina, the Agency is considering entering into a similar arrangement. The debtor-in-possession has submitted a liquidation plan of reorganization in which the debtor agrees to retain title to the contaminated property during the EPA cleanup. When the cleanup is completed, the debtor will sell the property. The proceeds will go first to cover administrative expenses involved in the sale and then to EPA for reimbursement of response costs. EPA has requested that language be included in the plan which protects the right of EPA to recover against the debtor's insurance companies.

3. Agreement with trustee regarding pro rata distribution of assets

Pending a final accounting, EPA may agree with the trustee to a pro-rata payment of our claim in bankruptcy. In In re Crystal Chemical Company, No. 81-02901-HB-4 (Bankr. S.D. Texas), EPA entered into a stipulation with the trustee for a pro rata payment of cleanup costs after liquidation. The stipulation was reached after a four day presentation of evidence to the bankruptcy court where EPA was seeking an immediate payment of funds for the ongoing cleanup.

4. Settlements contained in the reorganization plan

A Chapter 11 reorganization plan is a type of settlement document. Reorganization plans can be used to set forth various settlement-type provisions that are in the Agency's interest. For example, in In re Thomas Solvent Co., NK 84-00843 (Bankr. W.D. Mich.), the Second Amended Plan of Reorganization, which was confirmed by the court, included, at the government's insistance, provisions relating to preserving claims against liability insurers and provisions relating to restrictions on transfer of contaminated property. Other appropriate provisions in such plans might be provisions on access to property and retention of records. The Agency should insist on this type of provision in cases where a plan cannot be confirmed without our concurrence.

5. Settlement with other creditors.

In some cases, other creditors will be a party to a settlement between EPA and the debtor. For example, in In re Thomas Solvent Co., NK 84-00843 (Bankr. W.D. Mich.), there is approximately $350,000 available for distribution to creditors. The significant creditors are EPA, the State of Michigan and two residents groups with health claims. EPA, the State and the two groups have filed multi-million dollar claims. We are presently finalizing a settlement among these creditors and the debtor which will provide for the distribution of the $350,000. One primary benefit of such a settlement is that it avoids the need for time consuming and expensive litigation in bankruptcy court among creditors damaged by the same activities, and will allow us to devote our full resources to pursuing a cost recovery action against other responsible parties.

There are numerous other options for settlement, and for documentation of settlement, with a bankrupt party, including those used to resolve non-bankruptcy proceedings under CERCLA. Although Headquarters will be flexible in reviewing these settlements, it is important that the Regions consult with Headquarters and the Department of Justice before entering into final negotiations with a bankrupt party. An abbreviated referral of the bankruptcy settlement agreement is acceptable.

JUDICIAL DEVELOPMENTS

Since the May 24, 1984 guidance was issued regarding CERCLA enforcement againt bankrupt parties, there has been an increase in judicial activity in the area of environmental bankruptcy actions, particularly in cases involving hazardous waste sites. In addition to several significant District Court and Appellate Court decisions, the Supreme Court has issued two significant rulings in this area in Ohio v. Kovacs, 105 S. Ct. 705 (1985), and Midlantic National Bank v. New Jersey Department of Environmental Protection, 54 U.S.L.W. 4138 (U.S. Jan. 27, 1986) ("Quanta Resources").

1. Automatic Stays

Several courts have adopted the Agency's interpretation that the automatic stay provision of section 362 of the Bankruptcy Code does not apply to actions taken by a governmental unit to prevent environmental harm. In Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267, 274 (3d Cir. 1984), the court held that actions taken to "rectify harmful environmental hazards" were an obvious exercise of the State's authority under the police power and therefore were exempt from the automatic stay. The Supreme Court, in a footnote to the Kovacs decision, suggested that Penn Terra may be applicable to hazardous waste cleanup actions, 105 S.Ct. 705, 718, n. 11.

A recent CERCLA decision regarding the Film Recovery site in Illinois was also favorable to the Agency on the issue of the automatic stay, United States v. B.R. MacKay & Sons Inc.,

et al., No. 85-C-6925 (N.D. Ill. Jan. 17, 1986). In the McKay decision the court held that CERCLA cost recovery actions fall squarely within the governmental enforcement exception to the automatic stay. Id. at 7.

Other recent decisions indicate a split of authority on the issue of whether the automatic stay applies to enforcement actions brought pursuant to CERCLA. In United States v. ILCO, 48 B.R. 1016 (N.D. Ala. 1985), EPA asserted claims pursuant to RCRA §3008, CWA §§301 and 309, and CERCLA §106. The Court's decision in the ILCO case stated clearly that the CERCLA §106 claims were exempt from the automatic stay because the government's complaint, which sought a court order compelling ILCO to remedy environmental harm, constituted an equitable action to prevent future harm, rather than an action to enforce a money judgment. Recognizing that the debtor would have to expend funds in order to satisfy the requested mandatory relief, the Court indicated that compliance with environmental laws is of greater importance than the rights of the creditors. The ILCO decision cites Penn Terra, 733 F.2d 277 and Kovacs in support. See also, In the Matter of Hildeman Indus., Inc. (Bankr. N.D. N.J. Dec. 17, 1984) (dioxin sampling taken pursuant to an administrative order falls within the enforcement of the police or regulatory powers of a governmental unit). But see, In re Thomas Solvent Co., Bankr.

L. Rep. (CCC) ¶70,111 (Bankr. W.D. Mich. 1984) (automatic stay held applicable to Michigan's attempt to enforce a pre-bankruptcy cleanup injunction).

Enforcement actions brought pursuant to the Resource Conservation and Recovery Act and its applicable regulations have also been found to be exempt from the automatic stay in most of the recent decisions. The Bankruptcy Court in In re Wheeling Pittsburg Steel Corp., et al., v. United States Environmental Protection Agency and Ralph W. Siskind, No. 85-793 (PGH) No. 85-0236 (Bankr. W.D. Penn. Oct. 31, 1985), granted the United States' motion to dismiss the complaint to enforce the automatic stay. In that decision, the court held that the United States can: 1) proceed to enforce RCRA; 2) seek to determine the existence of any violations of RCRA; 3) seek to rectify those violations; and 4) seek the entry of a money judgment on any penalties assessed (but cannot seek to enforce such judgment without an order from the court).

Similarly, on appeal to the U.S. District Court for the Western District of Texas from the Bankruptcy Court, in In the Matter of Commonwealth Oil Refining Co., Inc., Offical Committee of Unsecured Creditors and the Indentured Trustee v. United States Environmental Protection Agency, No. SA 85-CA-2045 (W.D. Texas, Nov. 5, 1985), the court held that an EPA enforcement action to require a debtor to comply with RCRA's Part B requirements was an exercise of the Agency's regulatory power,

and thus excepted from the automatic stay under 11 U.S.C. §362(b)(4). The court stated that the expense which the debtor will incur to comply with environmental laws does not convert into an enforcement of a money judgment which would be automatically stayed, slip op. at 3. See also, United States v. ILCO, 48 B.F. 1016, 1021, 1024 (N.D. Ala. 1985); In re Bayonne Barrel and Drum Co., Inc., No. 82-04747, slip op. at 1 (D. N.J. July 17, 1984). But see, In re Professional Sales Corp., 48 B.R. 651 (Bankr. N.D. Ill. 1985), rev'd 56 B.R. 753 (N.D. Ill. 1985).

There is also some authority to suggest that the collection of a civil administrative fine or penalty is an exercise of the government's regulatory power, and therefore is exempt from the automatic stay provisions, United States v. Energy International Inc., 19 BR 1020, (S.D. Ohio, 1981).

2. Abandonment

In Midlantic National Bank v. New Jersey Dept. of Environmental Protection, ("Quanta Resources") 54 U.S.L.W. 4138 (Jan. 27, 1986), the Supreme Court held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." The Court qualified this holding by stating that this exception to the abandonment power would not apply if the state statute did not address an "imminent and identifiable harm" or if the violations alleged were "speculative or indeterminate future" events. Id. at n.9. The Court left

open the question of whether trustees must comply with health and safety laws no matter how "onerous" their provisions. However, the Court did give some clue when it described security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents as "relatively minor steps." Id at n.3.

Prior to the Supreme Court's ruling, abandonment decisions in the lower courts were mixed. Compare, In re T.P.Long Chemical Inc., No. 581-906 (Bankr. N.D. Ohio, Jan. 31, 1985) (the trustee was denied permission to use abandonment to avoid CERCLA liabilities) with, Catamount Dyers, 13 B.C.D. 321 (Bankr. D. Vt. 1985) (abandonment of contaminated property allowed); In re Union Scrap Iron and Metal, 13 B.C.D. 29 (Bankr. D. Minn., 1985 (same)).

3. Discharge

The Supreme Court recently addressed the issue of whether a bankruptcy discharge relieves the debtor from fulfilling environmental duties that may have arisen prior to filing the petition in bankruptcy. In Ohio v. Kovacs, 105 S. Ct. 705 (1985) the Court stated that a pre-petition injunction for cleanup of the Chem Dyne hazardous waste site is a dischargeable debt where the debtor had been dispossessed of the property and hence the State was seeking nothing more than payment of money for the cleanup. However, the Kovacs decision noted that an affirmative injunction not to bring waste to a site (which would not involve an expenditure of money) was not a dischargeable debt. The Agency has taken the position that the Kovacs ruling

should be applied only to those sites where the debtor is no longer in possession or control of the contaminated property. An equally narrow interpretation can be made of the decision in In re Robinson, No. 84-404-BK-J-GP (Bankr. M.D. Fla. Feb. 4, 1985), rev'd. (A pre-petition injunction to restore marshland which the debtor had illegally excavated was also held to be dischargeable even though the debtor was not dispossessed, because the restoration project would have required an expenditure of money and was not an affirmative injunction. In contrast, EPA enforcement actions or cleanup compliance orders could be characterized as an affirmative injunction).

4. Recovery of Response Costs - Administrative Expenses

The Agency has successfully argued that the EPA's response costs are necessary to preserve the estate of the debtor and should be accorded the priority allowed for administrative expenses, In re T.P. Long Chemical Inc., No. 581-906 (Bankr. N.D. Ohio, Jan. 31, 1985). In the T.P. Long case, the Court held that the estate was a liable party under CERCLA §107 and that the CERCLA liabilities of the estate were entitled to priority treatment as an administrative expense. Kovacs 105 S.Ct. at 711-712.

The Supreme Court's decision in Midlantic Bank may be read to support the holding in T.P. Long that CERCLA liabilities of the estate are administrative expenses. Although the Court attempted to reserve the administrative expenses question, the

implication of the Court's holding that trustees must comply with health and safety laws is that such compliance is an "actual, necessary cost and expense of preserving the estate." 11 U.S.C. §503(b)(1)(A). See also, In the Matter of Thomas Solvent Co., No. NK-84-00843 (Bankr. N.D. Mich, Jan. 2, 1986) (court order requiring construction of a fence on contaminated property owned by the debtor stated that cost of construction is an administrative expense pursuant to §503(b) of the Bankruptcy Code); In re Geuder Paesche & Frey Co., (Bankr. E.D. Wisc.) (cleanup costs are administrative expenses); In re Laurinberg Oil Co., Inc., No. B-84-00011 (M.D. N.C. Sept. 14, 1984) (expenses incurred to abate violations of state water pollution laws are administrative expenses); but see, Southern Railway Co. v. Johnson Bronze Co., 758 F.2d 137 (3d Cir. 1985) (in the absence of fraud, purchaser of property from the debtor does not have claims against the bankrupt's estate for the costs of cleaning up the site); In re Charles A. Stevens, 53 BR 783 (Bankr. D.C. Maine, Oct. 9, 1985) (costs for investigation of waste oil contamination were found not to be an administrative expense and constitute only a general, unsecured claim against the debtor's estate); and In re Wall Tube and Metal Products Co., No. 3-84-00278 (Bankr. E.D. Tenn. Jan. 17, 1986), appeal pending (environmental response costs incurred by the State of Tennessee did not constitute administrative expenses).

An important First Circuit decision which may have applicability in the recovery of CERCLA penalties from bankrupt parties

is the case In re Charlesbank Laundry, Inc., 755 F.2d 200 (1st. Cir. 1985), which held that a State fine assessed for violation of a preliminary injunction is properly an administrative expense.

Governments have also been successful in recovering cleanup costs through property liens. In In re Berg Chemical Co., Inc., Case No. 82-B-12052 (Bankr. S.D. N.Y. July 9, 1984), the City was granted a superpriority lien against the property to clean up chemical wastes. But see, In re Charles A. Stevens 53 BR 783 (Bankr. D.C. Maine Oct. 9, 1985) (the State's pre-bankruptcy investigation costs did not give rise to a lien against the property).

5. Federal Lien

The proposed CERCLA reauthorization legislation establishes a federal lien on property belonging to persons otherwise liable for costs and damages under CERCLA. (Amendments to CERCLA §107). The Senate bill provides that the lien is not valid against the purchaser, holder of security interest, or judgment creditor until notice of lien is filed in the State where the property is located. The House bill provides that the Agency's lien would be subject to the rights of purchasers, judgment lien creditors, or holders of security interests under State law until notice of lien is filed. The House version also establishes a maritime lien applicable to vessels.

ENFORCEMENT THEORIES

There have been several new enforcement theories developed by the EPA Regional Offices, the Department of Justice and the Office of Enforcement and Compliance Monitoring in the area of environmental enforcement against bankrupt parties. Two of these legal theories may be particularly useful in the cases involving insolvent hazardous waste handlers.

1. Withdrawal of Reference to District Court

In deciding whether a bankruptcy court is the appropriate forum there are two issues which are relevant: whether the proceeding is a core proceeding under Section 157(b) and, if so, whether Section 157(d) applies.

The bankruptcy courts have the authority to render final decisions on all core proceedings listed under the bankruptcy code. However, both core and non-core proceedings, such as factual determinations of liability for environmental damages, may be referred to the federal district court. Pursuant to 11 U.S.C. §157(d) the district court is required to withdraw a matter from bankruptcy court when its resolution will involve consideration of the bankruptcy code and other federal statutes regulating organizations or activities affecting interstate commerce.

In United States v. ILCO, Inc., 48 Bankr. Rep. 1016 (N.D. Ala., 1985), the district court held that Section 157(d) applied to, and required withdrawal from the bankruptcy court of, claims asserted by EPA under CERCLA and other environmental statutes.

The court found that CERCLA and the other environmental statutes relied on were "clearly...rooted in the commerce clause and are the type of laws Congress had in mind when it enacted the mandatory withdrawal provision." Id. at 1021. The court in ILCO clearly stated that withdrawal was only appropriate if the resolution of the claim required substantial and material consideration of CERCLA; not that the CERCLA issues were "merely incidental" for resolution of the matter. See also, briefs filed by the government in In re Johns Manville Corp., No. 85-6828(A) (S.D. N.Y. Dec. 30, 1985).

Seeking withdrawal from the bankruptcy court to the district court will allow the Agency a more favorable forum which is experienced in hearing complex issues of fact, and will allow the Agency to obtain a judgment enforceable in the bankruptcy court.

2. Discharge of Debts

All pre-petition debts are automatically dismissed when the debtor is granted a discharge in bankruptcy, 11 U.S.C. §727(b), 11 U.S.C. §502, 11 U.S.C. §1141(d)(1)(A). The definition of a pre-petition debt includes any action where a claim or where a potential claim existed before the debtor filed for bankruptcy (i.e, where a creditor could have sued or could have filed a proof of claim). Discharges are available in individual bankruptcies (§727(b)) and in Chapter 11 reorganizations (§1141(d)(1)(A). They are not available in corporate or

partnership Chapter 7 proceedings, or in Chapter 11 liquidations (§1141(d)(3). This raises three questions for the Agency: 1) what type of bankruptcy proceeding is involved? 2) when did the debt arise? and 3) is the debt subject to discharge?

First, if the Agency did not incur response costs at a site prior to the bankruptcy filing, the Agency may wish to argue that the debt (or potential debt) did not arise until after commencement of the bankruptcy action. The Agency may then preserve its right to pursue an action against the party after discharge. However, a discharge in a Chapter 11 proceeding may be read broadly to include all claims that arose pre-confirmation, §1141(d). The issue of the proper treatment of post-petition, pre-confirmation claims is currently being litigated by the Agency in the action against Johns Manville at the Iron Horse Park site in North Billerica, Massachusetts, In re Johns Manville No. 85-6828(A) (S.D. N.Y. Dec. 30, 1985).

It may be advantageous in a Chapter 7 liquidation case for the Agency to argue that the CERCLA cost-recovery claim "arose" pre-petition, when the environmental harm first occurred or was discovered, even though response costs were not incurred until after the petition. This is due to the fact that the debtor does not survive the bankruptcy and therefore recovery during liquidation of the estate, as a pre-petition creditor, is EPA's only chance for recovery.

Second, if the debtor is an individual, or corporation or partnership under Chapter 11 Reorganization, the Agency may wish to take the position that even if the debt is a pre-petition

debt, EPA's claim is not subject to discharge because it falls under one of the stated exceptions to discharge set out in 11 U.S.C. §523(a). The exceptions that would be applicable are those which apply to fines or penalties payable to and for the benefit of a governmental unit, 11 U.S.C. §523(a)(7), or for willful or malicious injury to property, 11 U.S.C. §523(a)(6). In cases of misrepresentation by the debtor, the discharge can also be blocked by: proof that the debtor made fraudulent statements regarding its financial condition; failure by the debtor to produce books and records; or failure by the debtor to explain losses, 11 U.S.C. §523(a).

CONCLUSION

Future CERCLA bankruptcy referrals will be carefully reviewed by Headquarters to determine if the action merits referral to the Department of Justice under the five criteria set out in this guidance. Settlement with bankrupt responsible parties is encouraged and, consistent with the Agency's current settlement policy, the Region is given greater flexibility and authority to settle claims against bankrupt parties. Recent judicial decisions and enforcement theories developed by EPA and the Department of Justice will strengthen the Agency's legal position in those cases where the Agency has decided to pursue an enforcement action against a bankrupt party.

IMPLEMENTATION

This guidance updates the procedures contained in the existing bankruptcy and cost recovery policies. All future hazardous waste bankruptcy referrels and settlements should follow this guidance. If you have any questions concerning these procedures please contact Heidi Hughes of my office (FTS 382-2845).

cc: F. Henry Habicht II
David T. Buente
Gene A. Lucero

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

9832.5

JUN 27 1988

MEMORANDUM

SUBJECT: Policy on Recovering Indirect Costs in CERCLA Section 107 Cost Recovery Actions

FROM: Frederick F. Stiehl
Associate Enforcement Counsel for Waste, OECM

John J. Stanton, Director
CERCLA Enforcement Division, OSWER

TO: Regional Counsels
Regional Waste Management Division Directors

This memorandum is a clarification of the Agency's policy regarding the recovery of indirect costs in CERCLA cost recovery actions. Previous memoranda from the Financial Management Division transmitting yearly indirect cost multipliers have indicated that indirect costs must be claimed in all cost recovery actions ("Recovering Indirect Costs Related to Superfund Site Cleanup," Vincette Goerl to Regional Financial Management Officers/Regions I - X, December 12, 1985; "Superfund Indirect Cost Manual for Cost Recovery Purposes - FY 1983 through FY 1986," Morgan Kinghorn, March 1986). However, to avoid disruption of ongoing settlement negotiations with PRPs in existing CERCLA Section 107 actions, and to avoid placing the Agency in an apparently inequitable posture before the court adjudicating the claim, it may not be appropriate to seek indirect costs in all on-going cases.

The decision whether or not to seek indirect costs in existing cases will be made by the Regions after consultation with DOJ and with the concurrence of OECM and OWPE. The decision, which will be made on a case-by-case basis, will depend upon whether EPA has disclosed the overall cost figure in either negotiations or formal discovery and whether that figure has been the basis of the parties' settlement negotiations. For those cases where no negotiations have occurred (and therefore the parties have not relied upon a specific cost figure), but a cost figure has been produced during discovery, the litigation team should supplement the pertinent discovery and seek indirect costs so long as the

complaint (particularly the prayer for relief regarding costs) is broad enough to include indirect costs./*

For those cases where indirect costs for past activities will not be sought (i.e., those cases that meet the criteria delineated above), the Region should notify the defendants at the next appropriate opportunity, but no later than July 30, 1986, that indirect costs associated with Agency activities undertaken after that date will be included in the Agency's demands. The defendants should also be notified, where appropriate, that all indirect costs will be sought if the case proceeds to trial.

Of course, all new CERCLA Section 107 referrals must seek indirect costs. Accordingly, cost recovery complaints filed in new cases should include indirect costs as part of the total amount sought and CERCLA demand letters must include indirect costs as a portion of the total demand made upon potentially responsible parties.

If you have any questions on this policy, contact David Van Slyke (OECM-Waste) at FTS 382-3082 or Janet Farella (OWPE) at FTS 382-2034.

cc: Vincette Goerl, FMD
David Buente, DOJ

/* Depending upon the posture of the case, it may be possible to amend the complaint to include a request for indirect costs.

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

OSWER Directive 9833.3

MAY 29 1987

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Administrative Records for Decisions on Selection of CERCLA Response Actions

FROM: Gene A. Lucero, Director
Office of Waste Programs Enforcement (WH-527)

Henry L. Longest II, Director
Office of Emergency and Remedial Response (WH-548)

TO: Addressees

As you are aware, section 113(k) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA), requires that the Agency establish administrative records containing information used by the Agency to make its decision on selection of response action under CERCLA. Section 113 also requires that the records be kept "at or near the facility at issue." This memorandum is to inform you of steps which must be implemented by the Regions immediately to assemble administrative records, if not already done.

As the section 113 requirement for the establishment of records is in effect, the Regions should ensure that information on selection of a response action is assembled now, and is available for public, including potentially responsible party, review both in the Regional Office and "at or near the facility at issue." This requirement applies to all sites for which a remedial investigation has begun. It also applies to removal actions where an Action Memorandum has been signed or public comment has been solicited.

This administrative record consists of information upon which the Agency bases its decision on selection of response action. It is a subset of information included in the site file. The site files will contain information on potentially responsible party liability and cost documentation, for example, which is not included in the administrative record. The administrative record will also overlap with the community relations information in the information repositories, the Federal facility docket, and the

NPL listing docket. A separate ~~memorandum concerning~~ setting up ~~site files, and~~ long term management of administrative records is under development. At this time, as you assemble and reproduce administrative records, you should keep other records management matters in mind.

Three million dollars were available in contract funds for records management in FY '87, some of which is still available. Additional funds averaging about $100,000 per Region have been earmarked this fiscal year specifically to assist in setting up administrative records. The Regions should submit a list of priority sites at which they will require assistance in compiling a record, and an estimate of the cost of such activities. Top priority should be given to those sites for which the Agency will be signing Records of Decision (RODs) in this fiscal year, and those for which a remedial investigation/feasibility study (RI/FS) is currently available for public comment. The next highest priority includes those sites where a ROD has been signed and the PRPs are not undertaking the remedial design (RD) or remedial action (RA); sites where a RI/FS workplan is available; and sites where a removal action is underway. Third priority sites are those where a ROD has been signed and PRPs are undertaking the remedial design or remedial action.

The Regions should also list sites which presently have funding for an administrative record. A coordinator should be designated in each Region to manage the compilation of priority sites and oversee the compilation of these administrative records. Please submit your list of priority sites and contract needs within two weeks to Linda Boornazian in OWPE. She can be reached at 382-4830.

The Agency plans to propose regulations establishing procedures for the administrative records. These administrative record regulations are expected to be issued in conjunction with the proposed NCP revisions. The upcoming proposed regulations will serve as interim guidance under SARA for the creation of adequate administrative records for response action decisions. We have been working with representatives from the Regions on these regulations.

During the course of developing these regulations, numerous policy issues have surfaced. These issues are currently being addressed at headquarters. This memorandum will be followed shortly by a memorandum addressing issues related to the administrative record requirements, in greater detail. The upcoming memorandum will summarize the Agency's current direction on these administrative record issues. We will also be addressing the administrative record requirements in the Superfund Record of Decision Workshops in June and July of 1987, emphasizing information on FY '87 RODs.

Attached is a list of items which, if generated for a particular site, should be included in the administrative record. Please note that information upon which the decision on selection of response action is based must be included in the record.

The Agency will be refining this list. The upcoming memorandum will go into much greater detail on all aspects of the administrative record. Until then, the above lists of documents should be used as an indication of information which should be placed in the administrative record.

Please call Deborah Wolpe of OWPE at FTS 475-8235 if you have any questions.

Attachment

Addressees:

Directors, Waste Management Division, Reg. I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division, Reg. II
Directors, Hazardous Waste Management Division, Reg. III, VI
Director, Toxics and Waste Management Division, Reg. IX
Director, Hazardous Waste Division, Reg. X
Regional Counsels, Regions I-X
Superfund Branch Chiefs, Regions I-X
Superfund Section Chiefs, Regions I-X

cc: Lloyd Guerci, OWPE
Russel Wyer, HSCD
Tim Fields, ERD
Edward Reich, OECM
Mark Greenwood, OGC
Nancy Firestone, DOJ

1987

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FEB 12 1987

OSWER Directive Number 9835.4

MEMORANDUM

SUBJECT: Interim Guidance: Streamlining the CERCLA Settlement Decision Process

FROM: J. Winston Porter
Assistant Administrator
Office of Solid Waste and Emergency Response

Thomas L. Adams, Jr.
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Regional Administrators, Regions I-X
Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X

During the Administrator's Superfund Implementation Meeting of November 19-20, 1986, several concepts were presented for streamlining and improving the CERCLA settlement decision process. Those concepts addressed three major areas:

1. Negotiation Preparation;
2. Management Review of Settlement Decisions; and
3. Deadline Management.

The purpose of this memorandum is to set forth those concepts in greater detail and to define the roles, responsibilities and procedures necessary to implement this important initiative.

BACKGROUND

Under CERCLA, EPA's goal has been and will continue to be to maximize the number of sites which can be cleaned up. Congress clearly indicated their support for this goal in the Section 122 settlement procedures of the Superfund Amendments and Reauthorization Act of 1986 (SARA). That goal requires constant review of old policies and development of new measures which promote privately financed response actions.

Clearly, one important measure to encourage settlement is to maintain aggressive use of Section 106 administrative and judicial enforcement authorities to compel private party response (see Porter/Mays memorandum "Use of CERCLA §106 Judicial Authority-Short Term Strategy", dated July 8, 1986). The Office of Solid Waste and Emergency Response (OSWER) has recently amended aspects of the Superfund Comprehensive Accomplishments Plan (SCAP) to offset some of the attendant project delay due to CERCLA Section 106 litigation. Regions may now request funding for remedial design (RD) for enforcement lead sites concurrent with their referral. This approach not only minimizes the time where no site action proceeds, but also puts the government in a stronger position at trial. Regions would be expected to pursue the litigation to completion absent extraordinary circumstances or compelling public health concerns.

Congress recognized the value of enhancing the settlement process in enacting SARA. The provisions for Section 122 are based in large part upon EPA's Interim CERCLA Settlement Policy (50 FR 5034) and are designed to increase potentially responsible party (PRP) participation in response actions. The new provisions related to special notice, information sharing and negotiation moratoria are particularly important. They attempt to strike a balance between the competing demands of prompting more settlements, conserving limited government resources, and minimizing the delay in the clean-up process.

Additionally, our experience in the last six years has shown us that the way in which we manage other parts of the settlement process can also have dramatic effects on the chances for successful negotiations. For example, setting deadlines too tightly can destroy the willingness of PRPs to attempt to settle. On the other hand, prolonged and inconclusive negotiations can seriously delay response actions at a site. Based on our experience, and comments from the Regions and other parties involved in the process, the Agency has concluded that there are three areas, in addition to the matters covered by SARA, where certain changes will help improve and streamline our process for conducting settlement discussions:

- Negotiation Preparation;
- Management Review of Settlement Decisions; and
- Deadline Management.

Before describing these changes in the sections which follow, a brief description of the problems that have been encountered will help to explain why this guidance has been prepared.

There are two kinds of problems sometimes associated with negotiation preparation: instances where EPA does not fully prepare itself for negotiations and instances where EPA does not facilitate the preparation of PRPs. Negotiations are occasionally begun without the benefit of government proposed settlement documents (e.g., a draft consent decree and technical support documents). Ideally, negotiating teams should have a strategy for settlement which addresses goals, interim milestones for continuing negotiations, firm schedules and followup steps in the event settlement is not achieved. When EPA does not adequately plan, it is difficult for the government to live up to its responsibilities in moving discussions towards conclusion.

Perhaps more important, though, are the issues related to our support of the PRP preparation process. PRPs at Superfund sites are often facing multi-million dollar liability. There are generally many of them (sometimes hundreds) and our success in negotiations is greatly influenced by the extent to which the PRPs have the time and information to organize themselves. Our occasional failure to give early notice or to provide adequate information (including draft settlement documents) to PRPs has been clearly counterproductive. Conversely, in those instances where notice has been given early in the process, substantial information has been made available and where EPA has assisted in the formation of steering committees (with or without third party assistance), we have been much more successful in settlement efforts.

Prompt conclusion of some negotiations has also been occasionally hampered by breakdowns in EPA's management review of settlement decisions. Superfund settlements have frequently posed issues which are difficult either because of their precedential nature or the sheer magnitude of the clean-up. Delayed decisions often affect the willingness of PRPs to settle and always impair the credibility of the negotiating team. When delays have occurred, they are generally attributable to several factors. In some instances, negotiating teams did not raise issues to management early in the process, and decisions ultimately are forced by crisis. In other cases, decisions seemingly can be made only by the highest levels of Headquarters management. The relative inaccessability of those decision-makers to decide on critical issues in a timely way has sometimes been a major impediment to settlement.

The third problem area in the settlement process relates to managing deadlines for negotiations. In recognition of the fact that these are multi-party negotiations over complicated legal and technical issues, a reasonable opportunity should be provided. However, guidelines must be established for bringing closure to issues so as not to excessively delay the clean-up at the site. At times, decisions are made to extend negotiations based on a showing of some subjective "progress", even where there is no concrete result to show for that progress. Decisions are sometimes made to continue negotiations based on concerns over future cost recovery actions.

In order to substantially improve the CERCLA settlement process, attention must be given to solutions for each of the three areas discussed above. The framework set forth herein is intended as a major first step in that direction. However, refinement and modification of these steps will be considered based on your comments and experience gained in the coming months.

SETTLEMENT PROCESS IMPROVEMENTS

Negotiation Preparation

Regions should improve negotiation preparation through four activities:

1. Earlier, Better Responsible Party Searches
2. Earlier Notice and Information Exchange
3. Initiating Discussions Earlier
4. Preparation of a Strategy and Draft Settlement Documents.

The PRP Search is the first step in the settlement process and is one of the most critical to success. Regions must pay close attention to both the timing and quality of the PRP search since inadequate information on the identity of PRPs and their contributions can be a significant impediment to the PRPs organizing themselves to present an offer of settlement. Guidance and targets established under the SCAP now require that PRP searches be initiated concurrent with the Expanded Site Investigation or National Priorities List (NPL) scoring quality assurance process. PRP searches are required to be completed not later than the year in which the site is proposed for the NPL. Contractor efforts should be supplemented by issuance of information request letters or the use of administrative subpoenas (a new provision of SARA) at the earliest possible time. It is imperative that these searches be comprehensive and of high

quality. That places a heavy responsibility on Regional staff to provide direction to and review of contractor efforts. In-house civil investigators will be hired and available to Regions this year to assist in this effort. In addition, Headquarters staff from both OSWER and the Office of Enforcement and Compliance Monitoring (OECM) will revise the the "Potentially Responsible Party Search Manual" as well as present a training program for Regional staff and contractors on the conduct and review of PRP searches. That training should be initiated late this year. In the meantime, Regional staff should carefully evaluate the adequacy of PRP searches for sites scheduled for fund obligations or judicial referral during FY 87 and early FY 88 to determine whether supplemental work is necessary.

Regions should give notice to PRPs of their potential liability through the traditional notice letters at the earliest practicable time and, in all cases, well in advance of initiating the negotiation moratorium. This is not to be confused with the Special Notice which triggers the moratorium as described in §122(e). (Guidance on Special Notice and the moratorium is forthcoming.) It is not acceptable to postpone issuing notice until only the minimal time for negotiations remains prior to obligation of funds. Notice may be given to some parties where further investigation or analysis is necessary to identify additional PRPs.

Notice letters should routinely include information requests under Section 104(e) if not previously issued. Notice letters should to the maximum extent practicable also provide information as to other PRPs (i.e. names, volumes contributed and rankings). In some cases, it may be more pratical to provide this information after analyzing the responses to the information requests.

It is likewise important to initiate discussions with PRPs earlier in the process. While formal negotiations may not begin until after Special Notice and closer to the planned obligation date for the project, EPA should encourage earlier discussions that will further the process of educating the PRPs as to the site, EPA's approach to it and the information we have that may bear on allocation or other pertinent matters.

The litigation team must also begin early the process of preparing draft settlement documents and a negotiation strategy. A draft Consent Decree (or administrative order for Remedial Investigation/Feasibility Study (RI/FS)) should be prepared along with any negotiation support documents outlining technical objectives to be presented at or before the first negotiation

session. (Note that a "Negotiation Support Document" to be used as a technical attachment for an RI/FS settlement may be prepared by a contractor but must be initiated well in advance of negotiations). Regional staff should also prepare for regional management review a negotiation strategy which addresses:

- initial positions on major issues with alternative and bottomline positions or statements of settlement objectives;

- schedule for negotiations which identifies not only the drop-dead date but also interim milestones at which negotiations can be evaluated for progress (date for good faith proposal with line-by-line response to draft settlement document; date for resolution of major issues related to scope of work, funding arrangements, reimbursement; date for receipt of all necessary submittals from PRPs such as technical attachments, preauthorization requests, trust agreements, etc);

- strategy and schedule for action against PRPs in the event negotiations are unsuccessful (i.e., issuance of unilateral Administrative Order (AO) concurrent with Remedial Design (RD) obligation, Section 106 referral, etc).

The timing of most of these activities is critical and in many cases will be related to the proposed date of obligation of funds. For that reason, management attention to the entire site management planning process is critical to ensure that the required activities at sites are properly sequenced. In order to assist you in this, attached for your Region is an Enforcement Confidential printout taken from the Integrated SCAP which shows the status of key settlement related activities for sites with planned obligations during FY 87 or FY 88. (Attachment I)

Management Review of Settlement Decisions

To help improve the management review of settlements, this section sets out roles and accountability in the decision process. In addition, it adds two new elements to focus and streamline policy review:

- A Settlement Decision Committee (SDC); and the
- Assistant Administrator (AA) Level Review Team.

The existing negotiation team approach will continue to be the primary vehicle for developing settlements. The negotiation team will routinely be comprised of a representative from the Waste Management Division and a representative from the Office of Regional Counsel. Department of Justice (DOJ), OECM, the Office of Waste

Programs Enforcement (OWPE) staff and appropriate State representatives may participate as necessary. The responsibilities of the negotiation team are to:

- ensure that PRP searches, notice and information exchange are properly scheduled and completed;
- develop a comprehensive negotiations strategy in advance of negotiations;
- develop and share draft settlement documents, including technical scopes of work, in advance of negotiations;
- conduct negotiations; and
- raise issues to the Regional Administrator, and where necessary, to the Settlement Decision Committee for resolution.

The Regional Administrator, in consultation with DOJ, is expected to be the primary decision-maker on CERCLA settlement issues. Administrative settlements for RI/FS are fully the Regional Administrator's responsibility. OSWER and OECM concurrence continues to be required on remedial settlements. In particular, certain major or precedential issues in Remedial Design/Remedial Action (RD/RA) negotiations should be referred for early Headquarters resolution. Those issues include mixed funding or preauthorization arrangements, broad releases, de minimis settlements, deferred payment schemes, and remedies that deviate significantly from the Record of Decision (ROD). More detailed guidance on those issues will be prepared and made available to you in the coming months.

At the same time such guidance is being prepared, Headquarters will develop an oversight program that ensures quality and consistency in Regional program administration, and provides sufficient feedback to allow future policy adjustments. Once guidance is finalized, some experience has been gained, and the oversight program is in place, we fully expect that the Regional Administrator will have broad authority to reach settlement decisions within the framework of that guidance. In the meantime, initial delegations of certain new authorities will be limited by consultation or concurrence requirements. After a period of experience, waivers of concurrence may be made to those Regions which demonstrate continuous quality and consistency in administering the CERCLA enforcement process. At this point, which is likely to occur within approximately one year, OSWER and OECM will largely fill an oversight role, assuring effective settlements consistent with applicable guidance and developing additional guidance as necessary. That role will also include periodically reviewing whether waivers of concurrence remain justified.

In the interim, a Settlement Decision Committee (SDC) has been created in Headquarters to provide timely action on issues which require Headquarters review. The SDC will be made up of the following individuals:

Chair: Gene A. Lucero, Director, OWPE
Members: Edward E. Reich, Associate Enforcement Counsel for Waste, OECM
David T. Buente, Chief, Environmental Enforcement Section, DOJ
Basil G. Constantelos, Director, Waste Management Division, Region V
Bruce Diamond, Regional Counsel, Region III

Henry L. Longest, Director, Office of Emergency and Remedial Response (OERR) (when necessary)

Regional representatives to the SDC will be rotated every six months. The SDC will meet approximately every 3-4 weeks, or more often if necessary. Its primary responsibility will be to coordinate decisions on policy issues raised by Regions. Most settlement issues requiring Headquarters review will be resolved at this level. The Chief, Compliance Branch, CERCLA Enforcement Division (CED), OWPE will serve as secretary for the SDC and will coordinate communicating policy decisions to the affected Region, and more broadly where decisions create precedent which may be transferable to other sites. The SDC will also monitor Regions' progress towards finalizing settlements, paying particulary close attention to pending deadlines.

Regions should access the SDC through either OECM-Waste or the CERCLA Enforcement Division, OWPE. Regions should be prepared to provide a brief summary of the issue, options and their recommendation. Regions may, at their discretion, attend the SDC meeting to present or elaborate on the issue. (More detailed procedures will be established by the SDC.)

The Assistant Administrator Review Team which was established during April 1986, will become a formal part of the management review and decision-making process. The group will be chaired by the AA-OSWER and include the AA-OECM and the Assistant Attorney General for Lands and Natural Resources, DOJ. The primary function of this Team will be to provide overall policy direction on settlement concepts, but will also be available to resolve major policy issues specific to sites where necessary, as determined by the SDC. The AA Review Team will meet at least quarterly, but may convene more frequently, if required by circumstances. As Chair of the AA Review Team, the AA-OSWER must approve extensions of negotiations beyond the 30 day authority granted to Regional Administrators below.

Deadline Management

Effective management of negotiations in the CERCLA program will require increase management attention both in Regions and Headquarters. In order to facilitate the management overview that will be necessary, particularly within both the program and counsel's office in the Region, OSWER will provide to you periodic reports from the Integrated SCAP, similar to Attachment I, which highlight negotiations in progress or planned for the next quarter. Headquarters staff and management will use these reports to track the progress of and preparation for negotiations.

Recognizing the complexity of CERCLA settlement discussions, it is clear that there will be instances where extension of discussion beyond the moratorium period will be appropriate. The framework for considering extensions includes:

1. Thirty day Extension by the Regional Administrators
2. Additional Extension by AA-OSWER in Exceptional Circumstances

While the SARA Section 122 provisions related to special notice and negotiation moratoria are discretionary, EPA policy will be that those provisions should generally be employed. Section 122 provides for up to a 120 day moratorium before remedial action, during which time EPA may not initiate enforcement action or remedial action. The full moratorium period is conditioned on receiving a good faith offer from the PRPs within 60 days. In its absence, the moratorium expires after 60 days. (Note that while EPA may proceed with design work, as a general rule we will not.) Where adequate preparation as discussed above has preceded special notice, Regions should generally be able to conclude negotiations, or at a minimum, resolve all major issues during that period. While negotiation extensions should not be encouraged, Regional Administrators may grant extensions to negotiations when it is believed that a settlement is likely and imminent. However, this period should not to exceed 30 days.

Further extension of negotiations beyond that 30 day period may be approved only by the AA-OSWER. Absent that approval, Regions are expected to move forward with Fund-financed action, administrative order or judicial referral where appropriate. (Note that negotiations may be resumed at any point after referral and filing of a Section 106 action.) Extensions will be granted only in rare and extraordinary circumstances and will generally be for short duration where the expectation is that final agreement is imminent. Requests for extension should be made by the Regional Administrator in writing through the Director, OWPE to the AA-OSWER

and should set out succinctly: 1) the length of extension requested; 2) status of negotiations (issues resolved and those unresolved); 3) justification for extension; and 4) actions to be taken in the event that negotiations are unsuccessful. The AA-OSWER will only consider requests for extensions made by the Regional Administrator and not direct requests made by PRPs.

In order to avoid any misunderstanding, these limitations should be communicated to the PRPs early in any discussions. Moreover, the schedule for negotiations, so long as it respects these deadlines, is always open to adjustment by agreement among the parties.

As discussed earlier, it is important to recognize that negotiations are not limited to the 120 day period established by the special notice provisions of the law. Information requests and traditional notice letters should be sent as soon as possible, and initial discussions should almost always occur with PRPs before the special notice is provided. We are developing more detailed guidance on notice letters, and the use of the special notice procedures, and we anticipate circulating this guidance for comment within the next month.

One of the lessons learned as a result of the limited April-May 1986 funding during the Superfund slowdown was that there are benefits derived by having several settlements which are on a parallel and firm schedule for final resolution. Not only did we find that firm schedules tend to force issues to resolution, but it proved to facilitate management review in that sites with similar issues could be dealt with concurrently. In order to extend this "clustering" effect, OSWER is considering including in the FY 88 Strategic Planning and Management System (SPMS) commitments a target for completion of RD/RA negotiations.

Approach for RI/FS Negotiations

In light of the delegation of RI/FS decisions, much of the above process is not relevant for RI/FS negotiations. The Agency continues to encourage PRP conduct of RI/FS in appropriate circumstances (see Thomas/ Price memorandum "Participation of Potentially Responsible Parties in Development of Remedial Investigation and Feasibility Studies", dated March 21, 1984). RI/FS settlement issues should generally be resolved by the Regional Administrator and need not be submitted to the SDC or the AA-level review group. Section 122 authorizes a 90 day moratorium for negotiations, conditioned on receiving a good faith offer from PRPs within 60 days of special notice. Regional Administrators have discretion to terminate or extend negotiations after 90 days. However, extension of negotiations beyond an additional 30 days should be authorized by the Regional Administrator only in

limited cases. The points made above in Negotiation Preparation are equally applicable to RI/FS negotiations, with the exception that negotiation strategies do not require Headquarters review.

SUMMARY

Implementation of these steps to streamline the settlement process was identified by the Administrator as one of his highest priorities under SARA. We urge you to give this topic the same priority in your Regions and provide a commensurate level of management attention.

If you have any questions about these measures or their implementation, please contact either of us directly.

Attachment

cc: Superfund Branch Chiefs
Regional Counsel RCRA/CERCLA Branch Chiefs
Enforcement Section Chiefs
Gene A. Lucero
Henry Longest
Ed Reich
Jack Stanton
Russ Wyer
David Buente

PRPs within 30 days of receipt of the notice.

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

There are also situations where an NBAR should probably not be prepared. For example, it may be clear very early in the process that there is insufficient information available on which to base an NBAR, or that the number of PRPs not *de minimis* is so small that an NBAR would not expedite settlement. In some cases it may seem that an equitable settlement can be more expeditiously or effectively achieved without use of NBAR procedures. There may also be cases where NBAR preparation is ruled out because an allocation for the site is already being prepared by or for PRPs.

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

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

III. How To Prepare an NBAR

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

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

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

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

Information Collection and Assessment

While aggressive information collection efforts occur in every case, additional information may be necessary for NBAR purposes. Additional information on actual volume and specific wastes with respect to each PRP at an NBAR site may be required.

Section 12(e)(3)(B) of SARA authorizes EPA to subpoena witnesses and documents. Section 104(e) of CERCLA, as amended by SARA, authorizes EPA to obtain access to information about a person's ability to pay and about the nature and quantity of hazardous substances generated, treated, stored, or disposed of by that person. These authorities may be used to gather data for an NBAR.

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

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

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

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

Allocation

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

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

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

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

In general, owner/operator culpabili is a significant factor in determining th percentage of responsibility to be allocated. For example, a commercial owner and/or operator that managed waste badly should receive a higher allocation than a passive, noncommercial landowner that doesn' qualify as innocent under section 122(g)(1)(B) of SARA. The relative allocation among successive owners and/or operators may be determined, where all other circumstances are equ by the relative length of time each owned and/or operated the site. Transporter allocations may be based

Dated: May 20, 1987.

Jean A. Newill,

Assistant Administrator for Research and Development.

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BILLING CODE 6560-50-M

FRL-3207-4

Superfund Program; Non-Binding Preliminary Allocations of Responsibility (NBAR)

AGENCY: Environmental Protection Agency.

ACTION: Request for public comment.

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

DATE: Comments must be provided on or before July 27, 1987.

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

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

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

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

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

The policies and procedures set forth in the interim guidelines are guidance to EPA employees. The interim guidelines include enforcement policies and internal procedures that are not appropriate or necessary subjects for rulemaking. Thus, the guidelines do not constitute rulemaking by EPA and may not be relied on to create a substantive or procedural right or benefit enforceable by any other person. EPA may, therefore, take action that is at variance with policies and procedures contained in this document.

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

Dated: May 18, 1987.

Lee M. Thomas,

Administrator.

INTERIM GUIDELINES FOR PREPARING NONBINDING PRELIMINARY ALLOCATIONS OF RESPONSIBILITY

I. Introduction

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

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

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

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

Should EPA decide to prepare an NBAR, it will normally be prepared during the remedial investigation and feasibility study (RI/FS), and provided to PRPs as soon as practicable, but not later than completion of the RI/FS for the site. The NBAR process will normally be used only in cases where the discretionary special notice procedures of section 122(e) are invoked.

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

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

II. When To Use the NBAR

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

on volume, taking into account appropriate considerations such as packaging and placement of waste at a site. Detailed guidance on allocations for transporters, owners, and operators may be prepared at a later date on the basis of experience under these interim guidelines.

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

IV. Offers Based on NBARS

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

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

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

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

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

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

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

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

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[OPTS-140074A; FRL-3209-1]

Toxic and Hazardous Substances Control; Contractor and Subcontractor Access to Confidential Business Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized several contractors and subcontractors for access to information submitted to EPA under various sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

FOR FURTHER INFORMATION CONTACT: Edward A. Klein, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Room E-543, 401 M Street SW., Washington, DC 20460 (202-554-1404).

SUPPLEMENTARY INFORMATION: Under TSCA, EPA must determine whether the manufacture, processing, distribution in commerce, use, or disposal of certain chemical substances or mixtures may present an unreasonable risk of injury to human health or the environment. New chemical substances, i.e., those not listed on the TSCA Inventory of Chemical Substances, are evaluated by EPA under section 5 of TSCA. Existing chemical substances, listed on the TSCA Inventory, are evaluated by the Agency under sections 4, 6, 7, and 8 of TSCA. Section 12 requires a person to report his or her intent to export certain chemical substances to foreign countries.

In accordance with 40 CFR 2.306(j), EPA has determined that the following contractors and subcontractors will require access to CBI submitted to EPA under TSCA to successfully perform work under the contracts described in the following units of this notice.

I. Previously Announced Contract

As was announced in the Federal Register of May 1, 1986 (FR 16205), the Dynamac Corporation, 11140 Rockville Pike, Rockville, Maryland, is authorized for access to CBI submitted to EPA under sections 4 and 8 of TSCA. EPA is issuing this notice to extend Dynamac's access to TSCA CBI under EPA Contract No. 68-02-4251 to February 28, 1989.

II. New Contractors and Subcontractors

Access to CBI by the contractors and subcontractors described in this section is being announced for the first time. EPA is issuing this notice to affected businesses informing them that EPA may provide access to TSCA CBI to these contractors and subcontractors under the indicated contracts on a need-to-know basis.

Under EPA Contract No. 68-01-7282, subcontractor CRC Systems, Incorporated, 4020 Williamsburg Court, Fairfax, Virginia, will assist the Office of Toxic Substances' Information Management Division in performing work under delivery order MCCS 17—PENTA Analysis and Design Evaluation. CRC, as a subcontractor, will be working for the prime contractor, Booz Allen and Hamilton. Booz, Allen and Hamilton will not require access to TSCA CBI under this contract. CRC will not conduct substantive review of any TSCA CBI; however, CRC personnel will require access to CBI on computer screens in order to evaluate technical aspects of computer programs to perform contract tasks. In addition, personnel will occasionally be required to review CBI documents to compare hardcopy data for those data elements contained in the systems. The systems to be accessed are PENTA, Molecular Access System (MACCS), and the Document and Personnel Security System (DAPSS). Under this contract, CRC personnel will be authorized for

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

JUN - 5 1987

OSWER DIRECTIV

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OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Entry and Continued Access Under CERCLA

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators I-X
Regional Counsels I-X

I. INTRODUCTION

This memorandum sets forth EPA's policy on entry and continued access to facilities by EPA officers, employees, and representatives for the purposes of response and civil enforcement activities under CERCLA. 1/ In short, the policy recommends that EPA should, in the first instance, seek to obtain access through consent. Entry on consent is preferable across the full range of onsite activities. If consent is denied, EPA should use judicial process or an administrative order to gain access. The appropriate type of judicial process varies depending on the nature of the onsite activity. When entry is needed for short-term and non-intrusive activities, an ex parte, judicial warrant should be sought. In situations involving long-term or intrusive access, EPA should generally file suit to obtain a court order.

The memorandum's first section addresses the recently amended access provision in CERCLA. The memorandum then sets forth EPA policy on obtaining entry and the procedures which should be used to implement this policy, including separate discussions on consent, warrants, court orders, and administrative orders.

1/ This policy does not address information requests under Section 104(e)(2).

II. STATUTORY AUTHORITY

EPA needs access to private property to conduct investigations, studies, and cleanups. The Superfund Amendments and Reauthorization Act of 1986 (SARA) explicitly grants EPA 2/ the authority to enter property for each of these purposes. Section 104(e)(1) provides that entry is permitted for "determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title."

SARA also establishes a standard for when access may be sought and defines what property may be entered. EPA may exercise its entry authority "if there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." § 104(e)(1). SARA, however, does not require that there be a release or threatened release on the property to be entered. 3/ Places and properties subject to entry under Section 104(e) include any place any hazardous substance may be or has been generated, stored, treated, disposed of, or transported from; any place a hazardous substance has or may have been released; any place which is or may be threatened by the release of a hazardous substance; or any place where entry is needed to determine the need for response or the appropriate response, or to effectuate a response action under CERCLA. § 104(e)(3). EPA is also authorized to enter any place or property adjacent to the places and properties described in the previous sentence. § 104(e)(1).

EPA is granted explicit power to enforce its entry authority in Section 104(e)(5). Under that provision EPA may either issue an administrative order directing compliance with an entry request or proceed immediately to federal district court for injunctive relief. Orders may be issued where consent to entry is denied. Prior to the effective date of the order, EPA must provide such notice and opportunity for consultation as is reasonably appropriate under the circumstances. If EPA issues an order, the order can be enforced in court. Where there is a "reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant," courts are instructed to enforce an EPA request or order unless the EPA

2/ Although CERCLA and SARA confer authority upon the President that authority has been delegated to the EPA Administrator. Exec. Order No. 12580, § 2(g) and (i), 52 Fed. Reg. 1923 (1987).

3/ The House Energy and Commerce bill at one point contained this limitation. H.R. Rep. No. 99-253 Part 1, 99th Cong., 1st Sess., 158 (1985). This limitation, however, was dropped prior to introduction of the bill for floor debate. See H.R. 2817, 99th Cong., 1st Sess., 131 Cong. Rec. H10857 (December 4, 1985).

"demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." § 104(e)(5). The legislative history makes clear that courts should enforce an EPA demand or order for entry if EPA's finding that there is a reasonable basis to believe there may be a release or threat of release is not arbitrary and capricious. 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. H9582 (October 8, 1986) (Statement of Rep. Glickman). See United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. November 3, 1986). In addition, a penalty not to exceed $25,000/day may be assessed by the court for failure to comply with an EPA order or the provisions of subsection (e).

Finally, Section 104(e)(6) contains a savings provision which preserves EPA's power to secure access in "any lawful manner." This broad savings provision is significant coming in the wake of the Supreme Court's holding that:

> When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission.
>
> . . . Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.

Dow Chemical Co. v. United States, 90 L.Ed. 2d 226, 234 (1986). 4/ One lawful means of gaining access covered by this paragraph is use of judicially-issued warrants. See S. Rep. No. 99-11, 99th Cong. 1st Sess. 26 (1985).

In numerous instances prior to the passage of SARA, EPA obtained court rulings affirming its authority to enter property to conduct CERCLA activities. 5/ Following enactment of SARA,

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4/ See also, Mobil Oil Corp. v. EPA, 716 F.2d 1187, 1189 (7th Cir. 1983), cert. denied, 466 U.S. 980 (1984) (EPA authority to sample effluent under Section 308 of the Clean Water Act broadly construed); CEDs, Inc. v. EPA, 745 F.2d 1092 (7th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

5/ United States v. Pepper Steel and Alloy, Inc., No. 83-1717-CIV-EPS (S.D. Fla. October 10, 1986); Bunker Limited Partnership v. United States, No. 85-3133 (D. Idaho October 21, 1985); United States v. Coleman Evans Wood Preserving Co., No. 85-211-CIV-J-16 (M.D. Fla. June 10, 1985); United States v. Baird & McGuire Co. No. 83-3002-Y (D. Mass. May 2, 1985); United States v. United Nuclear Corp., 22 ERC 1791, 15 ELR 20443 (D.N.M. April 18, 1985).

several courts have ordered siteowners to permit EPA access. United States v. Long, No. C-1-87-167 (S.D. Ohio May 13, 1987); United States v. Dickerson, No. 84-76-VAL (M.D. Ga. May 4, 1987); United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. Nov. 3, 1986). Further, the one adverse ruling on EPA's right of access has been vacated by the Supreme Court. Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985), vacated, 93 L. Ed. 2d 695 (1986).

III. EPA ACCESS POLICY

EPA needs access to sites for several types of activities, including:

- preliminary site investigations;
- removal actions;
- RI/FSs; and
- remedial actions.

Within each of these categories, the scope of the work and the time needed to complete that work may vary substantially. This memorandum sets Agency policy on what means should be used to gain access over the range of these various activities.

EPA may seek access through consent, warrant, administrative order, or court order. Consent is the preferred means of gaining access for all activities because it is consistent with EPA policy of seeking voluntary cooperation from responsible parties and the public. In certain circumstances, however, the Region should consider obtaining judicial authorization or issuing an administrative order in addition to obtaining consent. For example, where uncertainty exists whether a siteowner will continue to permit access over an extended period, reliance on consent alone may result in a substantial delay if that consent is withdrawn.

When consent is denied, EPA should seek judicial authorization or should issue an administrative order. If the judicial route is chosen, EPA may seek an ex parte warrant or a court order. Warrants are traditionally granted for short-term entries. Generally, warrants should not be used when the EPA access will involve long-term occupation or highly intrusive activities. Clearly, warrants are appropriate for preliminary site investigations. On the other hand, because of the long, involved nature of remedial actions, access for such projects should be sought through a request for a court order. Neither removals nor RI/FSs, however, can be rigidly matched with a given judicial access procedure. Depending on the activities to be undertaken and the circumstances at the site, either a warrant or a court order may be appropriate.

In deciding whether to use a warrant or a court order when access is needed for a removal or to conduct a RI/FS, the following general principles should be considered. First, if the activity will take longer than 60 days a court order normally is appropriate. Second, even if the activity will take less than 60 days, when the entry involves removal of large quantities of soil or destruction of permanent fixtures, a court order may again be appropriate. Finally, warrants should not be used if EPA action will substantially interfere with the operation of onsite business activities. These issues must be resolved on a case-by-case basis.

If EPA needs to gain access for a responsible party who has agreed to undertake cleanup activities under an administrative order or judicial decree, EPA may, in appropriate circumstances, designate the responsible party as EPA's authorized representative solely for the purpose of access, and exercise the authorities contained in Section 104(e) on behalf of the responsible party. Such a procedure may only be used where the responsible party demonstrates to EPA's satisfaction that it has made best efforts to obtain access. A further condition on the use of this procedure is that the responsible party agree to indemnify and hold harmless EPA and the United States for all claims related to injuries and damages caused by acts or omissions of the responsible party. The responsible party should also be advised that the expenses incurred by the government in gaining access for the responsible party are response costs for which the responsible party is liable. Before designating any responsible party as an authorized representative, the Region should consult with the Office of Enforcement and Compliance Monitoring.

IV. ACCESS PROCEDURES

A. Entry on Consent

1. General Procedures

The following procedures should be observed in seeking consent:

Initial Contact. Prior to visiting a site, EPA personnel 6/ should consider contacting the siteowner to determine if consent will be forthcoming. EPA personnel should use this opportunity to explain EPA's access authority, the purpose for which entry is needed, and the activities which will be conducted.

6/ As used in this guidance, the term "EPA personnel" includes contractors acting as EPA's authorized representatives.

Arrival. EPA personnel should arrive at the site at a reasonable time of day under the circumstances. In most instances this will mean during normal working hours. When there is a demonstrable need to enter a site at other times, however, arrival need not be limited to this timeframe. Entry must be reasonable given the exigencies of the situation.

Identification. EPA personnel should show proper identification upon arrival.

Request for Entry. In asking for consent, EPA personnel should state the purpose for which entry is sought and describe the activities to be conducted. EPA personnel should also present a date-stamped written request to the owner or person-in-charge. A copy of this request should be retained by EPA. Consent to entry must be sought from the owner 7/ or the person-in-charge at that time.

If practicable under the circumstances, consent to entry should be memorialized in writing. A sample consent form is attached. Although oral consents are routinely approved by the courts, a signed consent form protects the Agency by serving as a permanent record of a transaction which may be raised as a defense or in a claim for damages many years later. If a site-owner is unwilling to sign a consent form but nonetheless orally agrees to allow access, EPA should document this oral consent by a follow-up letter confirming the consent.

Since EPA contractors often are involved in gaining access in the first instance, the Regions should ensure that their contractors are acquainted with these procedures.

2. Denial of Entry

If consent is denied, EPA personnel or contractors, before leaving, should attempt to determine the grounds for the denial. EPA personnel, however, should not threaten the siteowner with penalties or other monetary liability or make any other remarks which could be construed as threatening. EPA personnel may explain EPA's statutory access authority, the grounds upon which this authority may be exercised, and that the authority may be enforced in court.

7/ If EPA's planned site activities will not have a physical effect on the property, EPA generally need not seek consent from the owner of leased property where the lessee is in possession. The proper person in those circumstances is the lessee. But where EPA entry will have a substantial physical effect on the property, both the lessee and the property-owner should be contacted since in this instance interests of both will be involved.

3. Conditions Upon Entry

Persons on whose property EPA wishes to enter often attempt to place conditions upon entry. EPA personnel should not agree to conditions which restrict or impede the manner or extent of an inspection or response action, impose indemnity or compensatory obligations on EPA, or operate as a release of liability. The imposition of conditions of this nature on entry should be treated as denial of consent and a warrant or order should be obtained. See U.S. EPA, General Counsel Opinions, "Visitors' Release and Hold Harmless Agreements as a Condition to Entry of EPA Employees on Industrial Facilities," Gen'l and Admin. at 125 (11/8/72). If persons are concerned about confidentiality, they should be made aware that business secrets are protected by the statute and Agency regulations. 42 U.S.C. § 9604(e); 40 C.F.R. § 2.203(b). EPA personnel should enter into no further agreements regarding confidentiality.

B. Warrants

1. General Procedures

To secure a warrant, the following procedures should be observed:

Contact Regional Counsel. EPA personnel should discuss with Regional Counsel the facts regarding the denial of consent or other factors justifying a warrant and the circumstances which give rise to the need for entry.

Contact Department of Justice. If after consultation with Regional Counsel a decision is made to seek a warrant, the Regional Counsel must contact directly the Environmental Enforcement Section in the Land and Natural Resources Division at the Department of Justice. 8/ The person to call at the Department is the Assistant Chief in the Environmental Enforcement Section assigned to the Region. The Assistant Chief will then arrange, in a timely manner, for the matter to be handled by either an Environmental Enforcement Section attorney or a U.S. Attorney. The Region must send to the Environmental Enforcement Section, by Magnafax or other

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8/ This procedure is necessary to comply with internal Department of Justice delegations of authority. Referral to a local U.S. Attorney's office is not sufficient for CERCLA warrants. The Environmental Enforcement Section of the Department of Justice must approve all warrant applications. (See Memorandum from David T. Buente, Jr. to All Environmental Enforcement Attorneys, "Procedures for Authorizing Applications for Civil Search Warrants Under CERCLA" (4/3/87) attached).

expedited means, a draft warrant application and a short memorandum concisely stating why the warrant is needed.

Prepare Warrant Application. The warrant application must contain the following:

1) a statement of EPA's authority to inspect; (see § II, supra)

2) a clear identification of the name and location of the site and, if known, the name(s) of the owner and operator of the site;

3) a statement explaining the grounds for a finding of a reasonable basis for entry (i.e., a reasonable basis to believe that there may be a release or threatened release of a hazardous substance or pollutant or contaminant) and the purpose for entry (i.e., determining the need for response, or choosing or taking any response action, or otherwise enforcing CERCLA);

4) affidavits supporting the asserted reasonable basis for entry and describing any attempts to gain access on consent, if applicable; and

5) a specific description of the extent, nature, and timing of the inspection;

Following preparation of the warrant application, the Justice Department attorney will file the application with the local U.S. Magistrate.

EPA may ask the Justice Department attorney to seek the assistance of the United States Marshals Service in executing the warrant where EPA perceives a danger to the personnel executing the warrant or where there is the possibility that evidence will be destroyed.

2. Reasonable Basis for Entry

A warrant for access on a civil matter may be obtained upon a showing of a reasonable basis for entry. This reasonable basis may be established either by presenting specific evidence relating to the facility to be entered or by demonstrating that the entry is part of a neutral administrative inspection plan.

A specific evidence standard is incorporated in SARA as a condition on EPA's exercise of its access authority: EPA must have "a reasonable basis to believe there may be a release or

threat of a release of a hazardous substance or pollutant or contaminant." § 104(e)(1). SARA's express specific evidence standard is consistent with how courts have formulated the specific evidence test in the absence of statutory guidance. E.g., West Point-Pepperell, Inc. v. Donovan, 689 F. 2d 950, 958 (11th Cir. 1982) (there must be a "showing of specific evidence sufficient to support a reasonable suspicion of a violation").

In drafting a warrant application, conclusory allegations regarding the specific evidence standard under subsection 104(e) will not suffice. Courts generally have refused to approve warrants where the application contains mere boilerplate assertions of statutory violations. Warrant applications have been granted, on the other hand, where the application contained detailed attestations by government officials or third-party complaints which have some indicia of reliability. Ideally, EPA warrant applications should contain an affidavit of a person who has personally observed conditions which indicate that there may be a release or threat of a release of a hazardous substance. If they are available, sampling results, although not required, should also be attached. Warrant applications based on citizen, employee, or competitor complaints should include details that establish the complainant's credibility. 9/

C. Court Orders

The provisions in CERCLA authorizing EPA access may be enforced by court order. To obtain a court order for entry, the Region should follow the normal referral process. If only access is required, the referral package can obviously be much abbreviated. If timing is critical, EPA HQ will move expeditiously and will refer the case orally if necessary. The Regions, however, should attempt to anticipate the sites at which access may prove problematic and should allow sufficient lead time for the referral process and the operation of the courts. The Regions should also not enter lengthy negotiations with landowners over access. EPA and DOJ are prepared to litigate aggressively to establish EPA's right of access.

9/ If information gathered in a civil investigation suggests that a criminal violation may have occurred, EPA personnel should consult the guidance on parallel proceedings. (Memorandum from Courtney Price to Assistant Administrators et al., "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency" (1/23/84)). Use of CERCLA's information-gathering authority in criminal investigations is addressed in separate guidance. (Memorandum from Courtney M. Price to Assistant Administrators et al., "The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations" (2/16/84)).

Prior to seeking a court order, EPA should request access, generally in writing, and assemble the record related to access. The showing necessary to obtain a court order is the same as for obtaining a warrant: EPA must show a reasonable basis to believe that there may be a release or a threat of a release of a hazardous substance or pollutant or contaminant. An EPA finding on whether there is reason to believe a release has occurred or is about to occur must be reviewed on the arbitrary and capricious standard. § 104(e)(5) (B)(i). If the matter is not already in court, EPA must file a complaint seeking injunctive and declaratory relief. Simultaneous to filing the complaint, EPA may, if necessary, file a motion, supported by affidavits documenting the release or threatened release, requesting an immediate order in aid of access. If the matter is already in litigation, EPA may proceed by motion to seek an order granting access. 10/

In a memorandum supporting EPA's request for relief it should be made clear that by invoking judicial process, EPA is not inviting judicial review of its decision to undertake response. action or of any administrative determinations with regard to the response action. Section 113(h) of SARA bars judicial review of removal or remedial action except in five enumerated circumstances. A judicial action to compel access is not one of the exceptions. Statements on the floor of the House and the Senate confirm that EPA enforcement of its access authority does not provide an opportunity for judicial review of response decisions. Senator Thurmond, chairman of the Judiciary Committee, remarked that when EPA requests a court to compel access "there is no jurisdiction at that time to review any response action . . .

10/ Parenthetically, it should be noted that the broad equitable power granted to courts in Section 106 can also be relied on to obtain a court order. An additional source of authority for courts in this regard is the All Writs Act, 28 U.S.C. § 1651. The Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." 28 U.S.C. § 1651. This authority "extends under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing are in a position to frustrate the implementation of a court order . . . ." United States v. New York Telephone Co., 434 U.S. 159, 174 (1977). Thus, the All Writs Act may prove useful as a means of compelling persons not a party to a consent decree to cooperate with EPA and other settling parties in execution of the decree. The use of the All Writs Act, however, may be limited in light of the Supreme Court's interpretation of the Act in Pennsylvania Bureau of Correction v. United States Marshal Service, 88 L. Ed. 2d 189 (1985).

[T]he court may only review whether the Agency's conclusion that there is a release or threatened release of hazardous substances is arbitrary or capricious." 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. 119582 (October 8, 1986) (Statement of Rep. Glickman); see United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. Nov. 3, 1986).

D. Administrative Orders

If a siteowner denies an EPA request for access, EPA may issue an adminstrative order directing compliance with the request. § 104(e)(5)(A). Each administrative order must include a finding by the Regional Administrator that there exists a reasonable belief that there may be a release or threat of release of a hazardous substance and a description of the purpose for the entry and of the activities to be conducted and their probable duration. The order should indicate the nature of the prior request for access. Further, the order should advise the respondent that the administrative record upon which the order was issued is available for review and that an EPA officer or employee will be available to confer with respondent prior to the effective date of the order. The length of the time period during which such a conferences may be requested should be reasonable under the circumstances. In deciding what is a reasonable time period, consideration should be given to the interference access will cause with onsite operations, the threat to human health and the environment posed by the site, and the extent of prior contacts with the respondent. The order should advise the respondent that penalties of up to $25,000 per day may be assessed by a court against any party who unreasonably fails to comply with an order. § 104(e)(5). Following the time period for the conference and any conference, the issuing official should send a document to the respondent summarizing any conference, EPA's resolution of any objections, and stating the effective date of the order.

If, following issuance of an administrative order, the siteowner continues to refuse access to EPA, the order may be enforced in federal court. EPA should not use self-help to execute orders. Courts are required to enforce administrative orders where there is a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance. EPA's determination in this regard must be upheld unless it is arbitrary and capricious. § 104(e)(5)(B)(i). EPA will seek penalties from those parties who unreasonably fail to comply with orders.

All administrative orders for access must be concurred on by the Office of Enforcement and Compliance Monitoring prior to issuance.

DISCLAIMER

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

Attachments

CONSENT FOR ACCESS TO PROPERTY

Name: _____

Address of Property: _____

_____

I consent to officers, employees, and authorized representatives of the United States Environmental Protection Agency (EPA) entering and having continued access to my property for the following purposes:

[the taking of such soil, water, and air samples as may be determined to be necessary;]

[the sampling of any solids or liquids stored or disposed of on site;]

[the drilling of holes and installation of monitoring wells for subsurface investigation;]

[other actions related to the investigation of surface or subsurface contamination;]

[the taking of a response action including . . . .]

I realize that these actions by EPA are undertaken pursuant to its response and enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9601 et seq.

This written permission is given by me voluntarily with knowlege of my right to refuse and without threats or promises of any kind.

_____ Date

_____ Signature

Subject: Procedures for Authorizing Application for Civil Search Warrants Under CERCLA

Date: April 3, 1987

To: All EES Attorneys

From: David T. Buente, Jr.
Chief, Environmental Enforcement Section

Under § 104(e) of CERCLA, as amended by SARA, the United States may seek access by warrant, administrative order, or court order. If access is obtained by administrative order, the appropriate documents are issued by relevant client agencies. If access is to be obtained by court order, then the Assistant Attorney General of the Land and Natural Resources Division must approve the complaint, upon referral from the relevant client agency according to ordinary procedures. For access to be sought through application on a civil CERCLA warrant,[1] the instant memorandum will confirm the procedures to be used by the Department of Justice.

Under ¶5.320-A-2 of the U.S. Attorney's Manual, application for warrant under CERCLA may not be handled unilaterally by the U.S. Attorneys. Applications for such warrants must be coordinated through the Environmental Enforcement Section.

Clearance through the Environmental Enforcement Section is important for a variety of reasons. First, the nature of the governmental activities involved under CERCLA civil warrants may be much broader and last considerably longer than an inspection under the other federal environmental regulatory statutes. Typically the latter require only a few days or weeks to conduct routine environmental sampling. Under CERCLA, access may be sought under a warrant for not only sampling, but even simple

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[1] The memorandum does not cover procedures for seeking a criminal search warrant where a CERCLA violation may be involved. All such matters are to be referred to the Director, Environmental Crimes Unit, EES.

removal-type activity, e.g., security/fencing, limited drum removal. The greater relative complexity of the governmental activity involved can be expected to provoke more challenges to CERCLA civil warrants than those under other statutes and the issues raised by CERCLA warrants may be much more complex. Second, this is a relatively new and vital area of the law. We must ensure that maximum efforts are made to develop this critical area of the law in an excellent manner. EES lawyers must make all reasonable efforts to ensure that exercises of the civil warrant authority under CERCLA will be vindicated by the federal courts, through proper presentation of facts and legal arguments by Departmental attorneys with experience in this area. Finally, since our experience has shown that judicial challenges to civil CERCLA warrants tend to move very rapidly, sometimes on an emergency motion basis, EES needs to work closely with client agencies on these matters so that the Division's Appellate Section is advised and prepared with sufficient lead time to expeditiously address appellate proceedings.

Coordinating these warrant applications through EES must be done on an expedited basis so that client agencies' program objectives are achieved. Moreover, our resources must not be consumed by duplicative work. Balancing the needs for careful warrant application preparations with that for expeditious handling of these matters, we will use the following procedures:

1. The client agency will telephonically notify the relevant EES Assistant Chief or Senior Lawyer when the Agency plans to seek a civil warrant.

2. The client agency will follow-up the request by expeditiously transmitting a short memorandum concisely explaining why the warrant is needed with a draft copy of the warrant application and supporting affidavits.

3. Upon receipt of the telephonic notification or written request, whichever first occurs, the EES Assistant Chief or Sr. Lawyer will arrange for either an EES staff attorney or an AUSA to handle the review and prosecution of the application. Unless a dispute develops between EES/AUSA personnel and the client agency, the EES Assistant Chief or Sr. Lawyer may approve the application. If such a dispute develops, it must be brought to the attention of the Chief or Deputy Chief, EES for resolution.

4. Handling of these matters is to be afforded priority on our docket. Moreover, the Chief or Assistant Chief of the Appellate Section shall be advised of each application request by the EES Assistant Chief or Sr. Lawyer as soon as possible after notification by the client agency, so that Appellate can be prepared to handle expeditiously appeal matters.

5. All civil actions to enforce civil CERCLA warrants, by way of application for civil contempt or other judicial orders, shall be authorized in writing by the Assistant Attorney General. Such actions shall be afforded highest priority on the docket.

For general advice/guidance on handling CERCLA civil warrant matters, contact John Fleuchaus, ORCM-Waste, 382-3109.

Attachment

9832.9

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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

JUN 12 1987

MEMORANDUM

SUBJECT: Cost Recovery Actions/Statute of Limitations

FROM: Gene A. Lucero, Director Gene A. Lucero
Office of Waste Programs Enforcement

TO: Directors, Waste Management Division,
Regions I,IV,V,VII,VIII

Director, Emergency and Remedial Response Division,
Region II

Directors, Hazardous Waste Management Division,
Regions III, VI

Director, Toxic and Waste Management Division,
Region IX

Director, Hazardous Waste Division, Region X

The purposes of this memorandum are to:

1. Update EPA's policy on timing of cost recovery action (This memorandum supersedes Timing of Cost Recovery Action, G. Lucero, October 7, 1985).

2. Request that you bring your personal attention to the accuracy of data being used to brief Congress on the status of cost recovery efforts at sites.

3. Request the initiation of cost recovery action for those sites where the statute of limitations date is approaching.

It remains the Agency's goal, where appropriate, to seek recovery of all monies expended at Superfund sites. Moreover, to promote cost recovery and obtain interest, the Agency will transmit demand letters as early as practicable. Additional guidance on the timing and content of demand letters, including guidance on maximizing interest, will be sent in the near future.

I. Timing of Cost Recovery

Section 113(g)(2) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA), contains specific provisions on the statute of limitations for cost recovery actions under section 107. This memorandum does not set forth the statute of limitations for pre-SARA response actions. Section 113(g) requires that cost recovery actions be commenced:

A. for removal actions, within three years after completion of the removal action. Where the Agency has made a determination to grant a waiver under section 104(c)(1)(C) for continued response action, the cost recovery action must be brought within six years after this determination; and

B. for remedial actions, within six years after the initiation of physical on-site construction of the remedial action. If the remedial action is initiated within three years after completion of the removal action, the removal costs may be recovered under the remedial action statute of limitations for cost recovery (i.e. within six years after the initiation of on-site construction of the remedial action).

The term "commenced" as used in section 113(g) means a filed section 107 cost recovery action. As a matter of policy, the Agency views completion of the removal action as the day the cleanup contractor demobilizes at the site and completes the scope of work identified in the original or modified action memorandum. The final Pollution Report (POLREP) submitted by the OSC normally contains this information. (See Superfund Removal Procedures, Revision #2, August 20, 1984). Remedial investigations/feasibility studies (RI/FS) may fall within the statutory definition of removal action. For purposes of cost recovery they should be treated as a separate removal action. Therefore, a cost recovery action should be commenced within three years of completing the original removal (exclusive of the RI/FS) unless physical on-site construction has started.

Although section 113(g)(2)(A) of CERCLA, as amended, allows three years from completion of a removal to initiate cost recovery action, it still remains our policy to begin cost recovery activity within one year after completion of the removal. For remedial actions, Agency policy requires that cost recovery activity be initiated within 18 months after the signing of the Record of Decision (ROD) or during the later phase of construction of the remedial action, if the construction is expected to take more than two years after the ROD is signed. Adherence to these time frames will ensure that current, not stale, evidence and knowledgeable witnesses will be available to support the prosecution of the action and that the Agency will not be faced with statute of limitation risks.

At this point it is appropriate to clarify the Agency's position on priorities for removal cost recovery referrals. Due to the resource commitment of litigation, the Agency has established that cost recovery cases where the costs exceed $200,000 should take priority for referral. There is no prohibition on referring cases under $200,000. However, the judicious use of limited resources dictates that the Agency first address those sites which promise a better return on the Agency's time and money investments. Where appropriate, cases under $200,000 have been and should continue to be referred. Selection of cases for referral is a Regional determination which should be based on a variety of factors including strength of evidence, financial viability of defendants and likely return to the Agency including enforcement costs.

Section 122(h) of CERCLA now provides the Agency with the authority necessary to compromise claims for cost recovery actions where the total of all response costs expended at a site is less than $500,000. This new authority should assist the Agency in addressing the lower dollar value cases without litigation where an appropriate settlement can be made. The Agency is currently developing procedures for settlement of claims under $500,000.

II. Update of Information

Attached for your review is information on completed removals for each of your Regions. Please review this information and, using the comment field provided, indicate your schedule for referral of cost recovery action. Cost recovery actions may not be appropriate for some sites: for example, where no PRP can be identified, or where the PRPs are not financially viable. If you do not intend to refer the case, please note this fact. Where you decide that cost recovery action is inappropriate, you should explain the decision not to take cost recovery action in a signed memorandum in your files. You should assume that there will eventually be audits of these cases, by Headquarters, and perhaps the Inspector General and Congressional Oversight Committees.

Please use the following categories when completing the comment field for sites where actions will not be referred:

1) No PRPs identified
2) PRPs not financially viable
3) Questionable evidence
4) Questionable legal case
5) other (specify)

The accuracy and completeness of this information is critical to our ability to demonstrate the effectiveness of EPA's cost recovery program. The current data, which has been provided in response to Congressional requests, indicates that EPA has initiated cost recovery efforts at only 29% of the completed removal sites. (They account for approximately 52% of the available obligations). To the extent

information was available, the above figure on cases subject to cost recovery was determined by subtracting from the universe of completed removals, those where it appeared that cost recovery is inappropriate.

While we believe that our data base may not be current, the low level of case initiation does point out the need for serious management attention. A referral should be planned in this or next years Superfund Comprehensive Accomplishments Plan (SCAP) and so indicated on the attached reports. Where action is not appropriate, it is critical that the data base be adjusted to so indicate. Please provide your comments and schedule for activity on the attached material within two weeks.

III. Initiation of Actions

If, after review of the attached site information, there are any cases which require filing immediately or in the near future, please advise OWPE, OECM and the Environmental Enforcement Section of the Justice Department immediately, so that we may expedite the referral and filing process. All planned referrals should be incorporated into the Integrated SCAP.

We will provide you with updates of removal completions and ongoing remedial actions (similar to the attached charts) on a quarterly basis for your review and comment. We also solicit your suggestions on the chart format and content.

Any questions on this memorandum or the attached information may be addressed to Janet Farella of my staff. She may be reached on FTS 382-2034.

ATTACHMENTS

cc: Edward E. Reich, OECM
David Buente, DOJ
Regional Counsels, Regions I-X

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

JUN 12 1987

MEMORANDUM

OSWER# 9833.2

SUBJECT: Consent Orders and the Reimbursement Provision Under Section 106(b) of CERCLA

FROM: Gene A. Lucero, Director Gene A. Lucero
Office of Waste Programs Enforcement

Steven Leifer, Acting Associate Steve Leifer
Enforcement Counsel for Waste
Office of Enforcement and Compliance Monitoring

TO: Addressees

The Superfund Amendments and Reauthorization Act (SARA) amended section 106 of CERCLA to add section 106(b)(2). This provision entitles persons to seek reimbursement from the Superfund for costs spent in complying with section 106 orders. Congress included the provision as an incentive for PRP's to take response actions even though they might disagree with EPA's unilateral order. It preserves their right to contest issues of liability or the nature of the response action at a later date.

This memorandum provides guidance regarding terms of consent orders to preclude parties who have signed consent agreements to subsequently seek reimbursement under section 106(b). To assure that parties to a consent order or decree do not seek reimbursement by contesting issues of liability in a later reimbursement proceeding, consent orders should contain a stipulation that the respondent(s) waives its right to seek reimbursement under section 106. For example: "In entering into this Consent Order, the Respondent waives any right to seek reimbursement under Section 106(b)(2) of CERCLA for any past costs and costs incurred in complying with this order."

Reimbursement issues under SARA will be addressed more comprehensively in the specific guidance on the reimbursement procedures, and in revisions to the August 1983 guidance on Administrative Orders under §106.

If you have any questions please call Rich Hopen at 382-2035.

Addressees: Directors, Waste Management Division,
Regions I, IV, V, VI, VII, VIII
Director, Air & Waste Management Division,
Region II
Directors, Hazardous Waste Management Division,
Regions III, X
Director, Toxic & Waste Management Division,
Region IX
Regional Counsels,
Regions I-X

Abstract: Petroleum refineries and chemical manufacturers must limit benzene emissions from new and existing fugitive emission sources. Owners and operators must submit to EPA one-time notifications for new construction, modification, and start-up. They must also submit semi-annual reports of the number of valves, pumps, and compressors for which leaks were detected. EPA uses the collected information as the basis for enforcement actions as well as to spot trends and plan program strategies.

Respondents: Chemical manufacturers and petroleum refineries.

Estimated Annual Burden: 91,897 hours.

Office of Pesticides and Toxic Substances

Title: Household Surveys of Chemical Product Usage (EPA ICR #1200). (This is a renewal without revision of a currently approved collection.)

Abstract: These annual surveys will provide information on household use of common chemical products. From the results, EPA will derive exposure assessments for use in making regulatory decisions required by the Toxic Substances Control Act.

Respondents: Individuals and households.

Estimated Annual Burden: 800 hours.

Agency PRA Clearance Requests Completed by OMB

EPA ICR #0155: Pesticide Application Certification Form, Training and Examination of Applicators; was approved 6/17/87 (OMB #2070-0029; expires 6/30/90).

EPA ICR #0613, Trade Secret Clearance Justification for Pesticides, was extended 6/16/87 (OMB #2070-0053-expires 9/30/87).

EPA ICR #1160, NSPS for Wool Fiberglass Manufacturing (Subpart PPP) Information Requirements, was approved 6/12/87 (OMB #2060-0114; expires 6/30/90).

EPA ICR #1315, Information Request for Development of NESHAP for Chromium Plating and Anodizing Operations, was approved 6/11/87 (OMB #2060-0142; expires 12/31/87).

EPA ICR #1382, NESHAP for Coke Oven Emissions from Wet-Coal Charged By-Product Coke Oven Batteries, was approved 6/15/87 (OMB #2060-0144; expires 6/30/90).

Send comments on the above abstract(s) to:

Patricia Minami, PM-223, U.S. Environmental Protection Agency, Information and Regulatory Systems Division, 401 M Street, SW., Washington, DC 20460

and

Susan Dudley (ICR #1200) and Nicolas Garcia (ICRs 0940 and 1153), Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, 728 Jackson Place, NW., Washington, DC 20503

Dated: June 24, 1987.

Daniel J. Fiorino,

Director, Information and Regulatory Systems Division.

[FR Doc. 87-14800 Filed 6-29-87; 8:45 am]

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[FRL-3224-7]

Science Advisory Board Executive Committee; Open Meeting

July 21 through 22, 1987.

Under Pub. L. 92-463, notice is hereby given of a meeting of the Executive Committee of the Science Advisory Board on July 21 through 22, 1987. The meeting will be held at the U.S. Environmental Protection Agency, 401 M Street, SW. On July 21 the meeting will be held in the Administrator's Conference Room, 1101. The meeting will begin at 9:00 a.m. and will adjourn at approximately 5:00 p.m. The meeting July 22 will be held in the North Conference Center Room #3 from 9:00 a.m. to approximately 12:00 noon.

Issues to be discussed at the meeting include: a status report of the Board's review of scientific issues related to municipal waste combustion; working relationships with the Science Advisory Panel; consideration of a request from the Deputy Administrator to form an indoor air panel; reports of committees and subcommittees; and other issues of member interest.

The meeting is open to the public. Any member of the public wishing to attend, obtain information, or submit written comments should contact Dr. Terry F. Yosie, Director, Science Advisory Board or Mrs. Joanne Foellmer located at 401 M Street, SW., Washington, DC 20460 or call (202) 382-4126 by close of business July 16, 1987.

Dated: June 24, 1987.

Terry F. Yosie,

Science Advisory Board.

[FR Doc. 87-14801 Filed 6-29-87; 8:45 am]

BILLING CODE [illegible]

[OPP-00243; FRL-3224-3]

State FIFRA Issues Research and Evaluation Group (SFIREG); Open Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 2-day meeting of the State FIFRA Issues Research and Evaluation Group (SFIREG). The meeting will be open to the public.

DATE: Monday, July 20 and Tuesday, July 21, 1987, beginning at 8:30 a.m. each day and ending by 4:30 p.m. on Tuesday, July 21.

ADDRESS: The meeting will be held at: The Hyatt Regency, Crystal City, 2799 Jefferson Davis Highway, Arlington, VA. (703-486-1234).

FOR FURTHER INFORMATION CONTACT:

By mail: Philip H. Gray, Jr., Office of Pesticide Programs (TS-766C), 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 1115, Crystal Mall, Building No. 2, Arlington, VA. (703-557-7096).

SUPPLEMENTARY INFORMATION: This will be the twenty-seventh meeting of the full Group. The tentative agenda thus far includes the following topics:

1. Action items from the March 1987 meeting of the SFIREG.
2. Regional reports.
3. Working Committee reports.
4. Other topics which may arise.

Dated: June 22, 1987.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 87-14670 Filed 6-29-87; 8:45 am]

BILLING CODE [illegible]

[FRL-3224-4]

Superfund Program; De Minimis Contributor Settlements

AGENCY: Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The Agency is publishing today its Interim Guidance on Settlements with *De Minimis* Waste Contributors under section 122(g) of SARA in order to inform the public and to solicit public comment on this important aspect of the Superfund enforcement process. This document provides guidelines for determining which potentially responsible parties ("PRPs") under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), may qualify for treatment as *de minimis* waste contributors pursuant to section 122(g)(1)(A) of SARA. It also provides

guidelines for negotiating with *de minimis* waste contributors and for entering into settlements with such parties pursuant to section 122(g) of SARA.

This publication does not address qualifications for or settlements with *de minimis* landowners under section 122(g)(1)(B) of SARA, which will be covered by separate guidance.

DATE: Comments must be provided on or before August 31, 1987.

ADDRESS: Comments should be addressed to Janice Linett, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Waste Enforcement Division, LE-134S, 401 M Street, SW., Washington, DC 20460, (202) 382-3077.

FOR FURTHER INFORMATION CONTACT: Janice Linett, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Waste Enforcement Division, LE-134S, 401 M Street, SW., Washington, DC 20460, (202) 382-3077.

SUPPLEMENTARY INFORMATION: Section 122(g) of SARA provides EPA with discretionary authority to enter into expedited, final settlements with *de minimis* waste contributors to Superfund sites. *De minimis* waste contributors are those generator and transporter PRPs who, in the judgment of the Agency (as delegatee of the President), contributed hazardous substances in an amount and of such toxic or other hazardous effects as to be minimal in comparison to other hazardous substances at the facility. Section 122(g)(1)(A). Pursuant to the requirements of section 122(g)(1), *de minimis* contributor settlements must be practicable and in the public interest, as determined by the Agency, and must involve only a minor portion of the response costs at the facility concerned with respect to each settling party.

De minimis contributor settlements under section 122(g) of SARA offer potential advantages to PRPs and the Agency alike. For *de minimis* parties, such settlements can be an effective means of achieving an early and equitable resolution of their liability with the expenditure of reduced legal fees and other transaction costs. For the Agency, section 122(g) settlements provide a means of simplifying the CERCLA enforcement process through early elimination from litigation and negotiations of the often numerous minimal contributor PRPs. *De minimis* settlements also offer the potential for increased numbers of voluntary settlement agreements. This is because *de minimis* contributors may be attracted by the advantages offered by section 122(g) settlements, and non-*de minimis* parties may be encouraged to settle as a result of the revenues raised through such agreements.

To use the *de minimis* settlement provision most effectively, the Agency will focus on achieving settlements in which multiple *de minimis* PRPs at a particular site are "cashed out" under one comprehensive agreement. *De minimis* parties should be encouraged to organize and present multiparty settlement offers to the government. Further, to limit governmental and PRP transaction costs, *de minimis* settlements should be standardized in form and should not be the subject of lengthy negotiations.

In the typical *de minimis* settlement, the settling parties, in exchange for a payment, will receive statutory contribution protection under section 122(g)(5) of SARA and may be granted a covenant not to sue where such a covenant is consistent with the public interest under section 122(g)(2). The scope of the covenant not to sue will vary depending upon the timing of the settlement, the amount of information available to the Agency about site PRPs and response costs, the amount of any premium payments recovered through the settlement, and other relevant considerations.

The Agency is aware that *de minimis* contributor settlements are the subject of great interest to potentially responsible parties and the public. Therefore, EPA is publishing this interim guidance to provide wide public distribution of information on this aspect of SARA implementation and to gain the benefit of public comment. EPA will reevaluate this interim guidance based upon its experience with its implementation and upon any public comments that may be received.

The interim guidance follows.

Dated: June 19, 1987.

Edward E. Reich,

Acting Assistant Administrator for Enforcement and Compliance Monitoring.

Dated: June 19, 1987.

J. Winston Porter,

Assistant Administrator for Solid Waste and Emergency Response.

Memorandum

Subject: Interim Guidance on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA

From: Edward E. Reich, Acting Assistant Administrator for Enforcement and Compliance Monitoring
J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response

To: Regional Administrators
Regional Counsels
Regional Waste Management Division Directors

June 19, 1987.

I. Purpose

The purpose of this memorandum provide interim guidance for determining which PRPs qualify for treatment as *de minimis* waste contributors pursuant to section 122(g)(1)(A) of the Superfund Amendments and Reauthorization A of 1986 ("SARA"), Pub. L. No. 99-49 and to present interim guidelines for settlement with such *de minimis* par pursuant to section 122(g) of SARA. Guidance on *de minimis* landowners under section 122(g)(1)(B) of SARA w be provided by separate memorandu

II. Background

When the harm is indivisible, generators and transporters of hazardous substances disposed of at facility are strictly and jointly and severally liable for all costs of remov or remedial action incurred by the United States under section 107(a) of Comprehensive Environmental Response, Compensation, and Liabili Act of 1980 ("CERCLA"), 42 U.S.C. 9607(a), as amended by SARA. Altho this liability is not statutorily limited the amount or type of hazardous substance generated or transported t the facility, Congress, in section 122(g)(1)(A) of SARA, recognized the concept of the *de minimis* waste contributor, *i.e.*, the potentially responsible party ("PRP") who satisfi the requirements for liability under section 107(a) of CERCLA and who d not have a valid section 107(b) defens but who has made only a minimal contribution (by amount and toxicity) comparison to other hazardous substances at the site.

Since the beginning of the Superfun program, the Agency has been faced with the problem of how to treat *de minimis* contributor PRPs. The legal fe and other transactions costs of negotiating and litigating with the Government, compounded by the potential costs of asserting and defending claims for contribution with other PRPs at the site, often could exceed the amount such minimal contributors would be expected to pay even under a settlement or a judgment unfavorable to them. As a result, *de minimis* parties often seek a swift and efficient means to pay a sum that is commensurate with their involvement the site and allows them to be dismiss from further negotiations and litigation The Agency also needs a method for

achieving settlements with minimal waste contributors in order to make negotiations and litigation more manageable.

EPA formally recognized and endorsed the concept of the *de minimis* contributor settlement in the Interim CERCLA Settlement Policy ("Settlement Policy"), 50 FR 5034 (Feb. 5, 1985). The Settlement Policy advised that negotiations with *de minimis* parties should focus on achieving cash settlements and should be limited to low volume, low toxicity disposers who normally would not make a significant contribution to the costs of cleanup in any event.

Section 122(g) of SARA [1] is in large part a codification of the Agency's position with regard to settlements with *de minimis* parties. While recognizing the liability of such parties, that section gives EPA discretionary authority to enter into expedited settlements with *de minimis* waste contributors and *de minimis* landowners. Section 122(g)(1) generally provides that when EPA determines that a settlement is "practicable and in the public interest," the Agency shall, "as promptly as possible," seek to reach a "final" settlement with a *de minimis* PRP by consent decree or administrative order, if the settlement "involves only a minor portion of the response costs at the facility concerned." Section 122(g)(1). A *de minimis* contributor settlement with a generator or transporter is authorized if these criteria are met and if the Agency determines that both "the amount of the hazardous substances contributed by that party to the facility," and "the toxic or other hazardous effects of the substances contributed by that party to the facility," are "minimal in comparison to other hazardous substances at the facility." Section 122(g)(1)(A). Section 122(g) further authorizes settlements with *de minimis* landowners as defined by section 122(g)(1)(B) of SARA. Because the Agency will be providing a separate guidance document on *de minimis* landowners under SARA, this document will focus on the definition and settlement requirements of the *de minimis* waste contributor.

III. Guidelines for Negotiating With De Minimis Parties

De minimis contributor settlements under section 122(g) of SARA can be an effective means of providing *de minimis* parties with an early and equitable resolution of their liability while minimizing their transaction costs. *De minimis* settlements can be particularly useful to the Government in complex cases involving numerous PRPs. In such cases, *de minimis* settlements offer the Agency a method of simplifying CERCLA enforcement actions through early elimination of the sometimes numerous minimal contributor PRPs from litigation and negotiations. *De minimis* settlements may also increase the amount of response costs recovered through voluntary settlement agreements. This is because *de minimis* parties (who otherwise might not have participated in settlements) may be attracted by the advantages offered by *de minimis* settlements and encouraged by the fact that their funds will be used to pay costs of cleanup, rather than transaction costs. Finally, *de minimis* settlements may increase the likelihood of settlement with the major waste contributors by raising sufficient revenues to reduce the overall liabilities of such parties.

To use the *de minimis* settlement provision most effectively, the Agency will focus on achieving comprehensive settlements in which interested *de minimis* PRPs at a particular site are addressed in one settlement agreement. *De minimis* parties should be encouraged to organize and present multi-party settlement offers to the Government. To limit Governmental and PRP transaction costs, *de minimis* settlements should take the form of standardized agreements, and the Regions should try to avoid lengthy settlement negotiations with *de minimis* parties.

At sites with dozens or hundreds of PRPs, the *de minimis* settlement authority will be particularly useful in helping to simplify the negotiation process. In situations of this kind, it is particularly important for the Agency to gather and release information about PRP waste contributions to the site at an early stage, so that potentially *de minimis* parties can identify and organize themselves to present settlement offers to the Government. Where sufficient information is available, the Agency may tentatively identify potentially *de minimis* parties in the information released to PRPs under section 122(e)(1) of SARA. The Agency may also consider negotiating separately with PRP Steering Committees representing substantial numbers of *de minimis* parties. In addition, the Agency may wish to consult with the major, *i.e.*, non-*de minimis*, parties during the *de minimis* negotiations in order to facilitate a later, comprehensive settlement with such major parties. This is because, among other things, the volume and toxicity criteria established by the Agency for participation in the *de minimis* settlement may have a significant effect on the willingness of the major parties to settle.

In determining the timing of a *de minimis* settlement, the Agency must consider a variety of factors: the amount of information available about the PRPs and their waste contributions to the site; the amount of information available about the costs of remediating site contamination; the nature of the reopeners included in the covenant not to sue; the amount of the premium to be paid by the settling parties; and the volume and toxicity criteria used by the Agency to distinguish between the *de minimis* and major parties at the site. The approach taken at a particular site should be designed to promote voluntary settlement, minimize transaction costs for both the PRPs and the Government, address the legitimate interests of the *de minimis* and major parties at the site, and assure that the level of risk to the Agency is acceptable. The Regions are not encouraged to devote extensive effort to assessing proposals for *de minimis* settlement unless there is a reasonable prospect of successful settlement.

The Agency may consider early settlement where complete information concerning PRP contributions and the nature of the remedy is not yet available. In such early settlements, the reopeners should be more expansive, and/or the premiums should be substantial. In addition, volume and toxicity levels should normally be set low, so that parties who may legitimately be treated as major do not instead end up being treated as *de minimis*. Where the Agency determines that it is more important to have finality in releases and reopeners and more certainty in the definition of premiums and volume/toxicity levels, negotiations for *de minimis* settlements should be deferred until the remedial investigation and feasibility study have been completed and the remedy and the relative PRP contributions have been definitively identified.

IV. Guidelines for Defining the De Minimis Waste Contributor

Because site conditions, remedial programs, number of PRPs and other considerations vary tremendously among sites, the approach taken by this guidance, consistent with section 122(g)(1)(A) of SARA, is that the *de minimis* contributor will be defined on a site-specific basis. To qualify as a *de minimis* generator or transporter, the PRP must have contributed an amount of

[1] The full text of section 122(g) of SARA is provided as an appendix to this memorandum.

hazardous substances which is minimal in comparison to the total amount at the facility. The PRP must also have contributed hazardous substances which are not significantly more toxic and not of significantly greater hazardous effect than other hazardous substances at the facility, as well as meeting the other conditions set forth in this guidance.

If, for example, all PRPs at the site disposed of waste of similar toxicity and hazardous nature, *e.g.*, organic solvents, then those PRPs who had contributed a minimal amount (in relation to the total amount at the facility) could qualify for *de minimis* status because their waste was not more toxic or otherwise hazardous than other hazardous substances at the site. If, on the other hand, a PRP disposed of a minimal amount of a waste which is more highly toxic or which exhibits other more serious hazardous effects than other hazardous substances at the site, then that PRP, despite the minimal amount of his contribution, normally would not qualify for treatment as a *de minimis* party.

Another way to analyzing the facts posed by the second example is to consider the cost of remediating site contamination resulting from the hazardous substance contributed by a particular party. If a PRP disposed of a hazardous substance requiring disproportionately high treatment and disposal costs, or requiring a different or more costly remedial technique than that which otherwise would be technically adequate for the site, then that PRP should not be treated as a *de minimis* contributor even if he disposed of a relatively minimal amount of such substance.

Even if a particular waste contributor meets the volume and toxicity requirements for *de minimis* contributor status, a possible settlement with a *de minimis* PRP must be determined by the Agency to be "practicable and in the public interest." Section 122(g)(1). This requires the consideration of factors beyond the basic eligibility criteria—factors relating to whether the settlement would effectuate the intent of section 122(g) and other purposes of the Act. For example, in the unlikely event that every PRP at a site meets the basic *de minimis* eligibility criteria, a *de minimis* settlement would not serve one of the primary goals of section 122(g): elimination of certain minor parties early in the process to focus the remaining case on the major parties. In such an instance, the emphasis should be on reaching a settlement as soon as possible with all parties using traditional settlement approaches. Similarly, in a situation where several major parties at a site are bankrupt or otherwise non-viable, it may not be in the public interest to "cash out" smaller contributors before reaching a settlement with the remaining parties.

The Agency currently has several *de minimis* pilot projects underway. After these and other section 122(g) settlements have been concluded, we will consider providing further guidance on the definition of the *de minimis* waste contributor based upon our experience with these early settlements and comments received on this interim guidance.

V. Guidelines for Settlement With De Minimis Waste Contributors

A. Timing of Settlement and Necessary Information

The general goal of settlements with *de minimis* parties is to allow PRPs who made minimal contributions to a site to resolve their liability quickly and without the need for extensive negotiations with the Government. Section 122(g)(3) indicates that the President shall reach a settlement or grant a covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

The first type of information that the Agency must have is adequate information about the identity, waste contributions and viability of PRPs for the site concerned. Such information is essential because the Agency must be able to determine, under section 122(g)(1)(A) of SARA, that each settling party's contribution by volume and toxicity is minimal in comparison to other hazardous substances at the facility in order to enter into a *de minimis* settlement. Such information is also important because the Agency must be able to evaluate the financial viability of, and strength of its case against, the non-settling parties at the site to determine whether a *de minimis* settlement is "practicable and in the public interest" under section 122(g)(1) of SARA.

Therefore, although the Regions may engage in preliminary negotiations with likely candidates for *de minimis* settlements prior to completion of full PRP investigatory work, as a general rule, *de minimis* settlements should not be concluded prior to completion of a PRP search (including title search and financial assessments) or prior to such time as the Agency is confident that adequate information about the extent of each settling party's waste contribution to the site has been discovered. The Regions should commence PRP investigatory work concurrent with the expanded site investigation or, at the latest, the National Priorities List scoring quality assurances process, and should make aggressive use of information requests pursuant to section 104(e) of CERCLA, as amended, and section 3007 of RCRA, as appropriate. The Regions should also use subpoenas, as needed and appropriate, pursuant to section 122(e) of SARA, and should consider all information discovered during site and PRP investigations.[8]

Early discussions with potential candidates for *de minimis* settlements will be most beneficial at sites with numerous PRPs, where such discussions may be used to encourage minimal waste contributors to organize and present multi-party settlement offers to the Government. In appropriate cases, the Agency may consider concluding *de minimis* settlements prior to completion of full PRP investigatory work. In such cases, the Agency may use more conservative criteria for distinguishing between *de minimis* and non-*de minimis* parties, *i.e.*, lower volume and toxicity levels, so that parties who may legitimately be treated as non-*de minimis* are not included within the *de minimis* class. Such settlements must also be drafted carefully to assure that they provide added protection to the Agency against the risk that new information may be discovered about a settling party's waste contribution to the site.

The second type of information that the Agency must have is information about the costs of remediating site contamination. *De minimis* settlements in which PRPs are granted an expansive covenant not to sue, *i.e.*, one without reservations of rights for cost overruns and future response action, *see infra*, pp. 16–18, generally should not be pursued until the Agency is able to estimate, with a reasonable degree of confidence, the total response costs associated with cleaning up the subject site, including oversight and operation and maintenance costs.[9] The Agency usually will arrive at this level of confidence only after a remedial investigation and feasibility study ("RI/FS") and a Record of Decision ("ROD") have been (or are close to being) completed at the site. A

[8] PRPs who have been unresponsive to information requests or subpoenas generally should not be considered for *de minimis* settlements.

[9] Past costs should be fully documented by the Agency prior to entering into a *de minimis* settlement.

minimis settlement with an expansive covenant not to sue of this kind may be concluded prior to completion of the RI/FS and ROD. However, if the Agency is relatively confident of its ability to estimate future response costs, and the settlement takes into account the increased level of uncertainty through an adequate premium payment and/or other safeguards. *See* section V(B)(2) below. The Agency will also consider alternative methods of structuring pre-RI/FS and ROD *de minimis* settlements which afford *de minimis* contributors the opportunity for early settlements when cost information is less certain while protecting the Government against the additional risks presented by such early agreements. Options for such settlements are discussed in Section V(B)(2) below.

B. Content and Form of Settlements

1. Introduction

The goal of negotiations with *de minimis* parties is to achieve quick and standardized agreements through the expenditure of minimal enforcement resources and transaction costs. To attain this goal, the *de minimis* settlement normally will be a "cashout," *i.e.*, it will not include a commitment to perform work,[4] but rather will require a payment to be made to the Hazardous Substance Superfund.[5] In exchange for this payment, the settling parties will receive statutory contribution protection under section 122(g)(5) of SARA and may receive a covenant not to sue as described in section V(B)(2) below.

2. Releases from Liability and Reopeners

De minimis settlors may be granted a covenant not to sue for civil claims concerning the site which seek injunctive relief under section 106 of CERCLA and section 7003 of RCRA, or cost recovery under section 107 of CERCLA, when EPA determines that such a covenant is consistent with the public interest, as provided in section 122(g)(2) of SARA.[6] The scope of this convenant not to sue will vary, depending upon the timing of the settlement, the amount of information available to the Agency, and the amount of any premium payment to be made by the *de minimis* parties pursuant to the settlement. Natural resource damage claims may not be released, however, and should be expressly reserved unless the Federal natural resource trustee has agreed in writing to such a convenant not to sue pursuant to the terms of section 122(j)(2) of SARA.

In order to protect the Agency against the possibility that a *de minimis* party's full waste contribution to a site has not been discovered, *de minimis* settlements should, in most cases, also include a reservation of rights which would allow the Government to seek further relief from any settling party if information not known to the Government at the time of settlement is discovered which indicates that the volume or toxicity criteria for the site's *de minimis* parties are no longer satisfied with respect to that party.[7] This reservation need not be included if sufficient information about the waste contributions of all site PRPs is known at the time of settlement, *i.e.*, if virtually all of the waste is accounted for, or if site records and results of PRP investigations are sufficiently complete for the Agency to conclude that the risk of discovering new information about waste contributions to the site is negligible.

In addition to the natural resource damage reservation and the reservation for new information indicating that the volume and toxicity criteria for the particular settlement are no longer satisfied, two further reservations of rights or "reopeners" may be required depending upon the facts of the case and the timing of the settlement. These reopeners protect the Agency against (1) The risk of cost overruns during the completion of the remedial action and (2) the risk that further response action will be necessary in addition to the work specified in the ROD.

If an RI/FS and ROD have been (or are close to being) completed at the site, and the Agency has sufficient information upon which to evaluate the likelihood of cost overruns or future response action and the potential costs associated with these contingent events, then the Agency may accept a premium payment from the settling *de minimis* parties in lieu of one or both of these two reopeners, depending on the facts. However, if a *de minimis* settlement is concluded prior to completion (or substantial completion) of the RI/FS and ROD, at a time when the Agency has insufficient information upon which to evaluate these risks and develop a premium payment commensurate with them, then reopeners for cost overruns and future response action generally will be required. In appropriate cases, the Agency may make exceptions to this general rule and accept a very high premium payment, which provides a wide margin of safety to the Government, at an earlier stage in the process in lieu of these two reopeners.

As noted above, the Agency will also consider various forms of pre-RI/FS and ROD *de minimis* settlements which provide *de minimis* contributors the opportunity for early settlements while protecting the Government against the additional risks presented by such early agreements. For example, EPA may consider partial settlements in which the *de minimis* parties make a payment in satisfaction of their liability for past costs and projected RI/FS costs. Settlements of this kind would not address the settling parties' liability for post-RI/FS costs. EPA may also consider settlements of greater scope in which an up-front payment is made for known past costs and projected RI/FS and remedial costs. In settlements of this kind, EPA would reserve the right to reopen the agreement if actual costs exceed EPA's estimate by an agreed-upon dollar amount or percentage. Alternatively, the Agency may pursue settlements in which an up-front payment is made for past costs only and in which the settling *de minimis* parties agree to pay a specified percentage of all future response costs.

In certain additional situations, the cost overrun or future remediation risks may be covered through a method other than a reservation of rights or a premium payment from the settling *de minimis* parties. First, if an extremely high or worst-case estimate of remedial action costs is used for the settlement, then a cost overrun premium or reopener may not be required from the settling *de minimis* parties. Second, if the major PRPs at the site have made a binding commitment to perform the remedial action selected in the ROD regardless of its cost, then the risk of cost overruns will be borne by those major parties, and a premium payment or reopener for cost overruns will not be required by the Government from the settling *de minimis* PRPs. Finally, if the major PRPs

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[4] In appropriate cases, the Agency will also consider entering into *de minimis* settlements under which the settling *de minimis* parties agree to perform a discrete portion of the response action needed for the site, *e.g.*, an RI/FS or operable unit.

[5] We are exploring the circumstances under which it may be appropriate for the settling parties to deposit the cashout fund pursuant to a *de minimis* settlement into a site-specific trust fund to be administered by a third-party trustee and used for site cleanup. Further guidance on this issue will be provided by separate memorandum.

[6] Under no circumstances may a convenant not to sue for criminal claims be granted.

[7] In some situations, the Agency may also require each settling *de minimis* party to certify in the settlement agreement that it has disclosed all information in its possession concerning its waste contribution to the site. This certification should be used in cases in which the *de minimis* settlement is concluded prior to completion of PRP investigations, particularly where information requests or subpoenas have not been issued.

have expressly assumed the *de minimis* parties' liability for cost overruns and future remediation as part of a comprehensive settlement with the Government, then these risks will be borne by the major parties, and a premium payment or reopener for cost overruns and future remediation will not be required by the Government from the settling *de minimis* parties.

3. Amount of Payment

In the typical *de minimis* settlement, the cash offer submitted by the *de minimis* parties must be at least equal to their volumetric share of the total past and projected response costs at the site.[8] Nature of the waste is less relevant to the amount of payment of a *de minimis* settlement because the waste must be minimal in toxicity in order for a party to meet the basic eligibility criteria for *de minimis* status. Volume is, therefore, a useful and simple method for tentatively determining the *de minimis* share. It is based upon the type of information that is most likely to be readily available and does not require the PRPs and the Agency to invest an inordinate amount of effort arguing about the appropriate share.

The volumetric share may be adjusted, however, based upon the other factors regarding partial settlements identified in the Interim CERCLA Settlement Policy (Part IV, 50 FR 5037–38). Factors that may be of particular importance include ability to pay, litigative risks, public interest considerations, value of a present sum certain, inequities and aggravating factors, and the nature of the case remaining against other parties after settlement. The shares may also be adjusted on the basis of a Nonbinding Preliminary Allocation of Responsibility, if one has been developed for the site pursuant to section 122(e)(3) of SARA.

In addition to the volumetric share of past and projected response costs, the Agency generally will require payment of a premium from each settling *de minimis* party in exchange for granting a covenant not to sue which does not include reopeners for cost overruns and future response action.[9] If the settlement is concluded prior to completion of the RI/FS and ROD, and information about projected costs is limited, then the cost overrun and future response action premiums should be calculated to reflect this increased level of uncertainty.[10] As discussed earlier, if the major PRPs are assuming the responsibility for conducting the cleanup, then the premium amounts may be made available to those PRPs rather than to the Agency. In this situation, the premium amounts may be negotiated between the major PRPs and the *de minimis* settlors.

Furthermore, because *de minimis* PRPs are jointly and severally liable for response costs at the site, the amount to be paid by a *de minimis* settlor is affected by the amount available from other PRPs. Thus, if a significant portion of the major parties at the site are bankrupt or otherwise not financially viable, then the *de minimis* offer may need to reflect a greater proportion of response costs, rather than simply a volumetric share and a premium. It is also possible that mixed funding may be appropriate in such a situation.[11]

4. Enforcement of Payment

If a settling party fails to make any payment required by a *de minimis* settlement, or otherwise fails to comply with any term or condition of the settlement, that party is subject to enforcement action, including imposition of civil penalties pursuant to Section 109 of CERCLA, as amended. *See* section 122(1) of SARA. In addition, the Agendcy may include a porovision in the settlement document which permits the agreement to be vacated in the event of noncompliance.

5. Type of Agreement

Section 122(g)(4) of SARA requires that *de minimis* settlements be entered as either judicial consent decrees or administrative orders on consent. The circumstances and procedures under which these two alternatives should be used are briefly describe below.

a. *Judicial Consent Decree.* Under section 122(d)(1)(A) of SARA, settlements with non-*de minimis* PRPs which provide for remedial action must be embodied in consent decrees. Thus, if the *de minimis* settlement is part of a larger, more comprehensive agreement with the non-*de minimis* parties under which remedial action will be performed, it may be advisable and efficient to use a consent decree for the entire settlement. Similarly, if the Government has already filed a CERCLA Section 106 or 107 action with respect to the site, a consent decree with the *de minimis* parties may be useful because the court will be familiar with the case and should be able to approve the settlement expeditiously.

At the present time, all *de minimis* consent decrees must be referred to Headquarters by the Regions and must receive the concurrence of the Assistant Administrator for Enforcement and Compliance Monitoring ("AA–OECM") and the Assistant Administrator for Solid Waste and Emergency Response ("AA–OSWER") or his or her designee prior to referral to the Department of Justice for filing. Further, all *de minimis* consent decrees will be subject to a thirty-day public comment period after lodging.[12] A model section 122(g) consent decree will be issued shortly.

b. *Adminstrative Order on Consent.* A *de minimis* settlement may also be embodied in an administrative order on consent ("consent order"). *See* section 122(d)(1)(A) of SARA. Because of the potential effect of administrative *de minimis* settlements upon future litigation and negotiations with the major waste contributors at the site, all such settlements currently must receive the concurrence of the AA-OECM and the AA-OSWER prior to signature by the Regional Administrator. Additionally, if the total past and projected response costs at the site, excluding interest, exceed $500,000 (as will generally be the case at sites involving *de minimis* settlements), section 122(g)(4) of SARA requires that the *de minimis* consent order receive the prior written approval of the Attorney General or his designee ("AG"). That subsection of SARA gives the AG thirty days from referral by EPA to approve or disapprove the settlement, unless the AG has reached agreement with the Agency on an extension of time.

Section 122(i) of SARA requires notice of all administrative *de minimis* settlements to be published in the Federal Register for a thirty-day public comment period. The Agency must consider all comments received and "may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate.

[8] The Agency's projection of future response costs generally should be based on a site-specific assessment of the most probable costs of the response action.

[9] The premium payment reduces the liability of the non-settling PRPs in the amount of the premium, unless otherwise provided in the settlement agreement. In some cases, it may be appropriate for the premium to be deposited in a site-specific trust fund as discussed *supra* n. 5, p. 14.

[10] Further guidance on calculating premium payments will be provided by separate memorandum.

[11] Guidance on mixed funding will be issued separately and is forthcoming.

[12] The payment provisions of *de minimis* consent decrees should not require payment to be made until after the United States has responded to any public comments received and until after the court has entered the decree.

improper, or inadequate." [18] Section 122(i)(3) of SARA. Modifying or withdrawing consent to an administrative settlement is subject to the same OECM and OSWER concurrences as are initial agreements.

More detailed guidance on the procedural aspects of *de minimis* consent orders, including Regional referral of orders for Headquarters concurrence and AG approval, solicitation of public comment, enforcement of orders, and other related matters, will be provided by separate memorandum. A model section 122(g) consent order will be issued shortly.

VI. Purpose and Use of This Memorandum

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

Appendix—Text of Section 122(g) of Sara

(1) *Expedited Final Settlement.*—Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 106 or 107 if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party—

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) *Covenant Not To Sue.*—The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f).

(3) *Expedited Agreement.*—The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) *Consent Decree or Administrative Order.*—A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed $500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) *Effect of Agreement.*—A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(6) *Settlements with Other Potentially Responsible Parties.*—Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this Act.

[FR Doc. 87-14802 Filed 6-29-87; 8:45 am]

BILLING CODE 6560-50-M

[18] The payment provisions in *de minimis* consent orders should not require payment to be made until after the public comment period has closed and until after the Agency has had sufficient time to determine whether any comments received require modification of or withdrawal from the consent order.

FEDERAL COMMUNICATION COMMISSION

Public Information Collection Requirements Submitted to the Office of Management and Budget for Review

The Federal Communications Commission has submitted the following information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507.

Copies of these submissions may be purchased from the Commission's duplicating contractor, International Transcription Service, 2100 M Street, NW., Suite 140, Washington, DC 20037, or telephone (202) 857-3815. Persons wishing to comment on an information collection should contact J. Timothy Sprehe, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, telephone (202) 395-4814. Copies of these comments should also be sent to the Commission. For further information contact Doris Benz, Federal Communications Commission, telephone (202) 632-7513.

OMB No.: 3060-0051
Title: Ship/Aircraft License Expiration Notice and/or Renewal Application
Form No.: FCC 405-B
Action: Revision
Estimated Annual Burden: 39,183 Responses: 1,959 Hours.
Needs and Uses: A computer-generated expiration notice which is sent to ship (voluntarily equipped and Title III Part III vessels) and aircraft radio service station licenses. The license may be renewed by returning the application when there is no change, or only minor changes, to the existing license. The data is used to update the existing data base and issue renewed licenses.

OMB No.: 3060-0096
Title: Application for Ship Radio Station License and Temporary Operating Authority
Form No.: FCC 506/506-A
Action: Revision
Estimated Annual Burden: 106,192 Responses; 21,238 Hours.
Needs and Uses: Form FCC 506 is used to apply for a new, modified, or renewal of a ship radio station license. Form FCC 506-A is retained by the applicant as a temporary operating authority and is valid for 90 days. The data is used to determine eligibility, update the existing data base, and issue licenses.

Federal Communications Commission.
William J. Tricarico,
Secretary.

[FR Doc. 87-14790 Filed 6-29-87; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL ELECTION COMMISSION

Clearinghouse Advisory Panel; Renewal of Charter

SUMMARY: The National Clearinghouse on Election Administration announces the renewal of the charter for the Clearinghouse Advisory Panel.

The purpose of the Panel is to provide advice and consulation to the Clearinghouse with respect to its

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

OSWER # 9841.1

JUL 16 1987

MEMORANDUM

SUBJECT: Interim Guidance on Use of Administrative Penalty Provisions of Section 109 of CERCLA and Section 325 of SARA

FROM: Thomas L. Adams, Jr. by
Assistant Administrator

TO: Regional Administrators
Regional Counsels
Directors, Regional Waste Management Divisions

This memorandum provides interim guidance on the use of the new administrative penalty provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 et seq. and the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499. Section 109 of SARA amended CERCLA by adding civil penalties for violations of certain provisions of CERCLA or agreements entered into pursuant to the Act. The penalties may be assessed in an administrative action or in a judicial action. SARA also created the Emergency Planning and Community Right-to-Know Act of 1986. Section 325 of Title III provides for civil and criminal penalties for violations of the notification and planning requirements of that Title.

Background

Section 109 and Section 325(b) established two classes of administrative penalties. Those classes differ from each other with respect to procedures for assessing and collecting penalties and the maximum penalty available. EPA may assess Class I administrative penalties of not more than $25,000 per violation for violations of the provisions specified in Section 109(a) and Section 325(b). In determining the amount of the Class I penalty, EPA must consider the factors specified in Section 109(a)(3) or Section 325(b)(1)(C). EPA may assess Class II administrative penalties of not more than $25,000 per day for each day the violation continues for violations of provisions specified in Section 109(b) or Section 325(b). For subsequent Class II violations, the penalty may be not more than $75,000 for each day of violation.

Section 109 and Section 325(b) also established different procedures for the two classes of penalties. For Class I penalties under Section 109 or Section 325 EPA must provide notice and opportunity for a hearing but the proceedings are not subject to the Administrative Procedure Act (APA). EPA may subpoena witnesses and documents for Class I proceedings. The person aggrieved by the penalty action may seek judicial review in a United States District Court. In such a case, EPA must file in the court a certified copy of the record on which the penalty was based. OECM-Waste Division is developing Class I penalty procedures, and expect to issue these procedures shortly.

For Class II penalties under Section 109 and Section 325, EPA must provide notice and opportunity for a hearing in compliance with Section 554 of the APA, 5 U.S.C. 554. For Section 109 penalties, the person aggrieved by the penalty action may seek judicial review in a United States Court of Appeals. For Class II penalties under Section 325, the person aggrieved by the penalty action may seek judicial review in a United States District Court.

Class II proceedings are similar to formal adjudicatory penalty proceedings conducted by the Agency under other environmental statutes. The Consolidated Rules of Practice, promulgated by EPA at 40 CFR Part 22, govern the administrative assessment under the APA of penalties available under other statutes. To make these rules applicable to Class II proceedings under Section 109 and Section 325, OECM-Waste Division will promulgate a rule providing that the Consolidated Rules shall govern proceedings for the assessment of Class II administrative penalties under those provisions.

The United States may also bring a civil action in a district court to collect penalties of not more than $25,000 per day for each day of violation for violations of those provisions specified in Section 109(c) and in Section 325(b). For subsequent violations, EPA may seek penalties of up to $75,000 for each day of violation. In addition to the Class I and Class II penalties for violations specified in Section 325(b), Sections 325(a), (c), and (d) provide for civil and administrative penalties for violating the requirements specified in those provisions. The United States may also seek criminal sanctions under Section 103 of CERCLA for violations of the release notification requirement. SARA amended Section 103 of CERCLA by increasing the maximum penalties for such criminal violations. Sections 325(b) and (d) also provide for criminal penalties.

Current Procedures

Prior to completion of the procedures for Class I penalties and the promulgation of the rule amending the Consolidated Rules,

EPA may seek civil penalties under Section 109 or Section 325 under one of two approaches. First, the Regions may file administrative actions assessing the Class I or Class II penalties of Sections 109 or 325(b) or the administrative penalties in Sections 325(c) and 325(d). In filing such actions, the Region on an interim basis should comply with the Consolidated Rules, 40 CFR Part 22. After the Class I penalty procedures are completed, Class I administrative penalties should be assessed in compliance with those procedures. The Regions may also prepare a judicial referral for civil action or a judicial referral for criminal action. Orders under Section 325(a) may be enforced after a judicial referral.

In the near term, EPA will be using Section 109 most frequently to seek administrative penalties for violations of the notice requirements of Section 103(a) and (b). Until further guidance is available, we have attached for your use a chart showing the elements needed to prove a violation of Section 103(a) or (b), background information in the reportable quantities provisions, and a sample certification by a person at the National Response Center that no notice was received. More detailed guidance on the assessment of administrative penalties under Sections 109 and 325 is now being developed by OECM-Waste Division and the Office of Waste Programs Enforcement. For further information contact Frances McChesney at FTS 475-9437.

Attachments

cc: Lisa K. Friedman
Gene A. Lucero
Regional Counsel Hazardous Waste Branch Chiefs

PRIMA FACIE CASE
SECTION 103(B) CERCLA, 42 U.S.C. SECTION 9603(B)
NOTIFICATION

FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
PERSON IN CHARGE OF VESSEL OR FACILITY	103(A), (B)	EVIDENCE SHOWING PERSON IS IN CHARGE
HAS KNOWLEDGE OF	103(A), (B)	KNOWLEDGE OF RELEASE MAY BE INFERRED ; STANDARD IN CIVIL CASES LESS THAN IN CRIMINAL CASES
RELEASE OF	103(A), (B)	EVIDENCE OF RELEASE
HAZARDOUS SUBSTANCE	103(A), (B)	EVIDENCE THAT SUBSTANCE RELEASED IS HAZARDOUS

PRIMA FACIE CASE
SECTION 103(B) CERCLA, 42 U.S.C. SECTION 9603(B)
NOTIFICATION
(CONTINUED)

FACT TO BE PROVED	STATUTORY BASIS	COMMENTS
IN REPORTABLE QUANTITY	103(A), (B)	EVIDENCE THAT RELEASE WAS EQUAL TO OR EXCEEDED REPORTABLE QUANTITY
WHO FAILS TO REPORT THE RELEASE	103(B)	CERTIFICATION BY NRC THAT IT WAS NOT NOTIFIED

BRIEFING ON

REPORTABLE QUANTITIES IMPLEMENTATION

BY

EMERGENCY RESPONSE DIVISION
OFFICE OF EMERGENCY AND REMEDIAL RESPONSE
OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

TOPICS

- Statutory Authority
- Purpose of Reportable Quantitites
- RQ Adjustments
- RQ Adjustment Methodology
- Relationship Between CERCLA and CWA
- Reporting Requirements
- Determining When an RQ Has Been Released
- Federally Permitted and Continuous Release Reporting Exemptions

STATUTORY AUTHORITY

- CERCLA SECTION 101(14) DEFINES "HAZARDOUS SUBSTANCE" BY REFERENCE TO OTHER ENVIRONMENTAL STATUTES, INCLUDING:

  -- CLEAN WATER ACT (CWA) SECTIONS 311 AND 307;
  -- CLEAN AIR ACT (CAA) SECTION 112;
  -- RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) SECTION 3001; AND
  -- TOXIC SUBSTANCES CONTROL ACT (TSCA) SECTION 7.

- IN ADDITION, THE ADMINISTRATOR HAS THE AUTHORITY UNDER SECTION 102 TO DESIGNATE ADDITIONAL HAZARDOUS SUBSTANCES THAT "WHEN RELEASED INTO THE ENVIRONMENT MAY PRESENT SUBSTANTIAL DANGER TO THE PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT." EPA IS IN THE PROCESS OF DESIGNATING EXTREMELY HAZARDOUS SUBSTANCES OF TITLE III OF SARA AS HAZARDOUS SUBSTANCES AND SETTING RQS.
- THERE ARE CURRENTLY 705 HAZARDOUS SUBSTANCES, INCLUDING INDIVIDUAL CHEMICALS AND WASTE STREAMS. THE SUBSTANCES ARE LISTED AT 40 CFR PART 302.

STATUTORY AUTHORITY
(CONTINUED)

- UNDER THE REGULATIONS IMPLEMENTING SECTION 103, RELEASES OF A HAZARDOUS SUBSTANCE WITHIN A 24-HOUR PERIOD IN A QUANTITY EQUAL TO OR GREATER THAN ITS "REPORTABLE QUANTITY" MUST BE REPORTED IMMEDIATELY TO THE NATIONAL RESPONSE CENTER (NRC). CRIMINAL PENALTIES MAY BE IMPOSED FOR FAILURE TO REPORT PROPERLY.

- REPORTABLE QUANTITITES (RQS) ARE STATUTORILY SET AT 1 POUND OR AT THE RQ ESTABLISHED UNDER CWA SECTION 311.

- THE ADMINISTRATOR HAS THE AUTHORITY UNDER SECTION 102 TO ADJUST BY REGULATION STATUTORY RQS.

PURPOSE OF REPORTABLE QUANTITIES

- RQs SERVE AS A TRIGGER FOR NOTIFICATION TO THE FEDERAL GOVERNMENT OF A HAZARDOUS SUBSTANCE RELEASE.

- RQs DO NOT NECESSARILY REFLECT THE DEGREE OF RISK POSED BY HAZARDOUS SUBSTANCES.

- ONCE A RELEASE IS REPORTED, EPA DETERMINES WHETHER A FEDERAL FIELD RESPONSE IS WARRANTED.

- NOT ALL REPORTABLE RELEASES NECESSITATE A FIELD RESPONSE; CONVERSELY, SITUATIONS CAN OCCUR WHERE A RELEASE OF LESS THAN AN RQ CAN RESULT IN RISKS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT.

- EXCEPT FOR FEDERALLY PERMITTED RELEASES, RELEASERS ARE LIABLE FOR RESPONSE COSTS AND NATURAL RESOURCE DAMAGES RESULTING FROM A HAZARDOUS SUBSTANCE RELEASE, REGARDLESS OF THE QUANTITY RELEASED.

RQ ADJUSTMENTS

- RQ ADJUSTMENTS ALLOW GOVERNMENT OFFICIALS TO FOCUS ATTENTION ON THOSE RELEASES THAT MAY POSE THE GREATEST THREAT TO PUBLIC HEALTH AND WELFARE AND THE ENVIRONMENT.

- RQ ADJUSTMENTS FOR 387 HAZARDOUS SUBSTANCES WERE PROPOSED IN AN NPRM PUBLISHED IN THE FEDERAL REGISTER ON MAY 25, 1983. ON APRIL 4, 1985, EPA PUBLISHED:

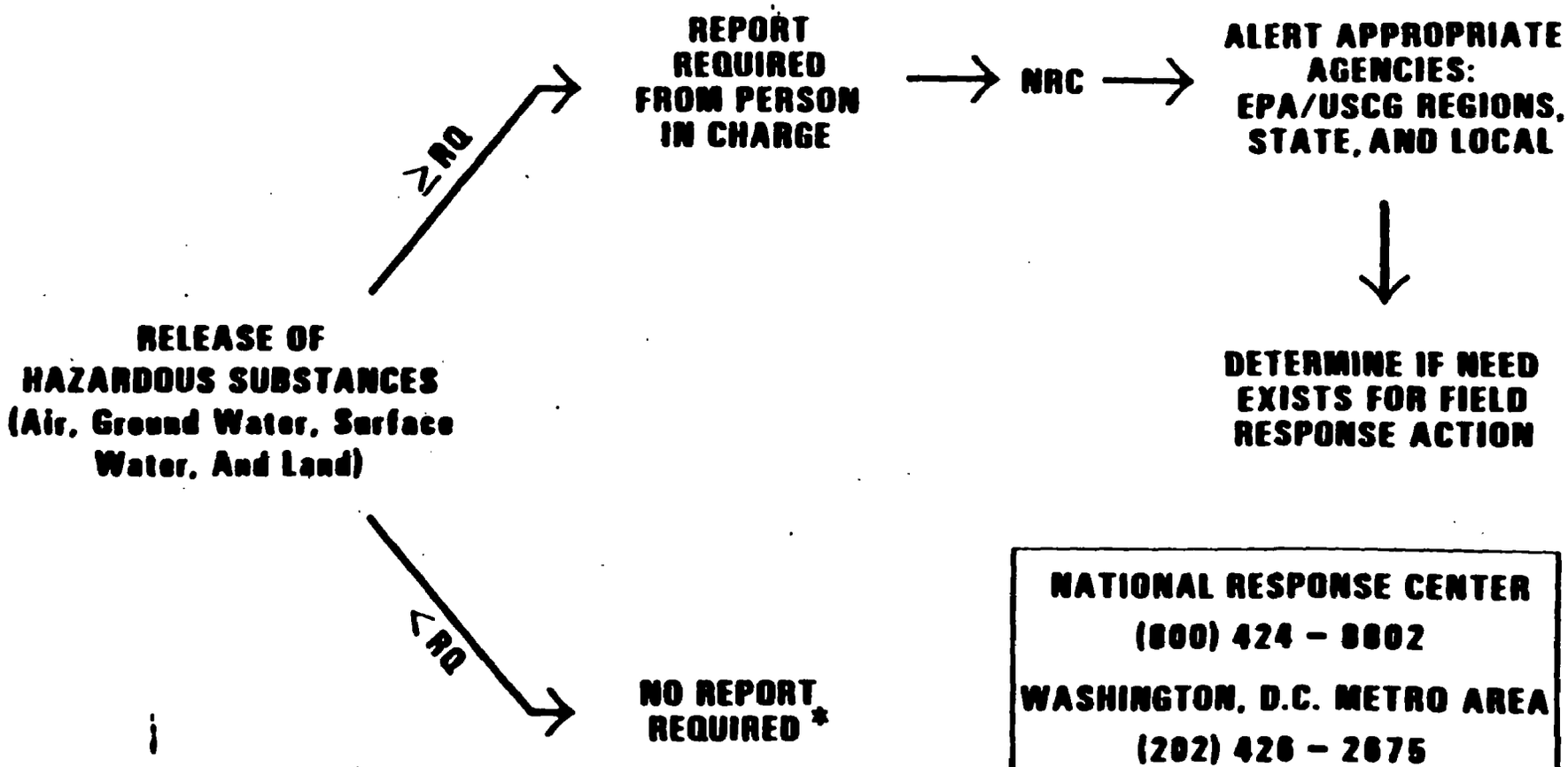
  -- A FINAL RULE ADJUSTING RQS FOR 340 OF THE HAZARDOUS SUBSTANCES FOR WHICH RQ ADJUSTMENTS WERE PROPOSED IN MAY 1983; AND

  -- AN NPRM PROPOSING RQ ADJUSTMENTS FOR 105 ADDITIONAL CERCLA HAZARDOUS SUBSTANCES.

- RQS OF THE REMAINING 260 SUBSTANCES (PRIMARILY POTENTIAL CARCINOGENS) ARE BEING ADJUSTED AND WILL FORM THE BASIS OF A THIRD NPRM. RQS FOR POTENTIAL CARCINOGENS AND RADIONUCLIDES WILL BE PROMULGATED IN 1987.

- FUTURE RQ RULEMAKINGS WILL PROVIDE CLARIFICATION OF THE REPORTING EXEMPTIONS FOR CONTINUOUS RELEASES AND FEDERALLY PERMITTED RELEASES. THOSE RULEMAKINGS WILL BE PROMULGATED IN 1987.

RQ AS TRIGGER FOR RELEASE NOTIFICATION



NATIONAL RESPONSE CENTER
(800) 424 – 8802
WASHINGTON, D.C. METRO AREA
(202) 426 – 2675

* PARTIES MAY BE RESPONSIBLE FOR RESPONSE COSTS OR NATURAL RESOURCE DAMAGES EVEN IF THE AMOUNT RELEASED IS LESS THAN THE APPLICABLE RQ.

RQ ADJUSTMENT METHODOLOGY

- THE RQ ADJUSTMENT METHODOLOGY IS BASED ON SCIENTIFIC AND TECHNICAL ANALYSIS OF THE CHARACTERISTICS OF THE HAZARDOUS SUBSTANCES.

- THE PROPOSED RQ ADJUSTMENTS USE CRITERIA THAT FOCUS ON A SUBSTANCE'S TOXICITY AND ITS CHEMICAL CHARACTERISTICS:

  -- AQUATIC TOXICITY;
  -- MAMMALIAN TOXICITY (ORAL, DERMAL, INHALATION);
  -- IGNITABILITY;
  -- REACTIVITY;
  -- CHRONIC TOXICITY; AND
  -- CARCINOGENICITY.

- RQS CAN BE ADJUSTED UPWARD ONE LEVEL BASED ON BIODEGRADABILITY, HYDROLYSIS, OR PHOTOLYSIS.

- EACH HAZARDOUS SUBSTANCE IS ASSIGNED ONE RQ APPLICABLE TO RELEASES TO ALL MEDIA (LAND, AIR, WATER).

RELATIONSHIP BETWEEN CERCLA AND CWA

- THE FOLLOWING ASPECTS OF THE CWA'S APPROACH TO DEALING WITH RELEASES OF HAZARDOUS SUBSTANCES HAVE BEEN ADOPTED UNDER CERCLA:

  -- THE FIVE RQ LEVELS OF 1, 10, 100, 1000, AND 5000 POUNDS;

  -- THE MIXTURE RULE FOR DETERMINING IF NOTIFICATION IS REQUIRED FOR MIXTURES OR SOLUTIONS CONTAINING HAZARDOUS SUBSTANCES;

  -- THE 24-HOUR PERIOD FOR MEASURING WHETHER A REPORTABLE QUANTITY OF A HAZARDOUS SUBSTANCE HAS BEEN RELEASED; AND

  -- THE REQUIREMENT THAT RELEASES BE REPORTED IMMEDIATELY TO THE NRC.

RELATIONSHIP BETWEEN CERCLA AND CWA
(CONTINUED)

- THE CWA IS LIMITED IN SCOPE AND DIFFERS FROM CERCLA IN THE FOLLOWING RESPECTS:

  -- CERCLA COVERS RELEASES INTO ALL ENVIRONMENTAL MEDIA, UNLIKE THE CWA WHICH COVERS ONLY NAVIGABLE WATERS;

  -- CERCLA DOES NOT COVER OIL SPILLS, UNLIKE THE CWA WHICH REQUIRES OIL SHEENS TO BE REPORTED TO THE NRC;

  -- CWA SECTION 311 RQS ARE BASED ON AQUATIC TOXICITY; BECAUSE CERCLA APPLIES TO ALL ENVIRONMENTAL MEDIA, RQS BASED SOLELY ON AQUATIC TOXICITY ARE NOT SUFFICIENT FOR THE CERCLA NOTIFICATION AND RESPONSE PROGRAM; AND

  -- CWA SECTIONS 311 AND 307 TOGETHER COVER ONLY A PORTION OF THE SUBSTANCES DEFINED AS HAZARDOUS UNDER CERCLA.

REPORTING REQUIREMENTS

- MECHANICS OF NOTIFICATION. AS SOON AS A RELEASER HAS KNOWLEDGE THAT A REPORTABLE RELEASE HAS OCCURRED, THE NRC MUST BE CALLED IMMEDIATELY. SUBPARTS E AND F OF THE PROPOSED NCP ALLOW THE RELEASER TO NOTIFY THE DESIGNATED OSC IN THE APPROPRIATE EPA REGION AND U.S. COAST GUARD DISTRICT IF NOTIFICATION TO THE NRC IS IMPRACTICAL.

- PERSONS COVERED. PERSONS IN CHARGE OF A FACILITY OR VESSEL ARE REQUIRED TO NOTIFY THE NRC OF REPORTABLE RELEASES.

  -- "PERSONS IN CHARGE" CAN BE INTERPRETED TO INCLUDE INDIVIDUALS AS WELL AS PUBLIC, PRIVATE, AND GOVERNMENT ENTITIES.

  -- "FACILITY" IS BROADLY DEFINED FOR LAND-BASED STATIONARY SOURCES AND VEHICLES.

  -- "VESSEL" IS ALSO BROADLY DEFINED TO INCLUDE PRACTICALLY ANYTHING THAT FLOATS.

  -- THE MAJOR EXCEPTIONS TO THESE DEFINITIONS ARE CONSUMER PRODUCTS IN CONSUMER USE.

REPORTING REQUIREMENTS
(CONTINUED)

- SUBSTANCES COVERED. ALL 705 HAZARDOUS SUBSTANCES LISTED IN THE APRIL 4, 1985 FINAL RULE ARE COVERED; ADDITIONAL SUBSTANCES MAY BE ADDED. (OSW INTENDS TO ADD ABOUT 120 MORE HAZARDOUS WASTES TO THE RCRA SECTION 3001 LIST IN THE NEAR FUTURE.) SUBSTANCES THAT ARE NOT LISTED IN THE FINAL RULE ALSO MAY BE HAZARDOUS:

  -- SUBSTANCES ARE NOT LISTED UNDER ALL POSSIBLE NAMES; AND

  -- WASTES WITH ICRE CHARACTERISTICS ARE HAZARDOUS (IF NOT SPECIFICALLY LISTED THESE WASTES HAVE AN RQ OF 100 POUNDS).

- RELEASES COVERED. THE DEFINITION OF RELEASE COVERS VIRTUALLY ALL WAYS THAT SUBSTANCES MAY ENTER THE ENVIRONMENT. HOWEVER, FOUR EXEMPTIONS ARE PROVIDED UNDER SECTION 101(22):

  -- RELEASES WHOLLY CONTAINED WITHIN A BUILDING OR STRUCTURE;
  -- MOBILE SOURCES OF AIR EMISSIONS;
  -- SOURCE, BY-PRODUCT, AND SPECIAL NUCLEAR MATERIAL; AND
  -- NORMAL APPLICATION OF FERTILIZERS.

DETERMINING WHEN AN RQ HAS BEEN RELEASED

- **REPORTING PERIOD.** CERCLA ADOPTS 24-HOURS AS THE PERIOD TO DETERMINE, FOR NOTIFICATION PURPOSES, WHETHER AN RQ HAS BEEN RELEASED.

- **MIXTURE RULE.** RELEASES OF MIXTURES OR SOLUTIONS MUST BE REPORTED IF A COMPONENT HAZARDOUS SUBSTANCE OF THE MIXTURE IS SPILLED IN AN AMOUNT EQUAL TO OR GREATER THAN ITS RQ.

  -- RQS OF DIFFERENT SUBSTANCES IN A MIXTURE ARE NOT ADDITIVE, SO THAT SPILLING A MIXTURE CONTAINING HALF AN RQ OF ONE SUBSTANCE AND HALF AN RQ OF ANOTHER SUBSTANCE DOES NOT REQUIRE A REPORT.

  -- WHEN THE IDENTITIES AND CONCENTRATIONS OF ALL SUBSTANCES IN A MIXTURE ARE NOT KNOWN, THE RQ THAT APPLIES TO THE MIXTURE IS THE LOWEST RQ OF THE COMPONENT SUBSTANCES.

- **MULTIPLE RELEASES.** WHEN REPORTABLE RELEASES OF THE SAME HAZARDOUS SUBSTANCE ARE OCCURRING AT SEVERAL LOCATIONS IN A FACILITY AT THE SAME TIME, ONLY ONE REPORT IS REQUIRED RATHER THAN MULTIPLE REPORTS.

FEDERALLY PERMITTED AND CONTINUOUS RELEASE REPORTING EXEMPTIONS

- SECTION 103 PROVIDES A COMPLETE REPORTING EXEMPTION FOR FEDERALLY PERMITTED RELEASES AND A LIMITED REPORTING EXEMPTION FOR CONTINUOUS RELEASES. THE RULEMAKING WILL BE PUBLISHED IN 1987.

- THE LIMITED EXEMPTION FOR CONTINUOUS RELEASES APPLIES TO RELEASES THAT ARE "CONTINUOUS" AND "STABLE IN QUANTITY AND RATE," AND FOR WHICH THE APPROPRIATE INITIAL REPORTS HAVE BEEN SUBMITTED.

- RELEASES THAT MEET THESE CONTINUOUS RELEASE CRITERIA NEED ONLY BE REPORTED ANNUALLY, OR WHEN A "STATISTICALLY SIGNIFICANT" INCREASE IN THE AMOUNT RELEASED OCCURS.

- SECTION 101(10) OF CERCLA DEFINES RELEASES THAT ARE "FEDERALLY PERMITTED." THESE RELEASES ARE COVERED BY SPECIFIED PERMITS OR REGULATIONS UNDER CWA, RCRA, CAA, THE MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT, THE SAFE DRINKING WATER ACT, AND THE ATOMIC ENERGY ACT.

Applicants state that granting their request will permit the Applicants to sell the subject gas on the spot market under their small producer certificate.

Applicants state that the August 9, 1965, contract expired on November 7, 1986, and that under the expired contract ANR has no take-or-pay obligation. Applicants state that the gas qualifies under NGPA section 108(a) and that the deliverability is approximately 650 Mcf/d.

Since Applicants allege that they are subject to substantially reduced takes without payment and have requested that their application be considered on an expedited basis, all as more fully described in the application which is on file with the Commission and open to public inspection, any person desiring to be heard or to make any protest with reference to said application should on or before 15 days after the date of publication of this notice in the Federal Register, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in a proceeding must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-16983 Filed 7-24-87; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3239-7]

Superfund Program; Covenants Not To Sue

AGENCY: Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The Agency is publishing its *Interim Guidance* governing the issuance of covenants not to sue under Section 122(f) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), in order to inform the public and to solicit public comment on this important aspect of the Superfund enforcement process. The guidance applies to private party cleanup and cost recovery settlements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by SARA.

DATE: Comments must be provided on or before September 25, 1987.

ADDRESS: Comments should be addressed to Jon Fleuchaus, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Waste Enforcement Division, LE-134S, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Jon Fleuchaus, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, LE-134S, 401 M St. SW., Washington, DC 20460, (202 382-3077.

SUPPLEMENTARY INFORMATION: Previously, on February 5, 1985, the Agency issued an Interim Settlement Policy which provided guidance on the appropriateness of the use of releases from liability, or convenants not to sue, in settlement of CERCLA cases, 50 FR 5034 (1985). The guidance published today on covenants not to sue reflects Congress' adoption of a provision governing the use of such covenants in section 122(f) of SARA.

Briefly, section 122(f) permits EPA, by delegation from the President, to issue covenants not sue for CERCLA liability, including future liability, if certain criteria are met. Section 122(f)(4) of CERCLA identifies a number of factors for the Agency to consider in determining whether to provide a covenant not to sue. These factors include:

- The effectiveness and reliability of the remedy;
- The nature of the risks remaining at the facility;
- The extent to which performance standards are included;
- The extent to which the response action provides a complete remedy;
- The extent to which the technology has been demonstrated to be effective;
- Whether the Fund would be available for any additional remedial action;
- Whether the remedial action will be carried out, in whole or in part, by the responsible parties.

Section 122(f)(3) provides that any covenant not to sue concerning future liability shall not take effect until EPA certifies that the remedial action is complete. Section 122(f)(6)(A) specifies that convenants not to sue for future liability generally must not apply to liability arising from unknown conditions. Finally, section 122(f)(6)(C) allows EPA to include in a covenant not to sue provisions for future enforcement action necessary to protect public health, welfare, and the environment.

Implementation of section 122(f) raises three major issues. The first of these issues is what type of "reopeners" should be included in covenants not to sue. A "reopener" is a provision which reserves EPA's right to require settling parties to take further response action, in addition to cleanup measures already provided for in a settlement agreement, notwithstanding the covenant not to sue. Under the Interim CERCLA Settlement Policy, EPA had required that, at a minimum, there must be reopeners permitting the government to seek further response action if information is received after entry of the consent decree regarding previously unknown site conditions or new scientific determinations, and such information indicates there is an imminent and substantial endangerment to public health or the environment. As noted above, section 122(f)(6)(A) of SARA mandates that, subject only to narrow exceptions, a reopener for unknown conditions be included in all covenants not to sue. One difference from the Settlement Policy, however, is that Congress did not limit the unknown conditions reopener by requiring an imminent and substantial endangerment threshold. Since the unknown conditions reopener has been established by the statute, the primary question is what additional reopeners are appropriate.

The statute not only requires the inclusion of the unknown conditions reopener in virtually all settlements, but also authorizes the inclusion of other limitations in covenants not to sue if necessary and appropriate to protect public health or the environment. Section 122(f)(6)(C). EPA has decided to implement section 122(f)(6)(C) by including in covenants not to sue a second reopener covering situations where additional information reveals that the remedy no longer protects public health or the environment. Further, this reopener is triggered by a threshold of "protection of public health or the environment" rather than the "imminent and substantial endangerment" threshold prescribed in the Settlement Policy.

Order No. 436 on June 23, 1987. In vacating Order No. 436, the Court rejected challenges to the Commission's statement of policy in § 2.77 of its Regulations. Section 2.77 states that the Commission will consider on an expedited basis applications for certificate and abandonment authority where the producers assert they are subject to substantially reduced takes without payment.

EPA's reasons for adopting this second reopener are several. First, although SARA does not explicitly require this reopener, both the statute and the legislative history evince a Congressional concern that responsible parties remain liable for failure of the remedial action to protect public health or the environment. For example, the mixed funding provision in section 122(b) clearly anticipates that the responsible parties who have settled retain liability for additional work necessary to address remedy failure. The five-year review provision in section 121(c) also reflects Congress' concern for remedy failure by mandating periodic reviews to ensure that remedial actions continue to protect public health and the environment. If a remedy does not meet this standard, EPA may take or require such additional remedial action as is necessary.

The second major issue addressed in the guidance is how EPA will exercise its discretion to seek additional remedial relief in the period following settlement but prior to the effective date of the covenant not to sue for future liability. Responsible parties have expressed concern that prior to the date on which the covenant becomes effective, EPA can alter its Record of Decision and impose additional costs upon settlors without the slightest change in circumstances. To assure settling parties that EPA does not intend such a result, EPA will include language in covenants, limiting EPA's ability to reopen a settled remedial matter to those situations where additional information is received, in whole or in part, after entering of the consent decree indicating that the remedy no longer protects public health or the environment. As explained above, EPA thinks that such a provision preserves Congressional intent as to the proper allocation of the risk or remedy failure while also assuring those same parties that some degree of certainty attaches to a settled matter.

The third issue involves the Agency's responsibility to certify completion of the remedial action. Section 122(f)(3) provides that a covenant not to sue for future liability cannot take effect until EPA has certified that remedial action has been completed. Section 122 does not include specific guidence on when a cleanup has been completed. CERCLA cleanups often involve the construction of some type of facility designed to correct contamination at the site and the operation and maintenance of that facility for the indefinite future. In this circumstance, certification of completion should not have to wait until all operation and maintenance activities are completed. Specific distinctions between remedial action and operation and maintenance are drawn in section 104(c)(6) of S[illegible]. Although these [illegible] distinctions are not strictly applicable as a legal matter to releases from liability, the Agency believes that it is unneccessarily confusing and inefficient to have two separate sets of definitions applied to remedial action, and will therefore as a matter of policy apply the distinctions in section 104 to releases from liability.

Section 104(c)(6) of CERCLA establishes definitions for purposes of the States' cost share of CERCLA response actions. It defines completed remedial action to include the completion of treatment or other measures necessary to restore surface and ground water quality to a level that assures protection of human health and the environment. The operation of such measures for a period of up to ten years after the construction or installation of the remedy shall be considered remedial action. Activities required to maintain the effectiveness of such measures following this ten-year period or the completion of remedial action, whichever is sooner, shall be considered operation or maintenance.

Questions have arisen in determining whether pumping and treating of goundwater constitutes part of the remedial action, or part of operation and maintenance, for purposes of funding. Section 104(c)(6) indicates that the completion of treatment or other measures necessary to restore surface and gound water quality falls within the definition of remedial action, rather than operation and maintenance, and can therefore be paid for out of the Fund for a period of up to ten years. However, ground or surface water cleanup measures initiated for reasons other than restoration would be treated as operation and maintenance, as would source control actions.

We recognize that this guidance addresses important and complex issues and for that reason are requesting public comment. We will evaluate all comments received for the purpose of determining whether any modifications to the guidance are warranted.

The interim guidance follows.

Date: July 17, 1987.

Edward E. Reich,

Acting Assistant Administrator for Enforcement and Compliance Monitoring.

Date: July 17, 1987.

J. Winston Porter,

Assistant Administrator for Solid Waste and Emergency Response.

July 10, 1987.

Memorandum

Subject: Covenants Not To Sue Under SARA.

From: Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, F. Henery Habicht II, Assistant Attorney General, U.S. Department of Justice.

To: Regional Administrators, Regions I–X

I. Introduction

In the Interim CERCLA Settlement Policy, 50 FR 5034 (1986), EPA provided guidance on when releases from liability were appropriate as consideration for an agreement involving a private party cleanup or reimbursement of EPA's costs. That policy expressed a strong preference for issuing releases in the form of covenants not to sue. The Superfund Amendments and Reauthorization Act (SARA) confirms the authority of EPA to release responsible parties from certain liabilities in settlement of an EPA claim under CERCLA. In section 122(f) of SARA, Congress adopted EPA's policy of drafting releases in the form of covenants not to sue and also established specific requirements governing the Agency's ability to issue such covenants. SARA includes several express requirements regarding covenants not to sue and also gives the Agency discretion to place further conditions on the extent of such covenants. This memorandum updates the Interim Settlement Policy by providing guidance on the implementation of the mandatory and discretionary provisions of SARA relating to use of covenants not to sue in consent decrees. Attached to this guidance is a model covenant not to sue.

II. Summary of Statutory Provisions

Section 122(f)(1) authorizes EPA to covenant not to sue responsibile partues for "any liability to the United States under this Act, including future liability, resulting from a release or threatened release addressed by a remedial action. . . ." Such covenants may be provided if each of the following conditions are met:

(A) The covenant not to sue is in the public interest;

(B) The covenant not to sue would expedite the response;

(C) The settlor is in full compliance with a consent decree under § 106 addressing the release or threatened release:

(D) EPA has approved the response action.

Section 122(f)(1).

Prior to entering a covenant not to sue under section 122(f)(1), EPA must assess the appropriateness of the covenant under seven factors set forth in section 122(f)(4). These factors, which relate to the effectiveness, reliability, and enforceability of the remedy, and the nature of the risk remaining at the site, include:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

Section 122(f)(4)

In addition to authorizing EPA, in its discretion, to covenant not to sue for liabilty, including future liability, section 112(f) mandates that EPA grant a covenant not to sue for future liability in two specific circumstances. Section 122(f)(2) provides that where the four conditions in section 122(f)(1) have been met, EPA must issue a covenant not to sue for "future liability for future releases" if: (1) EPA selects a remedial action involving offsite disposal of a hazardous substance after rejecting an onsite response which fully complies with the National Contingency Plan (NCP); or (2) the selected remedial action requires the destruction, elimination, or permanent immobilization of hazardous substances. Such a covenant may only address the portion of the remedial action which involves these two situations.

Assuming that a covenant not to sue for future liability is otherwise authorized under section 122(f), section 122(f)(3) prescribes that a covenant not to sue for future liability shall not take effect until EPA has certified that the remedial action has been completed in accordance with the terms of CERCLA. Moreover, whether the covenant is for future or present liability, section 122(f)(5) conditions such covenants upon satisfactory performance of the terms of the settlement agreement.

Finally, section 122(f)(6) addresses exceptions to covenants not to sue for future liability provided under Section 122(f)(1). For example, EPA must except from any covenant not to sue for future liability any future liability related to the release or threatened release which is the subject of the covenant where such liability arises from conditions unknown at the time the remedial action is certified complete. Section 122(f)(6)(A). This "reopener" for unknown conditions is not required for special covenants granted under section 122(f)(2) or for de minimis settlements under section 122(g). In addition, section 122(f)(6)(B) provides that a waiver for the unknown conditions reopener in section 122(f)(6)(A) may be granted in "extraordinary circumstances." In determining whether extraordinary circumstances exist, EPA must consider "such factors as those referred to in [section 122(f)(4)] and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, pubilc interest considerations, precedential value, and inequities and aggravating factors." Section 122(f)(6)(B). Nonetheless, even if extraordinary circumstances exist, the unknown conditions exception may not be waived if the terms of the agreement do not provide reasonable assurances that public health and the environment will be protected from any future releases. Section 122(f)(6)(C) authorizes EPA to except from covenants not to sue future enforcement actions necessary to protect public health, welfare, and the environment.

III. Explanation of Key Statutory Provisions

In interpreting Section 122(f) and developing a policy for its implementation, EPA has looked to the expressions of Congressional intent contained in other parts of SARA and the relevant legislative history. These courses indicate that section 122(f) serves several goals, including:

(1) Encouraging private party cleanups by providing EPA with the authority to grant covenants not to sue;

(2) Encouraging more permanent cleanups by codifying the principle that the more permanent the cleanup the more complete the release;

(3) Protecting the public by ensuring that responsible parties remain liable for future releases requiring future remedial action.

A. Present Liability and Future Liability

In section 122(f)(1), Congress authorizes EPA to issue covenants not to sue for both present liability and future liability. In the context of settlements involving remedial action, EPA interprets present liability as a responsible party's obligation to pay those response costs already incurred by the United States related to a site and to complete those remedial activities set forth in the Record of Decision (ROD) for that site, including meeting any performance standards or other measures established through the remedial design (RD) process. Future liability refers to a responsible party's obligation to perform any additional response activities at the site which are necessary to protect public health and the environment.

In deciding whether to provide a covenant not to sue for present liability, EPA must consider the criteria in sections 122(f)(1) and 122(f)(4). These factors essentially codify the approach taken in EPA's Interim CERCLA Settlement Policy. There, EPA stated as a general principle that "the more effective and reliable the remedy, the more likely it is that the Agency can negotiate a more expansive release." In judging the reliability and effectiveness of the remedy, the Interim Settlement Policy placed special emphasis on whether the remedy requires that health-based performance standards be met. As noted above, section 122(f)(4) explicitly makes performance standards a factor to be considered and EPA continues to regard this factor as critical. Where the criteria in section 122(f)(1) are fulfilled and where consideration of the factors in section 122(f)(4) suggests the remedy is reliable, effective, and enforceable (such as, for example, where the remedy includes numerical performance standards), a covenant not to sue for present liability may be provided which takes effect upon approval of the consent decree by the court. On the other hand, where the criteria in paragraph (f)(1) are met but the factors in section 122(f)(4) indicate that some questions remain about the reliability, effectiveness, and enforceability of the remedy, any convenant not to sue for present liability, if appropriate at all, would have to be conditioned on a

demonstration of the effectiveness and reliability of that remedy.

Covenants not to sue for future liability are also made contingent on the criteria set forth in section 122(f)(1) and the factors enumerated in section 122(f)(4). When these conditions are met, EPA may, in its discretion, provide a convenant not to sue for future liability but such a covenant, according to section 122(f)(3), may not take effect until EPA certifies that the remedial action has been completed. Prior to certification, therefore, the settling party remains fully responsible for any future liability for future remedial action necessary at the site. Following certification, unless a special covenant under section 122(f)(2) is required or extraordinary circumstances are present, the covenant not to sue for future liability is subject to a reopener covering (1) unknown conditions as mandated by section 122(f)(6)(A), (2) any other conditions EPA deems advisable based on the section 122(f)(4) factors, and (3) future enforcement activity necessary and appropriate to assure protection of public health, welfare, and the environment as provided in section 122(f)(6)(C).

B. Certification of Completion of the Remedial Action

Section 122(f)(3) specifies that a covenant not to sue for future liability shall not take effect until EPA certifies the remedial action is complete. In the context of paragraph 122(f)(3), EPA interprets completion of the remedial action as that date at which remedial construction has been completed. Where a remedy requires operational activities, remedial construction would be judged complete when it can be demonstrated that the operation of the remedy is successfully attaining the requirements set forth in the ROD and RD.

The exact point when EPA can certify completion of a particular remedial action depends on the specific requirements of that remedial action. Each consent decree should include a detailed list of those activities which must be completed before certification can occur.

Certification of completion under section 122(f)(3) does not in any way affect a settling party's remaining obligations under the consent decree. All remedial activities, including maintenance and monitoring, must be continued as required by the terms of the consent decree.

C. Reopeners

Under the CERCLA Interim Settlement Policy, EPA required that there be included in every consent decree reopeners covering situations where EPA received additional information after the time of the agreement regarding site conditions or scientific determinations which indicates that the site may pose an imminent and substantial endangerment to the public health or welfare or to the environment. Under section 122(f), a slightly different approach to reopeners must be followed. Section 122(f) provides that for future liability, no covenant not to sue shall be effective prior to certification of completion of the remedical action. Technically, therefore, since there is no release of future liability prior to certification, there is no need for reopeners in that time period. Reopeners for future liability only becomes necessary after certification, when the covenant not to sue takes effect.

As to reopeners regarding future liability, Congress expressly required a reopener for unknown conditions. In contrast to the Interim Settlement Policy, however, Congress expressly eliminated any endangerment threshold for that reopener. Congress also authorized EPA, in section 122(f)(6)(C), to include any other reopeners "necessary and appropriate to assure protection of public health, welfare, and the environment." EPA believes that it is in the public interest and consistent with Congressional intent to require a second reopener covering situations where additional information reveals that the remedy is no longer protective of public health or the environment. It is not in the public interest to release responsible parties from liability for additional response actions made necessary by new information, given, as noted in the Interim Settlement Policy, "the current state of scientific uncertainty concerning the impacts of hazardous substances, our ability to detect them, and the effectiveness of remedies at hazardous waste sites." 50 FR 5039.

Congressional concern with situations where the remedy fails to protect public health or the environment can be seen in SARA's mixed funding and five-year review provisions. The mixed funding provision in section 122(b) states that if mixed funding is adopted at a particular site, "the Fund shall be subject to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action." This provision anticipates that the responsible parties who have settled retain liability for additional work necessary to address remedy failure. Further support for this proposition can be found in the Conference Report statement that the continuing proportional Fund obligation in mixed funding [illegible] a settlement incentive. H.R. Rep. [illegible] 99th Cong., 2d Sess. [illegible]). The Fund's continuing obligation would only be an incentive to settlement if in non-mixed funding cases settling parties retained liability where the remedy fails to protect public health or the environment.

The five-year review provision in section 121(c) also addresses Congress' concern for situations where the remedy fails to protect public health and the environment by mandating periodic reviews to assure that remedial actions do just that. If a remedy is found not to protect public health or the environment, the statute provides that EPA may take or require such additional remedial action as is necessary.

Congressional concern that remedial action might fail to protect public health and the environment was not limited narrowly to a focus on the reliability of the remedial technology at the site. Rather, this concern apparently extended to any situation in the future at the site which is judged to present a threat to public health and the environment. EPA will follow this interpretation of remedy failure. For example, should health effects studies reveal that the health-based performance levels relied upon in the ROD are not protective of public health or the environment, *and* that public health or the environment will be threatened without further response action, then the EPA could invoke the remedy failure reopener. The reopener for remedy failure, however, is not meant to require changes purely based on advances in technology. Under the reopener, EPA would not compel settling parties to implement newly-developed, more permanent remedial technological unless EPA can show that the present remedy does not protect public health or the environment. Neither is the remedy failure reopener intended to give EPA the option to make changes in a remedial action absent additional information received following the entry of the consent decree. EPA does not consider the phrase "information received, in whole or in part, after entry of the consent decree," as used in the attached model covenant, to include a new analysis of the same information comprising the record of the initial remedy selection decision.

In short, this reopener is similar to the reopener for new scientific information provided for in the Interim Settlement

Policy, although the imminent and substantial endangerment threshold has not been included. To require a showing of imminent and substantial endangerment would be inconsistent with the provision in section 122(f) of SARA with regard to unknown conditions as well as the provisions concerning future response work in section 122(f)(6)(C) and section 121(c). Moreover, it is the Agency's view that requiring different showings for the two reopeners would lead to protracted disputes about which reopener applied to situations necessitating additional response activity.

EPA believes that in order to give settlors some measures of certainly prior to certification, the most reasonable means to implement the authority in section 122(f) is to specify in consent decrees those pre-certification situations in which EPA would seek further remedial action. Those situations at a minimum would include the circumstances described in the future liability reopeners:

(1) Discovery of previously unknown conditions; and

(2) Situations where additional information reveals that the remedy is no longer protective of public health and the environment.

Thus, prior to certification of completion of the remedial action, EPA will reserve its right to institute new proceedings to compel, or recover costs for further response action made necessary by information received, in whole or in part, after entering of the consent degree related to either unknown conditions or remedy failure. Following certification of completion of the remedial action, EPA will reserve its right to institute proceedings only to address information received after certification of completion of the remedial action related to unknown conditions or remedy failure. Pre-certification reopeners for unknown conditions and remedy failure apply to all covenants not to sue, even to special convenants under section 122(f)(2).

Particularly in the pre-certification period, the relationship of the remedy to the covenant and the reopeners should be carefully considered. EPA may insist on broader reopeners where the consent decree does not provide for a remedy that meets the preference in section 121(b)(1) for a permanent and significant reduction of the volume, toxicity, or mobility of the hazardous substances. In those instances, EPA shall assess the need for broader reopeners in the covenant not to sue based on the factors identified in section 122(f)(4). Nevertheless, once EPA has determined what reopeners are appropriate for the pre-certification period, EPA will agree in the covenant to institute new proceedings only where those reopener provisions are met.

Although covenants not to sue must include, at a minimum, the above-described reopeners during the pre-certification period, reopeners are not mandated in all circumstances in covenants not to sue applicable to the period following completion of the remedial action. Two statutory provisions address this period. First, section 122(f)(2) mandates that EPA issue a special covenant not to sue for future liability in two narrow circumstances: (1) Offsite disposal following rejection of an onsite remedy complying with the NCP; and (2) complete destruction of the hazardous substances. Such a special covenant may not contain reopeners for the post-completion period. Second, section 122(f)(6)(B) specifies that in extraordinary circumstances EPA may exclude a post-completion reopener for unknown conditions. This extraordinary circumstance waiver is only available where other terms in the agreement provide all reasonable assurances that public health and the environment will be protected. As a policy matter, EPA would also not include the reopener for later-received information relating to failure in a situation where the conditions in section 12(f)(6)(B) are met. EPA, however, is barred from granting covenants not to sue without reopeners absent a finding that a special covenant is appropriate or that extraordinary circumstances exist.

D. Extraordinary Circumstances

Section 122(f)(6)(B) provides that EPA may forego including a reopener for unknown conditions when extraordinary circumstances exist *and* "other terms, condition, or requirements of the agreement . . . are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility."

The legislative history on this provision indicates that it should be narrowly applied. The House-Senate Conference Report states that "[t]his provision should be implemented in an manner consistent with the current application of the Administration settlement policy as to unknown conditions." Conference Report, H.R. Rep. No. 99-962, 99th Cong., 2d Sess. 255 (1986). By this statement, the Conference Committee endorsed EPA's extremely limited use of the extraordinary circumstances waiver for reopeners contained in the CERCLA Interim Settlement Policy.

In section 122(f)(6)(B), Congress lists as relevant factors regarding extraordinary circumstances: "those [factors] referred to in [section 122(f)](4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggrevating factors." EPA has already explained how many of these factors will be interpreted in the Interim Settlement Policy.

A finding of extraordinary circumstances alone is not sufficient to meet the requirements of section 122(f)(6)(B). That provision also mandates that the unknown conditions reopener may only be waiver if other terms of the agreement provide all reasonable assurances that public health and the environment will be protected. One factor which may be considered in determining whether all reasonable assurances have been provided is whether a settling party has offered a premium payment to insure against the risk that future remedial action will be required at the site.

One of the instances where EPA has used the extraordinary circumstances exception in the past is where a responsible party has filed for bankruptcy. Whether or not a responsible party's bankruptcy filing presents extraordinary circumstances will depend on a number of case-specific factors involving, among other things, the grounds upon which the party is liable, and the type of bankruptcy relief-liquidation or reorganization-that is being sought by the debtor. EPA will not grant a debtor a convenant not to sue which is broader than a discharge under the bankruptcy laws but neither will EPA make settlement impossible by insisting on a convenant narrower than the discharge the debtor is entitled to by operation of the bankruptcy laws.

Waivers of reopeners under section 122(f)(6)(B) will require prior approval by the Assistant Administrators for OECM and OSWER and the Assistant Attorney General as provided in the Interim Settlement Policy, 50 FR at 5040.

E. Special Convenants

Special convenants not to sue under section 122(f)(2) are authorized for two extremely limited circumstances. First, under section 122(f)(2)(A) a special covenant is appropriate where EPA selects a remedial action involving offsite disposal after rejecting a proposed onsite remedy which is consistent with the NCP. This special convenant, it should be emphasized, it only available where EPA has determined that an onsite remedy fully

complies with the requirements of the NCP, but that onsite remedy is rejected in favor of offsite disposal. It is not sufficient for EPA to have merely considered onsite proposals in choosing the remedy. Further, the Conference Report makes clear that this provision was adopted in the context of section 121 requirements regarding offsite disposal and therefore EPA will only grant this special covenant in decrees involving remedies selected under section 121. Conference Report, H.R. Rep. 99-962, 99th Cong., 2d Sess. 234 (1986).

Second, under section 122(f)(2)(B), EPA will issue a special covenant where the remedy involves each of the following elements:

(1) Treatment of hazardous substances so as to

(2) Destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, *and*

(3) EPA determines that

(a) The substances no longer present any current or currently foreseeable future significant risk to public health, welfare, or the environment,

(b) No byproduct of the treatment or destruction process presents any significant hazard to public health, welfare, or the environment, *and*

(c) All byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or currently foreseeable future significant risk to public health, welfare, or the environment.

The term "permanent immobilization" applies only to a site where treatment technologies change the fundamental nature and character of the hazardous substances so that no person faces a significant risk of being exposed to the hazardous substance. Conference Report, H.R. Rep. No. 99-962, 99th Cong., 2d Sess. 254-55 (1986). Use of "permanent" storage containers or other containment technology does not qualify as permanent immobilization under this provision.

Finally, under either of the two circumstances in section 122(f)(2), the special covenant applies only to those hazardous substances actually transported offsite or destroyed, eliminated, or permanently immobilized. Thus to the extent that hazardous substances remain onsite, the standard reopeners for future liability must be included in the convenant not to sue. For example, Site X has soil contamination to a depth of 30 feet but under present health standards only the first five feet need to be incinerated. Assuming the incineration process meets the requirements of section 122(f)(2)(B), a special convenant may be granted for the incinerated soil but under no circumstances would a covenant not to sue for future liability without the standard reopeners be issued for the contaminated lower 25 feet of soil.

IV. Status of Interim Settlement Policy

The Interim Settlement Policy remains in effect to the extent not contradicted by SARA or by this or any other subsequent guidance. Nonetheless, a number of points from that policy are worth re-emphasizing:

(1) Covenants not to sue will not be issued for redisposal liability unless section 122(f)(2)(A) applies:

(2) Covenants not to sue in agreements where EPA has performed the remedy and EPA is seeking only the recovery of its costs should be no more expansive than covenants not to sue in consent decrees where the responsible parties agree to do the remedy;

(3) A covenant not to sue may be given only to the responsible party providing consideration for the covenant:

(4) The covenant not to sue must not cover any claims other than those involved for that site—thus unless unusual factors are present the covenant not to sue will apply only to claims under sections 106 and 107 of CERCLA and section 7003 of RCRA:

(5) The covenant not to sue must expressly be limited to civil claims:

(6) A covenant not to sue for a remedial investigation and feasibility study or a removal action must be limited to the work actually completed:

(7) A covenant not to sue regarding natural resources may only be provided by the Federal trustee responsible for those resources:

(8) Responsible parties must release any related claims against the Hazardous Substances Superfund.

Disclaimer

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

Covenant Not To Sue

1. A. Except as specifically provided in Subparagraph C, the United States covenants not to sue the settling parties for Covered Matters. Covered Matters shall include any and all civil liability to the United States for causes of action arising under §§ 106 and 107(a) of CERCLA and § 7003 of RCRA relating to the Site.

B. With respect to future liability, this covenant not to sue shall take effect upon certification by EPA of the completion of the remedial action. A determination regarding certification of completion will be made by EPA within [one year] of successful completion of the activities listed in Appendix _____

C. Notwithstanding any other provision in this Consent Decree, the United States reserves the right to institute proceedings in this action or in a new action (1) seeking to compel Settling Parties to perform additional response work at the Site or (2) seeking reimbursement of the United States' response costs, if:

(1) For proceedings prior to EPA certification of completion of the remedial action,

(i) Conditions at the Site, previously unknown to the United States, are discovered after the entry of this Consent Decree, or

(ii) Information is received, in whole or in part, after the entry of this Consent Decree,

and these previously unknown conditions or this information indicates that the remedial action is not protective of human health and the environment:

(2) For proceedings subsequent to EPA certification of completion of the remedial action,

(i) Conditions at the Site, previously unknown to the United States, are discovered after the certification of completion by EPA, or

(ii) Information received, in whole or in part, after the certification of completion by EPA,

and these previously unknown conditions or this information indicates that the remedial action is not protective of human health and the environment.

D. The United States' right to institute proceedings in this action or in a new action seeking to compel Settling Parties to perform additional response work at the Site or seeking reimbursement of the United States for response costs at the Site, may only be exercised where the conditions in subparagraph C are met. [Caution: check to insure that this subparagraph does not waive other reserved rights in the decree relating to additional response work.]

E. Notwithstanding any other provision in this Consent Decree, the covenant not to sue in subparagraph A shall not relieve the settling parties of their obligation to meet and maintain

compliance with the requirements set forth in this Consent Decree including the Record of Decision and Remedial Design for the Site which is incorporated herein.

[FR Doc. 87-16955 Filed 7-27-87; 8:45 am]

BILLING CODE [illegible]

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Submitted to OMB for Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of information collection submitted to OMB for review and approval under the Paperwork Reduction Act of 1980.

Title of Information Collection

Consolidated Reports of Condition and Income (Insured State Nonmember Commercial Banks) (OMB No. 3064-0052).

Background

In accordance with requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the FDIC hereby gives notice that it has submitted to the Office of Management and Budget a request for OMB review for the information collection system identified above.

ADDRESS: Written comments regarding the submission should be addressed to Robert Fishman, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 and to John Keiper, Assistant Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429.

Comments:

Comments on this collection of information should be submitted on or before August 28, 1987.

FOR FURTHER INFORMATION CONTACT: Requests for a copy of the submission should be sent to John Keiper, Assistant Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429, telephone (202) 898-3810.

SUMMARY: The FDIC is submitting for OMB review changes to the Consolidated Reports of Condition and Income (Call Reports) filed quarterly by insured state nonmember commercial banks. These revisions were approved at the April 21, 1987, meeting of the Federal Financial Institutions Examination Council (FFIEC) and are designed to reduce the reporting burden imposed by Call Report Schedule RC-J, "Repricing Opportunities for Selected Balance Sheet Categories," while preserving rate sensitivity data essential to the commercial bank surveillance activities of the three federal banking agencies. The proposed changes involve simplifying the methods used for presenting maturity and repricing frequency data. These changes, if approved, would become effective as of the March 31, 1988, report date.

The FFIEC approved one other change in the Call Report requirements that is unrelated to Schedule RC-J. This involves a change in reporting the "Loans secured by 1-4 family residential properties" item in the loan schedule (Schedule RC-C). This change would become effective as of the December 31, 1987, report date.

As a result of the proposed changes it is estimated that insured state nonmember banks, collectively, would receive an annual reduction in reporting burden of 121,008 hours. The annual reporting burden on these banks would then amount to 668,996 hours.

Dated: July 22, 1987.

Federal Deposit Insurance Corporation.

Margaret M. Olsen,

Deputy Executive Secretary.

[FR Doc. 87-16944 Filed 7-24-87; 8:45 am]

BILLING CODE 6714-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-795-DR]

Major Disaster and Related Determinations; Iowa

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Iowa, (FEMA-795-DR), dated July 17, 1987, and related determinations.

DATED: July 17, 1987.

FOR FURTHER INFORMATION CONTACT: Sewall H.E. Johnson, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3616.

Notice

Notice is hereby given that, in a letter of July 17, 1987, the President declared a major disaster under the authority of the Disaster Relief Act of 1974, as amended (42 U.S.C. 5121 *et seq.*, Pub. L. 93-288), as follows:

I have determined that the damage in certain areas of the State of Iowa resulting from severe storms and flooding during the period May 28 through 31, 1987, is of sufficient severity and magnitude to warrant a major disaster declaration under Public Law 93-288. I therefore, declare that such a major disaster exists in the State of Iowa.

In order to provide Federal assistance, you are hereby authorized to provide Public Assistance only to assist State and local governments for repair of damages to public facilities required as a result of this incident. Consistent with the requirement that Federal assistance be supplemental, Federal funds provided under PL 93-288 for Public Assistance will be limited to 75 percent of total eligible costs in the designated area. You are further authorized to allocate, from funds available for these purposes, such amounts as you find necessary for administrative expenses.

The time period prescribed for the implementation of section 313(a), priority to certain applications for public facility and public housing assistance, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Mr. Paul Ward of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Iowa to have been affected adversely by this declared major disaster: Fremont, Mills, Montgomery, and Page Counties for Public Assistance only.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Julius W. Becton, Jr.,

Director.

[FR Doc. 87-16922 Filed 7-24-87; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-796-DR]

Major Disaster and Related Determinations; Ohio

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Ohio, (FEMA-796-DR), dated July 17, 1987, and related determinations.

DATED: July 17, 1987.

FOR FURTHER INFORMATION CONTACT: Sewall H.E. Johnson, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3616.

OSWER # 9835.2b

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

SEP 21 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Waste Management Division Directors, Regions I-X

I have attached the final guidance addressing the use of stipulated penalties in civil judicial settlements under CERCLA and RCRA Section 7003. This document reflects comments which were received from the Office of Waste Programs Enforcement (OWPE), the Department of Justice (DOJ), and various Regional offices.

This guidance does not apply to administrative orders, such as RI/FS orders. In addition, to complement this guidance, the Agency is considering additional guidance to provide positive incentives for defendants to expedite completion of work under consent decrees.

I appreciate your assistance in the preparation of this guidance.

Attachment

cc: J. [redacted]ton Porter, Assistant Administrator for Solid Waste [redacted]mergency Response
Gene A. Lucero, Director, Office of Waste Programs Enforcement
Roger J. Marzulla, Acting Assistant Attorney General, Land and Natural Resources Division, Department of Justice
David T. Buente, Chief, Environmental Enforcement Section, U.S. Department of Justice

GUIDANCE ON THE USE OF STIPULATED PENALTIES

IN

HAZARDOUS WASTE CONSENT DECREES

SEP 21 1987

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Enforcement and Compliance Monitoring
1987

TABLE OF CONTENTS

Guidance on the Use of Stipulated Penalties
in Hazardous Waste Consent Decrees

		Page
I.	INTRODUCTION	1
II.	GUIDANCE	2
	A. Use of Stipulated Penalties	
	1. General Rule	2
	2. When Penalties May Be Excused or Delayed	4
	a. Force Majeure Event	4
	b. Dispute Resolution Period	5
	c. Period of Correction by Defendant	6
	d. Missed Interim Deadlines	6
	e. Grace Period	6
	B. Amount of Stipulated Penalties	
	1. General Rule	7
	2. Escalating Penalty	8
	3. Sharing Penalties with the State	9
	C. Collection of Stipulated Penalties	
	1. General Rule	9
	2. Procedure for Collecting Penalties	10
	3. Payment of Penalties	10
	D. Use of Other Remedies	11
	E. Purpose and Use of this Guidance	12
	APPENDIX - Model Stipulated Penalties Provisions	

I. INTRODUCTION

This document provides guidance on the use of stipulated penalties in hazardous waste judicial consent decrees. Stipulated penalties are fixed sums of money that a defendant agrees to pay for violating the terms of a decree. Such penalties are an effective enforcement tool for encouraging compliance with a consent decree.

This guidance applies to consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, as amended, and Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6973, supplements existing guidance[1/] issued by the United States Environmental Protection Agency (EPA), and incorporates recent Agency experiences in negotiating and overseeing consent decrees. The Agency strongly encourages the use of stipulated penalty provisions in consent decrees. It also supports the use of contempt penalties, statutory penalties and injunctive relief as additional sanctions for the violation of consent decrees.

1/ *See* "Drafting Consent Decrees in Hazardous Waste Imminent Hazard Cases" (Office of Enforcement and Compliance Monitoring (OECM), Office of Solid Waste and Emergency Response (OSWER), May 1, 1985), "Guidance for Drafting Judicial Consent Decrees" (OECM, October 19, 1983), "Division of Penalties with State and Local Governments" (OECM, October 30, 1985), "Remittance of Fines and Civil Penalties" (OECM, April 15, 1985) and the Superfund Amendments and Reauthorization Act of 1986.

While the concept of stipulated penalties also has relevance for administrative orders, distinctions between such orders and consent decrees may necessitate some differences in precise application. Guidance on use of stipulated penalties in administrative orders will be provided separately.

II. GUIDANCE

A. Use of Stipulated Penalties

1. General Rule

In the past, it has been OECM policy to include stipulated penalties in most consent decrees. See "Guidance for Drafting Judicial Consent Decrees" at 22. Moreover, the Superfund Amendments and Reauthorization Act of 1986 (SARA) requires that consent decrees which provide for remedial action[2/] contain stipulated penalties. Section 121(e)(2) of SARA provides that:

> ...Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree. (Emphasis added).

However, [illegible]ion 121 does not explicitly require that every requir[illegible] a consent decree have a stipulated penalty attached to it.

2/ Although Section 121 deals with "remedial" actions, it is recommended that stipulated penalties be included in consent decrees for removals as well.

Section 122(l) also permits additional penalty sanctions for violations of the requirements of a consent decree. Section 122(l) of SARA provides as follows:

> (l) CIVIL PENALTIES - A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 120 (relating to Federal facilities) or which is a party to an agreement under section 120 and which fails or refuses to comply with any term or condition of the order, decree or other agreement shall be subject to a civil penalty in accordance with section 109.

Thus, in the context of a CERCLA consent decree with mandated stipulated penalties, both the stipulated penalties contained in the consent decree and the Section 122(l) penalties may be assessed for violations of the terms of the decree. However, in limited circumstances, where the stipulated daily penalty amounts are sufficiently high to effectively deter noncompliance with the decree, the Agency may consider waiving Section 122(l) penalties. Such penalties nonetheless may be sought for any violations to which no stipulated penalty attaches.

St[redacted]ed penalties are seldom applicable to noncompliance wi[redacted]y requirement of a decree. Most often they are applicable to compliance schedules, performance standards, and reporting requirements. The types of violations for which stipulated penalties should be required will necessarily depend on the value the Agency places on the activity to be performed and the importance of timely performance.

Even consent decrees which primarily involve a "cash out" (i.e., where the defendant pays a fixed sum of money to absolve himself of his remedial obligations) warrant the inclusion of stipulated penalties. For example, if a defendant agrees to pay his cash out share in installments, stipulated penalties should be used to penalize late payments. If a case arises in which the defendant must perform certain tasks in addition to cashing out (such as providing site access or security), stipulated penalties should be imposed to ensure that the defendant performs those tasks.

2. <u>When Penalties May Be Excused Or Delayed</u>

Usually stipulated penalties should begin to accrue after the date on which complete performance of a particular task is due. Stipulated penalties will not necessarily accrue, or the accrual of such penalties may be stayed or waived, however, during designated periods or by the occurrence of certain events.

a. <u>Force Majeure Event</u>[3/]

One of the most common reasons for the noncollection of stipulated penalties is the occurrence of a force majeure event. A force majeure event is one which is beyond the control of the defendant and provides the defendant with an affirmative

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3/ Model force majeure language is forthcoming as an appendix hereto.

defense to a charge of noncompliance. Since penalties do not accrue during this period, the definition of a force majeure event should be narrowly drawn and the burden placed on the defendant to show that a force majeure event has occurred. In any event, neither increased costs nor financial difficulty should constitute a force majeure event.

b. Dispute Resolution Period

To avoid creating incentives to dispute consent decree obligations, stipulated penalties generally should accrue for any nonperformance occurring during the period of dispute. However, for limited types of disputes, EPA may agree to waive the accrual of penalties during the dispute resolution period. For example, consent decrees often permit the Agency to require that additional work be performed beyond that specifically provided for in the work plan. Where the defendants become aware of substantial "mid-course corrections" after the decree is signed, it may be appropriate to forego stipulated penalties during any legitimate dispute related to the additional work sought by EPA.

Stipulated penalties will not be collected if the defendant wins the dispute. In addition, in appropriate circumstances the Agency may use its discretion not to collect stipulated penalties, in whole or in part, which have accrued during the dispute resolution period.

c. Period of Correction by Defendant

A stipulated penalties provision may indicate that penalties will accrue until the violation is corrected by the defendant. To minimize uncertainties and foster timely and full compliance, such a statement should specify that penalties will accrue through the last day of correction, as determined by the Agency, rather than cease to accrue on the day the defendant begins to correct the violation.

d. Missed Interim Deadlines

Some decrees provide that penalties for interim deadline violations will not be sought if the defendant meets the final completion date. Since in many instances the final deadline is the most important, the penalties for violations of interim milestones may be waived in some cases. It should be clear to the defendant, however, that if the final deadline is missed, the penalties for interim deadline violations will be sought in addition to those which would accrue after the final deadline. The "Guidance for Drafting Judicial Consent Decrees" notes that interim deadline penalties may be collected up front and placed into an escrow account, to be returned to the defendant in the event the final compliance deadline is met. Id. at 24.

e. Grace Period

Some prior decrees provided for a fixed period immediately following notification of a violation in which the defendant was given the opportunity to explain his noncompliance and/or

correct it and during which stipulated penalties would not accrue. The length of such grace periods has ranged from 3 to 30 days. However, by requiring that every consent decree contain stipulated penalties, Congress has endorsed a strong preference for strict compliance with the terms of a decree. While the Agency does not endorse the use of grace periods, if a violation is expeditiously resolved the Agency may use its discretion not to seek stipulated penalties.

B. Amount of Stipulated Penalties

1. General Rule

Since stipulated penalties are intended to ensure compliance, they should be sufficient to provide economic incentives to the defendant to comply with the terms of the consent decree in a timely fashion. The penalty should not be set so low that the defendant would prefer to pay the penalty rather than perform the required activity.[4/] Therefore, stipulated penalties should generally be set at a level designed to exceed the amount of the estimated savings due to delay. In setting the amount, the Agency should also take into consideration the gravity of the violation and the degree of harm or danger to the public or environment which might result from the violation.

4/ Actual performance is required regardless of the payment of penalties. The Agency reserves the right to seek injunctive relief, modify the decree, or seek other remedies in such instances.

Each stipulated penalties provision should state a fixed amount per day to be imposed. This "sum certain" puts the defendant on notice of the potential extent of his obligation before a violation occurs.[5] The "undetermined amount" approach (i.e., "defendant shall pay up to $5000/day") should not be used since it makes the amount of the penalty subject to further resolution. The "undetermined amount" may destroy the economy of using stipulated penalties since the parties must then resolve the ultimate amount.

2. Escalating Penalty

Consent decrees should provide that the per diem amount of the penalty will increase with incremental increases in the period of noncompliance. For example, a fixed penalty of $5,000 per day might increase to $10,000 per day after the 15th day of noncompliance, and $15,000 per day after the 30th day. Escalating penalties will give the defendant added incentive to come into compliance, and it is recommended that they be used as a general rule.

5/ To the extent that EPA reserves its rights to seek penalties under SARA § 109 or civil contempt orders, however, the "sum certain" argument is really only an indication of the minimum amount for which a consent decree violator may be liable.

3. Sharing Penalties with the State[6/]

Generally, civil penalties may be shared with a State if the State has actively participated in the litigation, actively sought such penalties, and State law provides independent authority for the State to seek civil penalties.[7/] In addition,

> [t]he penalties should be divided in a proposed consent decree based on the level of participation and the penalty assessment authority of the state or locality....[T]he division should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties.

"Division of Penalties with State and Local Governments" at 3. Any agreement to share penalties with a State must be described in the consent decree. "Division of Penalties with State and Local Governments" at 2.

C. Collection of Stipulated Penalties

1. General Rule

Since Agency policy encourages aggressive post-settlement enforcement, it is essential to the integrity of the enforcement program that stipulated penalties be collected. Every

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6/ Note that Section 121(e)(2) of SARA gives States the authority to enforce the stipulated penalties section of consent decrees.

7/ Penalty division is a matter for discussion only between the governmental parties, and it is inappropriate for the defendant to participate in such discussions. "Division of Penalties with State and Local Governments" (OECM, October 30, 1985) at 3.

effort shall be made to collect stipulated penalties both to deter future noncompliance by defendants and to maintain the Agency's enforcement credibility. The Agency thus will not hesitate to initiate judicial actions to enforce the stipulated penalties provision of consent decrees.

2. Procedure for Collecting Penalties

Forfeiture is the best method of collecting penalties and should be provided for in the decree. Under this procedure, upon notice of a violation[8/] the defendant will have a stated number of days to pay the penalty or to move the issue into dispute resolution.

Consent decrees should not contain a limitations period for demanding stipulated penalties which results in the waiver of penalties that are not demanded within a specified period of time.

3. Payment of Penalties

The stipulated penalties section should indicate to whom monies are payable. This is particularly important for actions brought under CERCLA, since the "Superfund" is partially replenished by monies paid under that statute. Although monies collected pursuant to RCRA generally are paid to the "Treasurer of the United States," stipulated penalties collected pursuant

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8/ Penalties should begin to accrue on the day on which the violation actually occurs and not when the Agency later discovers it or gives notice to the defendant.

to CERCLA violations are to be made payable to the "Hazardous Substances Superfund."[9/] All penalties should be paid by certified check, contain the complete address of the defendant, include the site identification number if there is one, and reference the case name and civil action number.

D. Use of Other Remedies

Collection of stipulated penalties is not the sole remedy for violations of a decree. There may be times when the Agency will seek additional remedies, such as the court's equitable contempt powers or the collection of additional penalties under SARA or other applicable authorities. See, e.g., SARA § 109. Thus, to preserve the Agency's rights, each section on stipulated penalties should state that these penalties are "in addition to, and not in lieu of" the Agency's right to other sanctions for violations of the decree.[10/]

9/ This is supported by the guidance memorandum on "Remittance of Fines and Civil Penalties" (OECM, April 15, 1985) which indicates that "all Superfund billings" should go into a lockbox bank specifically designated for Superfund monies. In addition, since Section 107(c)(3) of CERCLA directs that punitive damages go into the Superfund, our view is that CERCLA stipulated penalties should be deposited there as well.

The address for the CERCLA lockbox is:

EPA - Superfund
P.O. Box 371003M
Pittsburgh, PA 15251

10/ Subject, of course, to any waiver of Section 122(1) penalties (see discussion at p. 3).

E. Purpose and Use of This Guidance

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the United States Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance or its internal implementing procedures.

APPENDIX

MODEL STIPULATED PENALTIES PROVISIONS[11/]

___. STIPULATED PENALTIES

1. Defendant shall pay stipulated penalties in the amounts set forth in paragraph 9 to the United States [and/or the State of ____] for failure to comply with [sections____ of] this Consent Decree, unless excused under paragraph___ ("Force Majeure"). Compliance by Defendant shall include completion of an activity under this decree or a plan approved under this decree or any matter under this decree in an acceptable manner and within the specified time schedules in and approved under this Decree. [If Defendant fails to meet [specified] interim deadlines, but meets the final completion date for the work to be performed herein, the penalties for missed interim deadlines are excused]. Any modifications of the time for performance pursuant to section___ ("Modifications") shall be in writing.

2. All penalties begin to accrue on the day that complete performance is due or a violation occurs, and continue to accrue through the final day of correction of the noncompliance. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree.

3. Following Plaintiff's determination that Defendant has failed to comply with the requirements of this Decree, Plaintiff shall give Defendant written notification of the same and describe the noncompliance. Said notice shall also indicate the amount of penalties due.

4. All penalties owed to the United States [or State] under this section shall be payable within 30 days of receipt of the notification of noncompliance, unless defendant invokes the dispute resolution procedures under section ___. Penalties shall accrue from the date of violation regardless of whether EPA [or the State] has notified Defendant of a violation. Interest shall begin to accrue on the unpaid balance at the end of the 30-day period. Such penalties shall be paid by certified check to ["Treasurer of the United States" for RCRA penalties, or "Treasurer of the State of X", or to the "Hazardous Substances Superfund" for CERCLA penalties] and shall contain Defendant's complete and correct address, the site name, [the site spill identifier number (SSID)], and the civil action number. All

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11/ Bracketed provisions are optional.

checks shall be mailed to [the appropriate Federal lockbox bank or State postal address].

5. Neither the filing of a petition to resolve a dispute nor the payment of penalties shall alter in any way Defendant's obligation to complete the performance required hereunder.

6. Defendant may dispute Plaintiff's right to the stated amount of penalties by invoking the dispute resolution procedures under section___ herein. [Penalties shall accrue but need not be paid during the dispute resolution period. If the District Court becomes involved in the resolution of the dispute, the period of dispute shall end upon the rendering of a decision by the District Court regardless of whether any party appeals such decision]. If Defendant does not prevail upon resolution, Plaintiff has the right to collect all penalties which accrued prior to and during the period of dispute. [In the event of an appeal, such penalties shall be placed into an escrow account until a decision has been rendered by the final court of appeal]. If Defendant prevails upon resolution, no penalties shall be payable.

7. No penalties shall accrue for violations of this Decree caused by events beyond the control of Defendant as identified in Section ___ herein ("Force Majeure)"][12/]. Defendant has the burden of proving force majeure or compliance with this Decree.

8. If Defendant fails to pay stipulated penalties, Plaintiff may institute proceedings to collect the penalties. However, nothing in this section shall be construed as prohibiting, altering, or in any way limiting the ability of Plaintiff to seek any other remedies or sanctions available by virtue of Defendant's violation of this Decree or of the statutes and regulations upon which it is based.

9. The following stipulated penalties shall be payable per violation per day to the United States [and/or State] for any noncompliance identified in subparagraph 1 above[13/]:

12/ With the exception of stipulated penalties clauses in consent decrees providing solely for cash payments, most decrees will include force majeure clauses.

13/ Please note that the penalty amounts set out above are only examples, and the amounts may vary with each individual case.

[

Amount/Day	Period of Noncompliance
$ 5,000	1st thru 14th day
$10,000	15th thru 30th day
$15,000	31st day and beyond

]

10. No payments made under this section shall be tax deductible.

11. This section shall remain in full force and effect for the term of this Decree.

FOR FURTHER INFORMATION CONTACT: For information on Registration Standard schedules, contact, by mail: Jean Frane, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Office location and telephone number: Rm. 1114, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 557-0944.

For information on public dockets, their availability, and docket indices, contact Franklin D. Rubis (703-557-4434) of the Information Services Section, in Rm. 242 at the above address.

SUPPLEMENTARY INFORMATION: The Registration Standards program is EPA's approach to the reassessment and reregistration of pesticides as mandated by Congress in section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The pesticide products currently registered by EPA contain more than 600 distinct active ingredients. Under this program the scientific data base underlying each active ingredient is thoroughly reviewed, and essential but missing scientific studies are identified.

The reassessment may result in requirements for submission of data needed to evaluate fully the safety of the compound according to contemporary scientific standards. The results of the review are reflected in a Registration Standard, which states the Agency's regulatory positions regarding the products containing an active ingredient and the rationale for each position, as well as requirements for submission of additional data needed to complete the assessment, and label warnings or other regulatory restrictions needed to protect health and the environment.

The purpose of this notice is to inform the public of Registration Standards currently under development. It also serves to provide the public with an opportunity to submit additional data pertinent to these reviews. EPA encourages the public to provide information relevant to the review of individual active ingredients for which Registration Standards are scheduled in FY 88. The Agency is particularly interested in receiving the following types of information: human toxicology, residue chemistry, product chemistry, environmental fate, human exposure, or ecological effects.

Registration Standards for the pesticides listed below will be under development in FY 88. An asterisk after the name indicates that the Agency is re-reviewing the chemical based on information submitted as a result of an earlier Registration Standard.

Name of pesticide	Chemical No.	Approximate date of completion
Propazine*	2310-17-0	October 1987
Sulfuron	28002-60-2	November 1987
Propazine	139-40-2	Do
Isovalerone	2303-78-9	Do
Fenthion	55-38-9	Do
Propyzamide	709-98-8	Do
Chlorpropham	101-21-3	Do
Propanil	114-89-1	December 1987
Phosphamidon	13171-21-6	Do
Dimethyl tetrachloroterephthalate	1861-32-1	Do
6-Benzyladenine	25067-40-8	Do
Adiuron	3337-71-1	Do
Metribuzin*	57837-19-1	January 1988
Metolachlor	121-75-5	Do
Tetrachlorvinphos	961-11-5	Do
Dimethoate*	60-51-5	Do
Terbufos*	13071-79-9	February 1988
Methomyl*	16752-77-5	Do
Ethoprop*	13194-48-4	March 1988
Mesic hydrazide	123-33-1	Do
Resmethrin	83-79-4	Do
Monuron	7786-34-7	April 1988
Cryolite*	15096-52-3	May 1988
2,4-Dichlorophenoxyacetic acid (2,4-D)	94-75-7	Do
4-(2,4-Dichlorophenoxy)butyric acid (2,4-DB)	94-82-6	Do
2-(2,4-Dichlorophenoxy)propionic acid (2,4-DP)	120-36-5	June 1988
Chlorothalonil	1897-45-6	Do
Carbaryl	63-25-2	Do
Ethephon	16672-87-0	July 1988
Dazomet	533-41-5	Do
Sethoxydim	52-69-6	Do
Sulfosate	3966-24-5	August 1988
Metiram	9006-42-2	Do
Maneb	12427-38-2	Do
Methidathion*	950-37-8	September 1988
Picloram*	1918-02-1	Do
Cyhexatin	2868-48-0	Do
Hexazinone*	51235-04-2	Do
Bromoxynil	1689-84-5	October 1988
2-Methyl-4-chlorophenoxyacetic acid (MCPA)*	94-74-6	Do
Dinoseb	42272-46-6	November 1988
Phorate*	298-02-2	Do
Resmethrin	10453-86-8	December 1988
Mecoprop	7085-19-0	Do
Warfarin*	81-81-2	Do
Methoxychlor	72-43-5	Do

Current regulations on Registration Standards and Special Review provide for the establishment of a public docket for Registration Standards under development and Special Review actions, the maintenance of docket indices, and the establishment of a mailing list of persons wishing to receive the docket indices on a regular basis. Special Review and Registration Standard dockets contain, among other things, materials submitted to the Agency by parties outside of government, Agency documents made available to persons outside of government, and memoranda of meetings with persons outside of government concerning pending Special Reviews and Registration Standards under development.

In accordance with § 155.32(d)(2) of the Registration Standard regulations and § 154.15(f)(3) of the Special Review regulations, the Agency has established a mailing list for docket indices. Separate mailing lists are maintained for Registration Standards an Special Reviews. Persons on each mailing list will receive automatically the docket indices (or updates to previous indices) for Registration Standards or Special Reviews. These will be distributed on a monthly or quarterly basis, as required by the regulations. Persons on each mailing list will receive docket indices for all open dockets. Persons will be required to renew their requests for inclusion on the mailing list annually.

Any person wishing to be included on either mailing list should submit his or her name, affiliation (if any), and mailing address to the address given earlier in this notice. Organizations, groups and companies are requested not to submit multiple requests under different names, but to designate a primary recipient with the organization. This will reduce mailing costs and Agency time in administering the mailing lists.

Persons currently on the Agency mailing list for either Registration Standard or Special Review indices must resubmit requests for continued inclusion on the mailing list at this time.

Dated: November 2, 1987.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 87-26105 Filed 11-10-87; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3290-1]

Superfund Program; De Minimis Contributor Settlements

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Agency is publishing today its Interim Model CERCLA section 122(g)(4) *De Minimis* Waste Contributor Consent Decree and Administrative Order on Consent. This document provides model language for drafting *de minimis* waste contributor settlements under section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). It is designed to be used in conjunction with the Interim Guidance on Settlements with *De Minimis* Waste Contributors under section 122(g) of SARA, published at 52 FR 24333 (June 30, 1987). EPA is publishing this document in order to provide wide public distribution of information on this important aspect of SARA implementation. The Agency may revise the interim models based upon

experience gained in drafting *de minimis* settlements and upon public comments received on the Interim Guidance referenced above.

This publication does not address settlements with *de minimis* landowners under section 122(g)(1)(B) of SARA, which will be covered by separate guidance.

FOR FURTHER INFORMATION CONTACT: Janice Linett, Mail Code LE-134S, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Waste Enforcement Division, 401 M Street SW., Washington, DC 20460, (202) 382-3077.

Edward E. Reich,

Associate Enforcement Counsel for Waste.

Date: October 29, 1987.

October 19, 1987.

Memorandum

Subject: Interim Model CERCLA Section 122(g)(4) *De Minimis* Waste Contributor Consent Decree and Administrative Order on Consent.

From: Edward E. Reich, Associate Enforcement Counsel for Waste, Gene A. Lucero, Director, Office of Waste Programs Enforcement.

To: Regional Counsels, Regions I–X, Regional Waste Management Division Directors, Regions I–X.

I. Purpose

The purpose of this memorandum is to provide interim model language to assist the Regions in drafting *de minimis* waste contributor consent decrees and administrative orders on consent under section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 42 U.S.C. 9622(g)(4) ("CERCLA"). The attached models are designed to be used in conjunction with the "Interim Guidance on Settlements with *De Minimis* Waste Contributors under section 122(g) of SARA," which was issued on June 19, 1987, and published at 52 FR 24333 (June 30, 1987). The models do not pertain to settlements with *de minimis* landowners under section 122(g)(1)(B) of CERCLA, 42 U.S.C. 9622(g)(1)(B), which will be addressed by separate guidance.

The attached models contain the basic legal and factual provisions necessary for a *de minimis* contributor settlement. While the specific language may be varied, consistent with the interim guidance, to suit the facts of the case and the timing of the settlement, use of the models will help the Agency to achieve quick, standardized, and nationally consistent *de minimis* contributor settlements without engaging in lengthy, resource-intensive negotiations. The models may be revised after we have gained experience in drafting *de minimis* settlements and have completed our review of public comments received on the interim guidance referenced above.

II. Disclaimer

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

Attachments

Attachment 1—Interim Model Section 122(g) (4) Consent Decree

United States of America, Plaintiff, v. *[Insert Name(s) of Defendant(s)]*, Defendant(s)

Civil Action No. _____

Judge _____

Consent Decree

[Note: If the complaint concerns causes of action which are not resolved by this document or names defendants who are not signatories to this document, the title should be "Partial Consent Decree."]

Whereas, the United States of America, on behalf of the Administrator of the United States Environmental Protection Agency ("Plaintiff" or "United States") filed a complaint on [insert date] against [insert defendants' names] ("Defendants") pursuant to [insert causes of action and relief sought, *e.g.*, sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 42 U.S.C. 9606 and 9607(a) ("CERCLA") and Section 7003 of Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. 6973, seeking injunctive relief regarding the cleanup of the [insert site name] ("Site") and recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Site]:

Whereas, the United States has incurred and continues to incur response costs in responding to the release or threat of release of hazardous substances at or in connection with the Site:

Whereas, the Regional Administrator of the United States Environmental Protection Agency, Region ____ ("Regional Administrator") has determined that prompt settlement of this case is practicable and in the public interest:

Whereas, this settlement involves only a minor portion of the response costs at the Site with respect to each [insert "Defendant" or "Settling Defendant" as appropriate]:

Whereas, [insert the amount and toxicity criteria used to qualify for *de minimis* treatment under the particular settlement, *e.g.*, "information currently known to the United States indicates that the amount of hazardous substances contributed to the Site by each Settling Defendant does not exceed ____% of the hazardous substances at the Site, and that the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Defendant do not contribute disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site"]:

Whereas, the Regional Administrator has, therefore, determined the amount of hazardous substances contributed to this Site by each Settling Defendant and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Defendants are minimal in comparison to other hazardous substances at the Site: and

Whereas, the United States and the Settling Defendants agree that settlement of this case without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action:

Now, therefore, it is *ordered, adjudged* and *decreed* as follows:

I. Jurisdiction

This Court has jurisdiction over the subject matter and the parties to this action. The parties agree to be bound by the terms of this Consent Decree and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

II. Parties Bound

This Consent Decree shall apply to and be binding upon the United States and shall apply to and be binding upon the Settling Defendants, their directors, officers, employees, agents, successors and assigns. Each signatory to this Consent Decree represents that he or she is fully authorized to enter into the

terms and conditions of this Consent Decree and to bind legally the Party represented by him or her.

[Note: It may be necessary to include a Statement of Purpose and/or a Definitions provision.]

III. Payment

1. Each Settling Defendant shall pay to the Hazardous Substance Superfund [insert as appropriate either: "the amount set forth below" or "the amount set forth in Attachment ____ to within ____ days [insert small amount of time, *e.g.*, 10, 30 or 45] of entry of this Consent Decree."

2. [Note: If a premium payment is included in the dollar amount to be paid by each Settling Defendant, the Consent Decree should explain what portion of the total payment compensates the United States for past and projected costs (including possible cost overruns) and what portion of the total payment is the premium amount. Lists may be attached and incorporated by reference as needed. A simple example follows:

Of the total payment of $30,000 to be made by each Settling Defendant pursuant to Paragraph 1 of this Section, $10,000 represents each Settling Defendant's share of the response costs including possible cost overruns, of the remedial action consistent with the Record of Decision ("ROD") for the Site (which currently are estimated to be between $____ and $____), and $20,000 represents each Settling Defendant's share of any costs which may be incurred if EPA determines that the remedial action consistent with the ROD is not protective of public health or the environment.]

[Note: This model assumes that there will be only one ROD at the site. If multiple operable unit RODs will be issued at the site, the decree must clearly identify which ROD is being referenced and should be structured to take into account the additional remedial action contemplated in, *e.g.*, the payment, covenant not to sue, and reservation of rights provisions.]

3. Each payment shall be made by certified or cashier's check made payable to "EPA-Hazardous Substance Superfund." Each check shall reference the site name, the number and address of the Settling Party, and the civil action number of this case, and shall be sent to:

EPA Superfund, P.O. Box 371003M, Pittsburgh, Pennsylvania 15251

4. Each Settling Defendant shall simultaneously send a copy of its check to:

[Insert name and address of Regional Attorney or Remedial Project Manager]

IV. Civil Penalties

In addition to any other remedies or sanctions available to the United States, any Settling Defendant who fails or refuses to comply with any term or condition of this Consent Decree shall be subject to a civil penalty of up to $25,000 per day of such failure or refusal pursuant to section 122(l) of CERCLA, 42 U.S.C. 9622(l).

V. Certification of Settling Defendants

[Note: The following language regarding disclosure of information concerning waste contributions to the site should be used in cases in which the *de minimis* settlement is concluded prior to completion of PRP investigations, especially where information requests or subpoenas have not been issued:

Each Settling Defendant certifies that, to the best of its knowledge and belief, it has provided to the United States all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents which relates in any way to the ownership, operation, generation, treatment, transportation or disposal of hazardous substances at or in connection with the Site.]

VI. Covenant not to sue

1. Subject to the reservations of rights in Section VII, Paragraphs 1 and 2, of this Consent Decree, upon payment of the amounts specified in Section III, Paragraph 1, of this Consent Decree, the United States covenants not to sue or to take any other civil or administrative action against any of the Settling Defendants for "Covered Matters." "Covered Matters" shall include any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to sections 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a), and section 7003 of RCRA, 42 U.S.C. 6973, with regard to the Site.

2. In consideration of the United States' covenant not to sue in Paragraph 1 of this Section, the Settling Defendants agree not to assert any claims or causes of action against the United States or the Hazardous Substance Superfund arising out of Covered Matters, or to seek any other costs, damages, or attorney's fees from the United States arising out of response activities at the Site.

VII. Reservation of Rights

1. Nothing in this Consent Decree is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any of the Settling Defendants for:

(a) Any liability as a result of failure to make the payments required by Section III, Paragraph 1, of this Consent Decree; or

(b) Any matters not expressly included in Covered Matters, including, without limitation, any liability for damages to natural resources. [Note: This natural resource damages reservation must be included unless the Federal natural resource trustee has agreed to a covenant not to sue pursuant to section 122(j)(2) of CERCLA. In accordance with section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substance at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal natural resource trustee of the negotiations and encourage the trustee to participate in the negotiations.]

2. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States to seek or obtain further relief from any of the Settling Defendants, and the covenant not to sue in Section VI, Paragraph 1, of this Consent Decree is null and void, if:

(a) Information not currently known to the United States is discovered which indicates that any Settling Defendant contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that the Settling Defendant no longer qualifies as a *de minimis* party at the Site because [insert volume and toxicity criteria, *e.g.*, "the Settling Defendant contributed greater than ____% of the hazardous substances at the Site or contributed disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site"]:

[Note: Unless a premium payment is being made under Section III of this Consent Decree which compensates the United States for taking the risk that the events noted in the reservations of rights in subparagraphs (b) and (c) below may occur, those reservations should be included. A premium may be accepted in lieu of one or both of the reservations of rights in Subparagraphs (b) and (c) below:

(b) Costs incurred during the completion of the remedial action [if ROD is completed, insert "consistent with the Record of Decision"] at the Site exceed [insert dollar amount of cost ceiling]; or

(c) The United States determines, based upon conditions at the Site,

previously unknown to the United States, or information received, in whole or in part, after entry of this Consent Decree, that the remedial action [if ROD is completed, insert "consistent with the Record of Decision"] is not protective of public health or the environment.]

3. Nothing in this Consent Decree is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Consent Decree.

4. The United States and the Settling Defendants agree that the actions undertaken by the Settling Defendants in accordance with this Consent Decree do not constitute an admission of any liability by any Settling Defendant.

VIII. Contribution Protection

Subject to the reservations of rights in Section VII, Paragraphs 1 and 2, of this Consent Decree, the United States agrees that by entering into and carrying out the terms of the Consent Decree, each Settling Defendant will have resolved its liability to the United States for Covered Matters pursuant to section 122(g)(5) of CERCLA, 42 U.S.C. 9622(g)(5), and shall not be liable for claims for contribution for Covered Matters.

IX. Public Comment

This Consent Decree shall be subject to a thirty-day public comment period. The United States may withdraw its consent to this Consent Decree if comments received disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper or inadequate.

X. Effective Date

The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Section IX of this Consent Decree.

The United States of America
By: _____

[The Settling Defendants]
By: _____

So ordered this _____ day of _____, 198__.

_____

United States District Judge.

Attachment 2—Interim Model Section 122(g)(4) Administrative Order on Consent

In the matter of: [Insert Site Name and Location] Proceeding under section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9622(g)(4)

U.S. EPA Docket No. _____

Administrative Order on Consent

I. Jurisdiction

This Administrative Order on Consent ("Consent Order") is issued pursuant to the authority vested in the President of the United States by section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), Pub. L. 99-499, 42 U.S.C. 9622(g)(4), to reach settlements in actions under section 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a). The authority vested in the President has been delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order 12580, 52 FR 2923 (Jan. 29, 1987) and further delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-E (Sept. 13, 1987).

This Administrative Order on Consent is issued to [insert names or reference attached list of respondents] ("Respondents"). Each Respondent agrees to undertake all actions required by the terms and conditions of this Consent Order. Each Respondent further consents to and will not contest EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

[Note: It may be necessary to include a Statement of Purpose and/or a Definitions provision.]

II. Statement of Facts

1. [In one or more paragraphs, insert site name, location, description, NPL status and brief statement of historical hazardous substance activity at the site.]

2. Hazardous substances within the definition of section 101(14) of CERCLA, 42 U.S.C. 9601(14), have been or are threatened to be released into the environment at or from the Site. [Note: Additional information about specific hazardous substances present on- or off-site may be included.]

3. As a result of the release or threatened release of hazardous substances into the environment, EPA has undertaken response action at the Site under section 104 of CERCLA, 42 U.S.C. 9604, and will undertake response action in the future. [Note: A brief recitation of the specific response action undertaken or planned for the site, *e.g.*, whether an RI/FS and ROD have been completed, should be included.]

4. In performing this response action, EPA has incurred and will continue to incur response costs at or in connection with the Site. [Note: The dollar amou of costs incurred as of a specific dat should be included.]

5. [Identify each respondent and it relationship to the site. If respondent are numerous, state generally that "Information currently known to EPA indicates that each Respondent listed Attachment _____ to this Consent Order, which is incorporated herein l reference, arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, a hazardous substance owned or possessed by such Respondent at the Site, or accepted a hazardous substar for transport ot the Site."]

6. [In one or more paragraphs, pres in summary fashion the factual basis EPA's determination in Section III be that the respondents are *de minimis* parties, *i.e.*, that the amount of hazardous substances contributed to site by each respondent and the toxic other hazardous effects of the substances contributed to the site by each respondent are minimal in comparison to other hazardous substances at the site. The language v vary depending upon the criteria established for the particular settlem An example follows:

Information currently known to EP indicates that the amount of hazardou substances contributed to the Site by each Respondent does not exceed _____% of the hazardous substances the Site, and that the toxic or other hazardous effects of the substances contributed by each Respondent to th Site do not contribute disproportionat to the cumulative toxic or other hazardous effects of the hazardous substances at the Site. [Note: An attachment listing the volume and general nature of the hazardous substances contributed to the site by each respondent, to the extent availab should be attached and incorporated b reference. The total estimated volume hazardous substances at the site shoul be noted on the attachment.]]

7. In evaluating the settlement embodied in this Consent Order, EPA has considered the potential costs of remediating contamination at or in connection with the Site taking into account possible cost overruns in completing the remedial action [if ROI is completed, insert "consistent with tl Record of Decision for this Site"], and possible future costs if the remedial action [if ROD is completed, insert "consistent with the Record of Decisio for this Site"] is no protective of public health or the environment.

8. Payments required to be made by each Respondent pursuant to this

Consent Order are a minor portion of the total response costs at the Site which EPA, based upon currently available information, estimates to be between $_____ and $_____. [Note: The dollar figure inserted should include the total response costs incurred to date as well as the Agency's projection of the total response costs to be incurred during completion of the remedial action at the site.]

9. EPA has identified persons other than the Respondents who owned or operated the Site, or who arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of a hazardous substance owned or possessed by such person at the Site, or who accepted a hazardous substance for transport to the Site. EPA has considered the nature of its case against these non-settling parties in evaluating the settlement embodied in this Consent Order.

III. Determinations

Based upon the Findings of Fact set forth above and on the administrative record for this Site, EPA has determined that:

1. The [insert site name] site is a "facility" as that term is defined in section 101(9) of CERCLA, 42 U.S.C. 9601(9).

2. Each Respondent is a "person" as that term is defined in section 101(21) of CERCLA, 42 U.S.C. 9601(21).

3. Each Respondent is a potentially responsible party within the meaning of section 107(a) and 122(g)(1) of CERCLA, 42 U.S.C. 9607(a) and 9622(g)(1).

4. The past, present or future migration of hazardous substances from the Site constitute an actual or threatened "release" as that term is defined in section 101(22) of CERCLA, 42 U.S.C. 9601(22).

5. Prompt settlement with the Respondents is practicable and in the public interest within the meaning of section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1).

6. This Consent Order involves only a minor portion of the response costs at the Site with respect to each Respondent pursuant to section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1).

7. The amount of hazardous substances contributed to the Site by each Respondent and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Respondent are minimal in comparison to other hazardous substances at the Site pursuant to section 122(g)(1)(A) of CERCLA, 42 U.S.C. 9622(g)(1)(A).

IV. Order

Based upon the administrative record for this Site and the Findings of Fact and Determinations set forth above, and in consideration of the promises and covenants set forth herein, it is hereby agreed to and ordered:

Payment

1. Each Respondent shall pay to the Hazardous Substance Superfund [insert as appropriate either: "the amount set forth below" or "the amount set forth in Attachment ____ to this Consent Order, which is incorporated herein by reference."] within ____ days [insert small amount of time, *e.g.*, 10, 30 or 45] of the effective date of this Consent Order.

2. [Note: If a premium payment is included in the dollar amount to be paid by each respondent, the Consent Order should explain what portion of the total payment compensates EPA for past and projected costs (including possible cost overruns) and what portion of the total payment is the premium amount. Lists may be attached and incorporated by reference as needed. A simple example follows:

Of the total payment of $30,000 to be made by each Respondent pursuant to paragraph 1 of this section, $10,000 represents each Respondent's share of the response costs incurred by EPA to date and the projected costs, including possible cost overruns, of the remedial action consistent with the Record of Decision ("ROD") for this Site (which currently are estimated by EPA to be between $____ and $____), and $20,000 represents each Respondent's share of any costs which may be incurred if EPA determines that the remedial action consistent with the ROD is not protective of public health or the environment.]

[Note: This model assumes that there will be only one ROD at the site. If multiple operable unit RODs will be issued at the site, the order must clearly identify which ROD is being referenced and should be structured to take into account the additional remedial action contemplated in, *e.g.*, the payment, covenant not to sue, and reservation of rights provisions.]

3. Each payment shall be made by certified or cashier's check made payable to "EPA-Hazardous Substance Superfund." Each check shall reference the site name, the name and address of the Respondent, and the EPA docket number for this action, and shall be sent to:

EPA Superfund, P.O. Box 371003M, Pittsburgh, Pennsylvania 15251.

4. Each Respondent shall simultaneously send a copy of its check to:

[Insert name and address of Regional Attorney or Remedial Project Manager]

Civil Penalties

5. In addition to any other remedies or sanctions available to EPA, any Respondent who fails or refuses to comply with any term or condition of this Consent Order shall be subject to a civil penalty of up to $25,000 per day of such failure or refusal pursuant to section 122(l) of CERCLA, 42 U.S.C. 9622(l).

Certification of Respondents

6. [Note: The following language regarding disclosure of information concerning waste contributions to the site should be used in cases in which the *de minimis* settlements is concluded prior to completion of PRP investigations, especially where information requests or subpoenas have not been issued:

Each Respondent certifies that, to the best of its knowledge and belief, it has provided to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, generation, treatment, transportation or disposal of hazardous substances at or in connection with the Site.]

Covenant not to Sue

7. Subject to the reservations of rights in Section IV, Paragraphs 9 and 10, of this Consent Order, upon payment of the amounts specified in Section IV, Paragraph 1, of this Consent Order, EPA covenants not to sue or to take any other civil or administrative action against any of the Respondents for "Covered Matters." "Covered Matters" shall include any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to sections 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a), or section 7003 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6973, with regard to the Site.

8. In consideration of EPA's covenant not to sue in Section IV, Paragraph 7, of this Consent Order, the Respondents agree not to assert any claims or causes of action against the United States or the Hazardous Substance Superfund arising out of Covered Matters, or to seek any other costs, damages, or attorney's fees from the United States

arising out of response activities at the Site.

Reservation of Rights

9. Nothing in this Consent Order is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, at law or in equity, which the United States, including EPA, may have against any of the Respondents for:

(a) Any liability as a result of failure to make the payments required by Section IV, Paragraph 1, of this Consent Order; or

(b) Any matters not expressly included in Covered Matters, including, without limitation, any liability for damages to natural resources. [Note: This natural resource damage reservation must be included unless the Federal natural resource trustee has agreed to a covenant not to sue pursuant to section 122(j)(2) of CERCLA. In accordance with section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substance at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal natural resource trustee of the negotiations and encourage the trustee to participate in the negotiations.]

10. Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to seek or obtain further relief from any of the Respondents, and the covenant not to sue in Section IV, Paragraph 7, of this Consent Order is null and void, if:

(a) Information not currently known to EPA is discovered which indicates that any Respondent contributed hazardous substances to the Site in such greater amount or of such greater toxic of other hazardous effects that the Respondent no longer qualifies as a *de minimis* party at the Site because [insert volume and toxicity criteria from Paragraph 7 of the Findings of Fact, *e.g.*, "the Respondent contributed greater than ____% of the hazardous substances at the Site or contributed hazardous substances which contributed disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site"]:

[Note: Unless a premium payment is being made under Section IV, Paragraph 1, which compensates EPA for the risk that the events noted in the reservations of rights in subparagraphs (b) and (c) may be accepted in lieu of one or both of the reservations in subparagraphs (b) and (c) below:

(b) Costs incurred during the completion of the remedial action [if ROD is completed, insert "consistent with the Record of Decision"] at the Site exceed [insert dollar amount of cost ceiling]; or

(c) EPA determines, based upon conditions at the Site, previously unknown to EPA, or information received, in whole or in part, after entry of this Consent Order, that the remedial action [if ROD is completed, insert "consistent with the Record of Decision"] is not protective of public health or the environment.

11. Nothing in this Consent Order is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States, including EPA, may have against any person, firm, corporation or other entity not a signatory to this Consent Order.

12. EPA and the Respondents agree that the actions undertaken by the Respondents in acordance with this Consent Order do not constitute an admission of any liability by any Respondent. The Respondents do not admit and retain the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this Consent Order, the validity of the Findings of Fact or Determinations contained in this Consent Order.

Contribution Protection

13. Subject to the reservation of rights in Section IV, Paragraphs 9 and 10, of this Consent Order, EPA agrees that by entering into and carrying out the terms of this Consent Order, each Respondent will have resolved its liability to the United States for Covered Matters pursuant to section 122(g)(5) of CERCLA, 42 U.S.C. 9622(g)(5), and shall not be liable for claims for contribution for Covered Matters.

Parties Bound

14. This Consent Order shall apply to and be binding upon the Respondents and their directors, officers, employees, agents, successors and assigns. Each signatory to this Consent Order represents that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to bind legally the Respondent represented by him or her.

Public Comment

15. This Consent Order shall be subject to a thirty-day public comment period pursuant to section 122(i) of CERCLA, 42 U.S.C. 9622(i). In accordance with section 122(i)(3) CERCLA, 42 U.S.C. 9622(i)(3), EPA withdraw consent to this Consent if comments received disclose fac considerations which indicate tha Consent Order is inappropriate, improper or inadequate.

Attorney General Approval

16. The Attorney General or his designee has issued prior written approval of the settlement embod this Consent Order in accordance section 122(g)(4) of SARA. [Note: Attorney General approval usuall be required for *de minimis* consen orders because the total part and projected response costs at the si exceed $500,000, excluding interes the event that Attorney General approval is not required, the order should not include this Paragraph should include the following as a separate numbered paragraph in t Determinations section (Section II above: "The Regional Administrat EPA, Region xx, has determined th total response costs incurred to da or in connection with the Site do n exceed $500,000 excluding interest that, based upon information curre known to EPA, total response cost in connection with the Site are not anticipated to exceed $500,000, excluding interest, in the future." I this determination requires change the model Findings of Fact in Secti above: specifically, Paragraph 3 of Findings should not state that furth response action will be undertaker the future, and Paragraph 4 of the Findings should not state that EPA incur response costs in the future.]

Effective Date

17. The effective date of this Con Order shall be the date upon which issues written notice to the Respon that the public comment period pu to Secton IV, Paragraph 15, of this Consent Order has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Ord

It is so agreed and ordered:

[Respondent(s)]
By: [Name] [Date]

U.S. Environmental Protection Age
By: [Name] [Date]

[FR Doc. 87-26107 Filed 11-10-87; 8:45 a

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1988

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

APR 7 1989

9831.6

MEMORANDUM

SUBJECT: Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I - X

On October 1, 1986, the Office of Solid Waste and Emergency Response issued two separate guidances on funding States in support of their enforcement actions at CERCLA National Priorities List (NPL) sites. One guidance covered activities related to negotiations with and administrative and judicial enforcement actions against potentially responsible parties (PRPs); while the other covered activities related to the oversight of PRP response actions.

This package includes updated guidances which supersede the October 1, 1986 guidances. The revised guidances on funding State enforcement and PRP oversight incorporate relevant comments, as well as consider various issues that have arisen since passage of SARA. Therefore, along with this memorandum the attached package is made up of the following components:

- Guidance on CERCLA funding of State enforcement actions at National Priorities List sites (9831.6a);
- Guidance on CERCLA funding of Potentially Responsible Party Oversight by States at National Priorities List Sites (9831.6b);
- Cost Estimates for Budgeting State Enforcement Activities (9831.6c); and
- Recommended Procedures for Headquarters/Regional Review and Concurrence of Initial Enforcement Cooperative Agreements (9831.6d).

Along with this "interim final" package, the Grants Administration Division (GAD), in conjunction with OSWER, has developed an assistance-related manual entitled "Guide for Preparing and Reviewing Superfund Cooperative Agreements" (September 1987). This manual is to be used when reviewing and awarding actual cooperative agreement applications submitted by States. In the near future, this manual will include a model enforcement cooperative agreement application, which will be representative of the scope and content expected from the States. A copy of this manual can be obtained by contacting your Regional Assistance Administration Unit (AAU).

This package and GAD's guidance, along with the Office of Emergency and Remedial Response's manual on "State Participation in the Superfund Program," the "Interim Guidance on State Participation in Pre-Remedial and Remedial Response" (OSWER, July 21, 1987), the regulation on "Intergovernmental Review of Environmental Protection Agency Programs and Activities" (40 CFR Part 29), the "General Regulation for Assistance Programs" (40 CFR Part 30), the guidance on "State Procurement under Superfund Remedial Cocperative Agreements (OERR, March 1986) and the regulation on "Procurement Under Assistance Agreements" (40 CFR Part 33), should form the basis for preparing and administering cooperative agreements concerning CERCLA State-lead enforcement actions at NPL sites.

In addition, the upcoming revisions to the National Contingency Plan and the draft "Guidance on Preparing a Superfund Memorandum of Agreement" (SMOA) jointly issued by OERR and OWPE on October 5, 1987 will provide EPA Regional offices and States with a specific understanding of the extent and manner in which States should involve themselves in CERCLA enforcement and remedial responses and the extent of involvement and oversight expected of EPA during State conduct of such responses.

Furthermore, some issues outlined during review of the previous funding guidances will be further addressed in future guidance on CERCLA State enforcement. Please see the attachment to this memorandum for those issues and the direction to follow.

There are several additional policy points to follow when implementing this guidance package.

1. States should clearly understand that funding under the guidances is related to encouraging or compelling PRPs to undertake traditional response activities to clean up a site (such as negotiations for remedial investigations, feasibility studies, remedial designs and remedial actions)

and to conduct necessary technical, administrative and enforcement activities during their oversight of the PRPs' response (such as oversight in the field, compiling administrative records, preparing remedy decision documents and enforcing the provisions of settlement agreements). At this time, EPA will not provide funding solely to litigate claims such as to recover past costs or natural resource damages.

2. Although the guidances do not specifically address funding States during Federal facility response actions at National Priorities List sites, funding by EPA will nonetheless be considered under the following situations. Management assistance funding may be provided to support State involvement in pre-remedial activities and activities leading to signature and execution of an agreement under Section 120(e) of CERCLA. If the State is a signatory to the agreement, the agreement should spell out the State's responsibilities for the site, including oversight responsibilities. Funding through a cooperative agreement may then be available to conduct these oversight responsibilities. In the absence of an oversight role spelled out in the agreement, management assistance funding may be available to ensure adequate State involvement during the facility's response action. If the State is not a signatory to the agreement, oversight activities will be conducted by EPA. However, management assistance funding may still be available to ensure adequate State involvement. Furthermore, EPA's current position is to not fund States for litigating or taking any enforcement actions against a Federal facility. Finally, per Section 120(g) of CERCLA, EPA must retain lead responsibility with respect to its Section 120 authorities over Federal facility sites on the National Priorities List. As such, Federal facility sites cannot be designated as "State-lead."

3. Cost documentation of State intramural and extramural activities continues to be a critically important aspect of the Superfund program. As such, the Financial Management Division's soon to be published "State Superfund Financial Management and Recordkeeping Guidance" should be clearly understood and followed by the Regions and States for all enforcement-related cooperative agreements developed and funded under this guidance package. FMD's guidance replaces Appendix U,

"Cost Documentation Requirements for Superfund Cooperative Agreements" of the Manual "State Participation in the Superfund Program." The need for cost recovery, particularly regarding PRP oversight, should be considered in drafting cooperative agreements.

4. Provisions outlined in the funding guidances may be alternatively addressed and agreed to in the SMOA. Of course, actual funding is done only through a cooperative agreement. The Region and State should discuss the best approach to ensuring compliance with the provisions outlined in the guidances. However, the Region should ultimately decide whether reiteration or expansion of SMOA provisions should be made in the cooperative agreement application. When making this determination, the Region should employ such criteria as the level of State experience and capabilities, and past State performance in the CERCLA cleanup program.

5. Per Section 104(d)(1)(A) of CERCLA, as amended by SARA, EPA must make a determination on cooperative agreement applications within 90 days of receipt. Since the 90 day clock begins when the Regional Assistance Office receives the final application from the State, the Regional program office must ensure that the application is properly logged in and dated by the Assistance Office. See the "Interim Guidance on State Participation in Pre-Remedial and Remedial Response" for further direction on the 90 day review requirement.

6. EPA Headquarters does not intend to be routinely involved in reviewing and concurring on enforcement cooperative agreement applications. However, some Headquarters involvement in the initial applications received by the Region is necessary to ensure the guidance is interpreted correctly and consistently. Therefore, at least the first application received in each Region under the negotiation and litigation guidance and under the oversight guidance should be submitted for review and concurrence to the Director, CERCLA Enforcement Division, Office of Waste Programs Enforcement. (See the section entitled "Recommened Procedures for Headquarters/Regional Review of Initial Enforcement Cooperative Agreements" for the suggested approach.) After having gone through this mutual Headquarters and Regional review, the Regions will only need to keep Headquarters informed of subsequent applications through the SCAP and by providing a copy of awarded

agreements. Management assistance cooperative agreements need not be submitted to Headquarters for review prior to their award. Finally, per the program delegation, enforcement cooperative agreements will be awarded by the Regional office.

7. Beginning in Fiscal Year 1988, State yearly funding requirements for activities outlined in this guidance package must be included in the Region's Superfund Comprehensive Accomplishments Plan (SCAP). The Region and State should be working closely during the SCAP development process to ensure that State funding requirements are adequately addressed in the final plan.

8. The Administrator is highly interested in improving the role and relationship of State Attorneys General offices in the Superfund program. In this regard, during development and review of enforcement cooperative agreements and SMOAs, the Regional office should ensure that relevant responsibilities of the State Attorney General are adequately addressed in the document. At the request of the Administrator, my office is also looking into the possibility of earmarking some Core Program funds for relevant State Attorney General CERCLA program activities.

As you go about developing cooperative agreement applications to support CERCLA State enforcement actions, please feel free to contact Tony Diecidue on FTS(202)-382-4841 or the appropriate Regional Coordinator in OWPE for assistance on the various policy or site-specific issues that may need resolution.

cc: Director, Waste Management Division
Regions I, IV, V, VII and VIII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Region III and VI
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X
Regional Counsel, Region I - X
Regional Assistance Management Contact, Region I - X
Regional CERCLA Branch Chief, Region I - X
Regional CERCLA Enforcement Section Chief, Region I - X

ISSUES ON DRAFT GUIDANCE ON FUNDING CERCLA STATE ENFORCEMENT ACTIONS

The following issues received on the draft guidance on funding CERCLA State enforcement actions will be further addressed in future guidance on State involvement in CERCLA enforcement actions. However, here is policy direction on proceeding with these issues.

1. Must the State outline their enforcement authorities for the entire action, or only the authorities for performing a particular action (such as PRP searches or negotiations)?

   When the State submits a cooperative agreement application, it is assumed the site has already been designated a State-lead enforcement site. It is also assumed the State will carry the enforcement response as far along as possible and, therefore, should spell out the authorities to be used by the State. Since part of the initial classification process includes whether adequate enforcement authorities are available, the State would only need to reiterate them in the application. For example, a letter from the Attorney General outlining these authorities could be prepared and the same letter could be used for each cooperative agreement. A Superfund Memorandum of Agreement (SMOA) could also suffice in ensuring that adequate enforcement authorities are available.

2. Is there any intent to require States to follow the CERCLA Section 122 settlement provisions?

   The procedures spelled out in Section 122 of CERCLA are related to settlements pursued by the Federal government and their use is subject to sound discretion at a particular site (See Section 122(a)). While States can avail themselves of equivalent procedures, they are not authorized by EPA to use Section 122 when pursuing enforcement actions under their own authorities. However, in pursuit of consistency with the intent of CERCLA, State settlements will need to be consistent with certain Section 122 procedures and related EPA Superfund enforcement policy and guidance when negotiating and settling with PRPs <u>under a cooperative agreement</u>. These include giving notice and establishing negotiation time frames (Section 122(e)); ensuring adequate public participation (Section 122(d)); and requiring that covenants not to sue contain a "reopener" provision (except for a special covenant not to sue, a <u>de minimis</u> settlement, or in an extraordinary circumstance) (Section 122(f)). Other Section 122 provisions clearly do

opportunity to conduct necessary response actions at State-lead enforcement sites. These activities are to be performed under State authorities (note that statutory authority is generally not required for these activities). However, as stated in question #2 above, States will need to be consistent with the Federal procedures for notifying PRPs and establishing negotiation timeframes when funded under a cooperative agreement. Any review, consultation and/or concurrence role for EPA with regard to State notice letters should be worked out during the SMOA or CA development process.

CERCLA FUNDING OF STATE ENFORCEMENT ACTION AT NATIONAL PRIORITIES LIST SITES

not apply to State-lead enforcement sites, such as mixed funding (Section 122(b)), since provisions such as this can only be implemented through settlements with the Federal government. Therefore, please note that the negotiation and litigation funding guidance requires a State assurance on this issue.[1]

3. There is nothing in the guidances on EPA participation in State-lead enforcement actions. There is no discussion of having, or letting, EPA sit in on negotiations or participate in setting up the strategy for such negotiations. Should this not be a reciprocal requirement?

The draft guidance on preparing a SMOA discusses, in the enforcement section, that when developing an agreement the Region and State should consider and address to what extent each party will be involved in the other's negotiations with PRPs. Furthermore, the Region and State continue to have the discretion of also preparing site-specific enforcement agreements. The extent of involvement should be based on various factors. These include the level of confidence in and past experience with the State, and site-specific factors such as the complexity or national significance of the response action. Consistency of the remedy with Section 121 of CERCLA, the upcoming revisions to the NCP and applicable EPA guidance, and assurance that it will be implemented correctly through an enforceable pleading are the most important concerns. Also, EPA and the States should not be duplicating the others activities at sites. Regardless of the extent of Regional involvement in State-lead enforcement negotiations, settlements at these sites would typically be two party agreements (State and PRPs) under State authorities.

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1 Since the reauthorization of CERCLA, EPA has issued several policies concerning Federal government implementation of the various Section 122 settlement procedures. Because these policies are designed for Federal settlements, they contain numerous requirements that are irrelevant to or need not be adhered to by States during their enforcement actions. Also, consistent with Section 122(a), EPA and the State can jointly waive use of the procedures outlined in the Section. EPA is developing additional guidance to specifically address and clarify the relation of the Section 122 settlement procedures and related policy to State enforcement actions.

4. Is EPA responsible for the final selection of remedy at State-lead enforcement sites? Should EPA participate in the development of the remedy at these sites even if the work will be done by the PRPs under a State settlement agreement? What authority does EPA have if the State believes its remedy is consistent with the NCP and EPA disagrees?

   The upcoming revisions to the NCP state that unless a State Record of Decision (ROD) or other decision document is concurred with and adopted in writing by EPA, EPA shall not be deemed to have approved of the State decision. The NCP and upcoming guidances will set forth the procedures for and intent of EPA's concurrence and adoption of the remedy. States must recognize that if their procedures and remedies are not consistent with EPA's (including RI/FSs and Section 121 of CERCLA), it should not be expected that EPA will approve the remedy. With or without EPA's approval, however, States may decide to proceed under their own authorities and funding. In turn, EPA has the authority under CERCLA to proceed with its own enforcement action or attempt to intervene prior to a State settlement with or litigation against PRPs. However, one purpose of establishing SMOAs and seeking EPA concurrence and adoption of the remedy is to avoid such problems at the remedy selection stage by outlining roles and responsibilities up front, including the extent of support agency participation in lead agency negotiations and other legal efforts, and a process for informally resolving disputes (i.e., short of the courts). Furthermore, please note that when EPA is paying for these activities <u>under a cooperative agreement</u>, the State is assuring that their oversight of PRP technical activities and their selection of a remedy for the site will be consistent with CERCLA, as amended by SARA, the NCP and applicable EPA guidance.

5. The guidance assumes that States can issue standard notice letters. Should careful examination of standard notice letter content be done to ensure that a State letter provides adequate notice for future State or Federal claims, and to ensure that the State letter is sufficient to EPA and DOJ attorneys? Should there be a requirement that EPA approve the general form notice letter the State intends to use?

   It has always been assumed that States would attempt to notify PRPs of their potential liability and offer them an

CERCLA FUNDING OF STATE ENFORCEMENT ACTIONS AT NATIONAL PRIORITIES LIST SITES

PURPOSE

The purpose of this guidance is to assist EPA Regional offices and States on funding, under a CERCLA cooperative agreement (CA), of State search and notification, negotiation, and administrative and judicial enforcement efforts to encourage or compel hazardous waste site cleanups by potentially responsible parties (PRPs).

BACKGROUND

In its opinion of February 12, 1986, regarding CERCLA funding of State enforcement efforts, the Office of General Counsel reconsidered and expanded upon a July 20, 1984, opinion to allow limited assistance for identification of PRPs and gathering of evidence, remedial investigations and feasibility studies (RI/FS) to support State or Federal enforcement actions, and oversight of RI/FSs and remedial designs (RD) conducted by PRPs. The February 12, 1986, opinion allows such activities as oversight of PRP-conducted remedial actions (RA), reporting to the public on private party response actions, negotiation, and administrative and judicial enforcement to encourage or compel PRPs to initiate response actions at National Priorities List (NPL) sites. The Superfund Amendments and Reauthorization Act of 1986 (SARA) also confirms this interpretation by expanding the activities eligible for CA funding under Section 104(d)(1) of CERCLA.

The intent of funding for these activities is to successfully secure the greatest number of private party cleanup actions possible. In achieving this goal, States will need to be consistent with EPA's Superfund enforcement policies and procedures. This is necessary to ensure that site cleanups:

- Are consistent with CERCLA, as amended by SARA, and the National Contingency Plan (NCP);
- Are conducted in a timely manner and allow for deletion from the NPL; and
- Enable EPA and States to conduct future CERCLA cost recovery actions.

GUIDANCE

Cooperative Agreement funding for PRP searches, issuance of notice letters, negotiation, or administrative and judicial enforcement will only be provided at NPL sites that have been designated as State-lead enforcement. In determining lead designation, Regional offices and States should use the criteria outlined in the EPA/Association of State and Territorial Solid Waste Management Officials (ASTSWMO) policy memorandum of October 2, 1984. In addition, EPA Headquarters is in the process of developing additional classification guidance based upon SARA and the upcoming revisions to the NCP. Prior to drafting or accepting a cooperative agreement application for review and award, the criteria should be applied to the site. This includes sites currently designated as State-lead enforcement and sites States are seeking to place in the State-lead enforcement category. Once the designation is made and a State requests CA funding, the Region should pay particular attention to the itemized budget submitted along with the application. The budget should be carefully reviewed to ensure that adequate resources and staff expertise are devoted to the site. Along with these considerations, the conditions and requirements outlined in this guidance must be incorporated into the CA application prior to award.

This guidance does not preclude the Regions from including additional enforcement-related conditions in the application, if warranted. Furthermore, it is imperative that applicable provisions outlined in Appendix F of the EPA manual State Participation in the Superfund Program be incorporated into each CA application. See Attachment A for those applicable provisions and sample language for the enforcement provisions.

State annual funding requirements for activities outlined in this guidance must be included in the Region's Superfund Comprehensive Accomplishments Plan (SCAP). The Region and State should be working closely during the SCAP development process to ensure that State funding requirements are adequately addressed in the final plan. When developing CA applications for these activities, the State Project Officer (SPO) should work closely with the Remedial Project Manager (RPM) and Regional Counsel to ensure that the application is sufficient and complete. SPOs should also coordinate closely with their Headquarters Regional Coordinator in the Office of Waste Programs Enforcement (OWPE). The Regions will continue to be responsible for awarding the CA.

I. Funding State PRP Searches at Pre-NPL and NPL Sites

If EPA and the State agree to designate sites as State-lead enforcement, the State should identify PRPs. In order to conduct PRP searches in a timely manner, EPA may fund States to perform this activity prior to proposal of a site on the NPL. Candidate sites for this funding are those undergoing a listing site investigation or the NPL scoring quality assurance process. This will enable PRP searches to be completed within six months of proposal of the site on the NPL.

A. Conditions for Funding State PRP Searches Under a Cooperative Agreement

In order to receive funding for PRP searches, the State must agree to include the following information in its CA application and be prepared to make the following assurances in the final CA. Except where noted, the following information and assurances must be certified by the State's Governor, Attorney General, designee, or appropriate State agency. In States where these authorities overlap among different State offices, all applicable signatures will be required.

1. The State must provide a letter outlining the State enforcement authorities that provide the basis for initiating enforcement actions against PRPs (e.g., administrative or judicial enforcement) which can result in securing the necessary response.

2. The State must designate a lead agency RPM and lead State attorney for the site.* Also, if multiple State offices are funded for a site, one must be designated as the lead State agency.

3. The State must agree that PRP searches will be consistent with relevant EPA Superfund enforcement policy and guidance.

4. The State must retain, in a central file, all documents produced, collected, received, or issued as part of the PRP search funded through the CA. These documents may be required for subsequent State or Federal enforcement action, or future cost recovery activities. Examples of such documents include:

   a. Site histories (such as ownership of property through titles or property sales; operations at the facility; and compliance or non-compliance with environmental regulations);

   b. Title searches and summary of findings;

   c. Lists of names, addresses (past and current, if applicable), and phone numbers of PRPs identified (such as owners, operators, generators, and transporters); volume and nature of substances sent to the site and volumetric ranking;

   d. Files on each PRP with evidence (including responses to information requests) of shipments to the site, amount shipped and the fact that hazardous substances were shipped.

   e. Corporate histories, status, and information relating to the availability of PRPs to pay for or perform a cleanup, including financial assessments and insurance information as available; and

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* The same RPM and attorney can be designated the lead for more than one site, if a multi-site CA is developed by and awarded to the State.

f. Conclusions and recommendations for pursuing additional leads or enforcement actions (such as unconfirmed PRPs that could not be conclusively linked to the site).

B. Fundable PRP Search Tasks

This section outlines specific fundable tasks for conducting PRP searches. These tasks parallel those conducted by EPA.

1. Identifying site owners or operators during a preliminary assessment and site inspection.

2. Conducting searches to examine legal descriptions and owners of property (e.g., title searches), government files, reports, and court files. Also, to examine technical information on the types of waste disposed of and methods of disposal used.

3. Identifying initial contacts (such as site owners or operators) to gather documents regarding names and addresses of other parties involved and their contributions to the site.

4. Reviewing information provided by initial contacts, which may lead to the discovery of additional PRPs. This information may include documents such as customer lists, generator invoices, bills and receipts, and owner or operator records and manifests.

5. Conducting on-site investigations to identify additional PRPs. These investigations may include an inventory of drums, and wastes found on site, review of abandoned records, vehicles, buildings, etc.

6. Conducting off-site investigations to provide new leads and identify additional PRPs. These investigations may include interviews with local police, fire and health department personnel, local residents, Chamber of Commerce staff, bank personnel, and local industry representatives.

7. Issuing information request letters.

8. Reviewing and retrieving information from various data bases. Commercial data bases may provide corporate information about PRPs, technical information on specific chemicals, ownership of property, and operations and employees of various firms.

9. Verifying and documenting the various types of information collected during the PRP search process. This effort may include establishing a data base to maintain this information and information collected through notice and information request letters.

10. Identifying PRPs by name and address, indicating the volume and nature of substance contributed by each PRP and ranking PRPs by volume.

11. Securing site access to conduct any of the above mentioned tasks. No EPA funds may be used to compensate site owners for access.

Community relations tasks are also allowable activities under a CERCLA CA. Specifically, States should contact appropriate local officials and community representatives if there is any possibility of citizen interest or concern about potential State enforcement actions. This should also include conducting community interviews to assess public concerns, learn about additional information on the site and PRPs, and prepare a community relations plan. Chapter 6 of the guidance entitled Community Relations in Superfund - A Handbook should be consulted when requesting CA funds for, and when developing, such tasks.

II. Funding State Issuance of Notice Letters and Negotiation Activities at NPL Sites

If EPA and a State agree to designate sites as State-lead enforcement, the State should attempt to notify PRPs of their potential liability and attempt to secure their commitment for site cleanup. Therefore, general notice as well as special notice to PRPs and negotiation for PRP conduct of the RI/FS and/or RD/RA should begin within the time frames established by Section 122 (e) of CERCLA and relevant EPA Superfund enforcement policy and guidance.

In order to issue notice letters within a reasonable timeframe upon proposal of a site on the NPL, EPA may fund States to prepare notice letters prior to such proposal. Candidate sites for this funding are those having received a preliminary HRS of 28.5 or better and planned to undergo NPL quality control review.

A. Conditions for Funding State Issuance of Notice Letters and Negotiations Under a Cooperative Agreement

In order to receive funding for issuing notice letters and negotiating with PRPs, the State must agree to include the following information in its CA application and be prepared to make the following assurances in the final CA. Except where noted, the following information and assurances must be certified by the State's Governor, Attorney General, designee, or appropriate state agency. In States where these authorities overlap among different State offices, all applicable signatures will be required.

1. The State must provide a letter outlining the State enforcement authorities that provide the basis for initiating enforcement actions against PRPs (e.g., administrative or judicial enforcement) which can result in securing the necessary response.

2. The State must designate a lead agency RPM and lead State attorney for the site. Also, if multiple State offices are funded for a site, one must be designated as the lead State agency.

3. The State must conclude successful negotiations by entering into an enforceable order or decree, or by issuing some other enforceable document requiring the PRP to conduct an RI/FS and/or RD/RA in accordance with CERCLA, as amended by SARA (including remedies consistent with Section 121 cleanup standards), the NCP, and applicable EPA policy and guidance.

4. The State must agree to conduct negotiations and develop settlements consistent with CERCLA Section 122 procedures on notice and negotiation time frames (Section 122(e)), ensuring adequate public participation (Section 122(d)) and requiring that covenants not to sue contain a "reopener" provision (except for special covenants, de minimis settlements or extraordinary circumstances)(Section 122(f)).

5. For issuing notice letters and negotiating with PRPs to conduct an RI/FS, the State must agree that the issuance of notice letters and negotiations will be consistent with CERCLA, as amended by SARA, the NCP, and relevant EPA Superfund enforcement policy and guidance.

   - If a settlement is not reached within 90 days after notice to PRPs, the State must notify EPA and recommend either continuing with negotiations or other enforcement actions or requesting initiation of a State- or Fund-financed RI/FS. (If negotiations have begun prior to awarding the CA, the State must notify EPA within 90 days after award.) If EPA and the State determine that negotiations should not continue, the State may request that the CA be amended to redirect remaining funds toward a Fund-financed RI/FS (subject to availability of funds). If EPA and the State determine that negotiations should continue, the State must provide a revised time schedule and date for conclusion of negotiations.

6. For issuing notice letters and negotiating with PRPs to conduct an RD/RA, the State must agree that, the issuance of notice letters and negotiations will be consistent with CERCLA, as amended by SARA, the NCP, and relevant EPA Superfund enforcement policy and guidance.

   - If a negotiated settlement is not reached within 120 days after notice to PRPs, the State must notify EPA and recommend either continuing with negotiations, proceeding with other enforcement actions, or establishing a schedule for conducting a Fund-financed cleanup. (If negotiations have begun prior to awarding the CA, the State must notify EPA within 120 days after award.) If EPA and the State determine that negotiations should not continue, the State may request that the CA be amended to redirect remaining funds toward other administrative or judicial enforcement activities (subject to availability of funds). If EPA and the State determine that negotiations should continue, the State must provide a revised time schedule and date for conclusion of negotiations.

7. The State must compile and maintain an administrative record as required under Section 113 of CERCLA, the NCP and applicable EPA guidance.

8. The State must conduct a community relations program in accordance with the NCP and applicable EPA guidance.

9. In the event that the State determines after execution of the CA that State laws or other restrictions prevent the State from acting consistent with CERCLA, as amended by SARA, the State must agree to promptly notify and consult with EPA regarding the use of such laws or other restrictions[b].

10. The State must retain in a central file all documents produced, collected, received, or issued as part of its issuance of notice letters and negotiations with PRPs. These documents may be required for subsequent State or Federal enforcement action or future cost recovery activities.

    Examples of such documents include:

    a. Lists of names of PRPs receiving notice letters or information request letters and copies of the letters;

    b. Information and data collected as a result of PRP searches and notice letters or information request letters (waste-in lists; volumetric rankings; etc.);

    c. Descriptions of the problems at the site (such as the site history, environmental and public health concerns, and previous response and enforcement activities);

    d. Negotiation strategies or goals and specific response actions sought;

    e. Listings of PRPs involved in the negotiations (such as names, addresses and phone numbers, and other possible PRPs and reasons they were considered or rejected);

    f. Expected and actual time schedules and dates for conclusion of negotiations (such as first negotiation session with PRPs, etc.); and

    g. Copies of the final order or decree and accompanying documents (RI/FS or RD/RA statement of work and work plans).

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b In the course of negotiating the CA, consistency with Section 121 and Section 122 (notice, public participation and covenants not to sue) should be assured.

B. Fundable Notice Letter and Negotiation Tasks

This section outlines specific fundable tasks for conducting negotiations with PRPs. These tasks parallel those conducted by EPA.

1. Various tasks may be conducted to notify PRPs. Fundable tasks include:

   a. Identifying recipients of notice letters by reviewing the results of PRP searches.

   b. Drafting notice letters to be issued to PRPs. This task may include tailoring EPA's model notice letter to address the specifics of the case or to request specific responses from various PRPs.

   c. Mailing notice letters. This task also includes ensuring knowledge that the letters are received by PRPs (e.g., certified return receipt) and that replies are sent to the State.

   d. Receiving and sorting out response letters and reviewing and answering questions raised by PRPs.

   e. Maintaining copies of notice letters issued, responses received, and other documents relevant to the site.

   f. Releasing the names of notified PRPs, in order for all notified parties to begin organizing among themselves in anticipation of negotiations with the State. Releasing the names of notified PRPs to other interested parties may be done in accordance with State Freedom of Information laws and requirements.

   g. Constructing other relevant information (such as a summary of volumetric contribution) to help in organizing PRPs and preparing for negotiations with PRPs.

2. Various tasks may be conducted during negotiations with PRPs. These tasks can be broken down into three broad areas: project management, technical tasks, and legal tasks. (Project management and technical staff may perform parts of some legal tasks, and legal staff may perform parts of some project management tasks.) Fundable tasks for these three areas include:

   a. Analyzing information provided by PRPs in response to notice letter and information requests (such as development of transactional data bases using waste-in lists, volumetric rankings, and type of involvement and years of association with the site).

   b. Reviewing relevant and applicable policies and guidance documents.

   c. Analyzing, reviewing, and providing comments on work plans, samples, studies, and other scientific and technical data.

   d. Assessing site conditions.

e. Defining technical points open for discussion (such as number and placement of samples; scope of the investigation; remedial options to be considered; cleanup standards and techniques to be met; and operable units to be addressed).

f. Reviewing and responding to PRP proposals and/or counter proposals.

g. Identifying applicable and relevant and appropriate requirements (ARARs).

h. Establishing a negotiation team (legal and technical members) and defining each team member's role, authority, and responsibilities.

i. Holding meetings to follow up the notification process.

j. Performing legal research (such as applicable laws, need for precedent, etc.) to support the negotiation effort.

k. Negotiating with PRPs (including de minimis parties, et al.).

l. Analyzing settlement alternatives.

m. Monitoring strengths and weaknesses of State and PRP positions and evidence to be taken to trial should the negotiations fail.

n. Preparing draft orders and decrees for PRP review and comment.

o. Assessing PRP comments on the draft order and preparing and issuing the final order.

p. Meeting with EPA and/or expert witnesses to discuss the draft order and other aspects of the enforcement action.

q. Developing a payment plan for fines or cash settlements.

Community relations tasks are also allowable activities under a CERCLA CA. The State is responsible for conducting a community relations program during negotiations with PRPs. The State should refer to Chapter 6 of the guidance entitled Community Relations in Superfund - A Handbook when requesting CA funds for, and when developing, such a program.

III. Funding State Administrative and Judicial Enforcement Actions at NPL Sites

If EPA and a State agree to designate sites as State-lead enforcement, and private parties do not agree willingly to clean up the site, the State may pursue administrative or judicial enforcement action against PRPs to compel cleanup (in State or Federal Court, as appropriate). These actions are considered while an RI/FS is being completed in order to plan, in the event that a settlement is not reached, whether the design is to be financed by the Fund, whether to issue a

unilateral order and or whether to file a judicial action for injunctive relief. Therefore, EPA will not fund these actions unless the steps outlined above have been completed or pursued. Where this situation occurs, EPA may fund the State for these actions against the PRPs.

However, EPA will consider other factors that justify or require pursuing administrative or judicial enforcement to compel performance of the RI/FS. For instance, States as part of their enforcement process may typically issue unilateral administrative orders either to initiate the negotiation process (tantamount to a notice) or at the termination of negotiations where no settlement is reached (i.e., PRPs failed to execute or sign the enforcement document). EPA may fund the tasks necessary to prepare and issue the unilateral administrative order. The State must outline the factors for pursuing this method of enforcement in the CA application.

A. Conditions for Funding State Administrative or Judicial Enforcement Actions Under a Cooperative Agreement

In order to receive funding from EPA for administrative or judicial enforcement actions against PRPs, the State must agree to include the following information in its CA application and be prepared to make the following assurances in the final CA. Except where noted, the following information and assurances must be certified by the State's Governor, Attorney General, designee, or appropriate State agency. In States where these authorities overlap among different State offices, all applicable signatures will be required.

1. The State must provide a letter outlining the State enforcement authorities that provide the basis for initiating enforcement actions against PRPs (e.g., administrative or judicial) which can result in securing the necessary response.

2. The State must designate a lead agency RPM and lead State attorney for the site. Also, if multiple State offices are funded for a site, one must be designated as the lead State agency.

3. The State must issue a unilateral order and/or file a judicial action requiring the PRP to conduct an RI/FS or RD/RA in accordance with CERCLA, as amended by SARA (including remedies consistent with Section 121 cleanup standards), the NCP and applicable EPA policy and guidance.

4. The State must agree to conduct negotiations and develop settlements consistent with CERCLA Section 122 procedures on notice and negotiation time frames (Section 122(e)), ensuring adequate public participation (Section 122(d)) and requiring that covenants not to sue contain a "reopener" provision (except for special covenants, de minimis settlements or extraordinary circumstances)(Section 122(f)).

5. The State must compile and maintain an administrative record as required under Section 113 of CERCLA, the NCP and applicable EPA guidance.

6. The State must conduct a community relations program in accordance with the NCP and applicable EPA guidance.

7. In the event that the State determines after execution of the CA that State laws or other restrictions prevent the State from acting consistent with CERCLA, as amended by SARA, the State must agree to promptly notify and consult with EPA regarding the use of such laws or other restrictions[c].

8. The State must retain in a central file all documents produced, collected, received, or issued as part of its administrative or judicial enforcement against PRPs. These documents are generally required as part of an action to compel PRPs to take a response action or for cost recovery. Examples of such documents include:

   a. Descriptions of problems at the site (such as the site history, environmental and health concerns, and responses and enforcement activities preceding litigation).

   b. Objectives of litigation (such as relief and/or monetary penalties sought).

   c. Statutory provisions upon which the case is being built (such as State and/or Federal statutes).

   d. Factors leading to the need for litigation (such as the legal history of the case and other elements of the case).

   e. Proposed litigants and evidence of use of the site (such as names, how they are linked to the site, and other possible litigants and reasons they were considered or rejected).

   f. Potential problems with the litigation (such as any anticipated defenses, problems with consistency with NCP, and reasons for urgency in proceeding with litigation).

   g. Summary of the contents of the documentary file (such as technical documents, administrative decisions, correspondence, pleadings, documentation and minutes of negotiations and technical discussions with PRPs, and other relevant documents).

   h. Previous settlement discussions and proposals made by the State and/or PRPs.

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[c] In the course of negotiating the CA, consistency with Section 121 and Section 122 (notice, public participation and covenants not to sue) should be assured.

i. Expected and actual time schedule for litigation (such as motion for first discovery, first summary judgment, first deposition, etc.).

j. Copies of final judgments or consent decrees and accompanying documents.

B. Fundable Administrative or Judicial Enforcement Tasks

This section outlines specific fundable tasks for administrative or judicial enforcement against PRPs. These tasks parallel those conducted by EPA.

Various tasks may be conducted during an administrative or judicial enforcement action against PRPs. These tasks can be broken down into three broad areas: project management, technical tasks, and legal tasks. (Project management and technical staff may perform parts of some legal tasks, and legal staff may perform parts of some project management tasks.) Fundable tasks for these three areas include:

1. Analyzing information provided by PRPs in response to notice letters and information requests (such as development of transactional data bases using waste-in lists, volumetric rankings, and type of involvement and years of association with the site).

2. Reviewing relevant and applicable policies and guidance documents.

3. Analyzing, reviewing, and providing comments on work plans, samples, studies, and other scientific and technical data.

4. Analyzing previous negotiations and PRP proposals and/or counter proposals.

5. Defining technical points to be addressed during litigation (such as technical and scientific data supporting selection of a particular remedy, cleanup standard and/or technique and endangerment, and release of other elements of proof under State law).

6. Compiling and evaluating testimony and depositions. Hiring expert witnesses through the State's procurement procedures.

7. Identifying ARARs.

8. Developing a litigation team (legal and technical members) and defining each team member's role, authority, and responsibility.

9. Organizing all documents collected and generated throughout the case.

10. Performing legal research (such as legal history and theory of the case and statutes upon which to proceed).

11. Reviewing proceedings of previous negotiations and settlement offers.

12. Conducting discovery and deposition tasks.

13. Preparing pleadings, motions, and briefs.

14. Preparing expert witness testimony.

15. Analyzing potential defenses to the case.

16. Assessing settlement alternatives.

17. Preparing pretrial order.

18. Trying the case in court, if a pretrial settlement cannot be reached.

Community relations tasks are also allowable activities under a CERCLA CA. The State is responsible for conducting a community relations program during an administrative action or litigation against PRPs. The State should refer to Chapter 6 of the guidance entitled Community Relations in Superfund - A Handbook when requesting CA funds for, and when developing, such a program.

ATTACHMENT A

PROVISIONS SPECIFIC TO STATE-LEAD ENFORCEMENT ACTIONS AT CERCLA NATIONAL PRIORITIES LIST SITES

State-lead enforcement Cooperative Agreements should contain the provisions found in Sections 1 (A-F) and 2 (B-M, O-T) of Appendix F of the EPA manual State Participation in the Superfund Program. In addition, they should also contain the following provisions.

A. State Enforcement Authorities

In providing CERCLA funds for State-lead enforcement PRP search, notification, negotiation, and administrative and judicial enforcement, the State has shown it possesses the legal authorities to pursue such actions to ensure performance of the response action. EPA asks the State to outline these authorities in the Cooperative Agreement application.

> "The State possesses the legal authorities to pursue enforcement actions to ensure performance of the private party response action. The State agrees to use these authorities if private parties are unwilling to implement the necessary response action. These legal authorities are outlined in a letter from [official providing letter], dated [_____] and is attached to the Cooperative Agreement application."

B. Designation of Lead Site Project Manager and Lead Attorney/Coordination Among Appropriate State Offices

CERCLA enforcement actions are a joint effort, involving individuals with project management, technical, and legal expertise. To this extent, enforcement actions require close coordination and cooperation between technical experts and attorneys to ensure successful results. EPA asks the State to identify State officials who will represent this expertise and ensure that the various State offices involved in the enforcement action are involved in the development and execution of the Cooperative Agreement.

> "The State has designated [name, title, address, phone number] to serve as lead agency remedial project manager for the [site]. The State has designated [name, title, address, phone number] to serve as lead attorney for the [site]. All appropriate State offices involved in the execution of the enforcement action planned for the [site] have been coordinated with in developing this Cooperative Agreement application."

C. Consistency with EPA Policy and Guidance[1]

In pursuing enforcement actions against PRPs, the State must assure that such actions are consistent with CERCLA, as amended by SARA, the NCP, and relevant EPA Superfund enforcement policy and guidance.

For PRP Searches:

"In conducting PRP searches funded by this Cooperative Agreement, the State agrees to ensure that such activities will be consistent with relevant EPA Superfund enforcement policy and guidance, including but not limited to:

- o U.S. EPA, Office of Waste Programs Enforcement, Potentially Responsible Party Search Manual, August 27, 1987."

For Issuance of Notice Letters and RI/FS Negotiations with PRPs:

"In issuing notice letters and conducting RI/FS negotiations funded by this Cooperative Agreement, the State agrees to ensure that such activities will be consistent with CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA Superfund enforcement policy and guidance, including but not limited to:

- o U.S. EPA, Office of Solid Waste and Emergency Response, Interim Guidance on Notice Letters, Negotiations and Information Exchange, October 19, 1987;
- o U.S. EPA, Office of Solid Waste and Emergency Response, Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies, (pending);
- o U.S. EPA, Office of Emergency and Remedial Response, Guidance on Remedial Investigations under CERCLA and Guidance on Feasibility Studies under CERCLA, June 1985."

For Issuance of Notice Letters and RD/RA Negotiations with PRPs:

"In issuing notice letters and conducting RD/RA negotiations funded by this Cooperative Agreement, the State agrees to ensure that such activities will be consistent with CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA Superfund enforcement policy and guidance, including but not limited to:

- o U.S. EPA, Office of Waste Programs Enforcement, Interim Guidance on Notice Letters, Negotiations and Information Exchange, October 19, 1987;

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1 The policies cited in this section should not be construed as all inclusive or entirely relevant to each site-specific enforcement action. Other policies that may exist or be developed in the future may also need to be referenced in a Cooperative Agreement. In addition, some of the policies listed above are currently being revised (such as the RI/FS and RD/RA guidances):

- o U.S. EPA, Office of Solid Waste and Emergency Response, Office of Enforcement and Compliance Monitoring, U.S. Department of Justice, Interim CERCLA Settlement Policy, December 5, 1985 (to the extent not superseded by Section 122 of CERCLA);

- o U.S. EPA, Office of Emergency and Remedial Response, Superfund Remedial Design and Remedial Action Guidance, Revised, June 1986."

For Administrative and Judicial Enforcement Actions against PRPs:

"In conducting administrative and judicial enforcement actions funded by this Cooperative Agreement, the State agrees to ensure that such activities will be consistent with CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA Superfund enforcement policy and guidance, including but not limited to:

- o U.S. EPA, Office of Solid Waste and Emergency Response, Office of Enforcement and Compliance Monitoring, U.S. Department of Justice, Interim CERCLA Settlement Policy, December 5, 1985 (to the extent not superseded by Section 122 of CERCLA);

- o U.S. EPA, Office of Emergency and Remedial Response, Superfund Remedial Design and Remedial Action Guidance, Revised, June 1986."

D. Consistency with Section 122 of CERCLA

State negotiations and settlements will need to be consistent with Section 122 of CERCLA and relevant EPA Superfund enforcement policy and guidance when State enforcement actions are funded under a cooperative agreement.

"In conducting negotiations and developing settlements funded by this Cooperative Agreement, the State agrees to be consistent with CERCLA Section 122 procedures on giving notice and establishing negotiation time frames (Section 122(e)); ensuring adequate public participation (Section 122(d)); and requiring that covenants not to sue contain a "reopener" provision (except for a special covenant not to sue, a de minimis settlement, or in an extraordinary circumstance) (Section 122(f))."

E. Time Frame for Negotiations

When conducting negotiations funded under a CERCLA Cooperative Agreement, the State must attempt to settle with PRPs within a specified time frame. EPA asks the State to notify EPA if a settlement is not reached within this time frame and to recommend whether negotiations should continue with the PRPs.

For RI/FS Negotiations:

"If a settlement is not reached within 90 days after notice to potentially responsible parties for their conduct of the RI/FS, the State agrees to notify EPA and recommend either (1) continuing with negotiations or other enforcement actions or (2) requesting initiation of a State or Fund-financed RI/FS. (If negotiations have begun prior to award of the Cooperative Agreement, the State agrees to notify EPA within 90 days after award.) If EPA and the State determine that negotiations should not continue, the State may request that the agreement be amended to redirect remaining funds toward a Fund-financed RI/FS (subject to availability of funds). If EPA and the State determine that negotiations should continue, the State agrees to provide a revised time schedule and date for conclusion of negotiations."

For RD/RA Negotiations:

"If a settlement is not reached within 120 days after notice to potentially responsible parties for their conduct of the RD/RA, the State agrees to notify EPA and recommend either (1) continuing with negotiations, (2) proceeding with other administrative or judicial enforcement actions, or (3) having EPA establish a schedule for conducting a Fund-financed cleanup. (If negotiations have begun prior to award of the Cooperative Agreement, the State agrees to notify EPA within 120 days after award.) If EPA and the State determine that negotiations should not continue, the State may request that the agreement be amended to redirect remaining funds toward other administrative or judicial enforcement actions. If EPA and the State determine that negotiations should continue, the State agrees to provide a revised time schedule and date for conclusion of negotiations."

F. Formalizing Successful Negotiations, and Administrative or Judicial Enforcement Actions

In pursuing negotiations with or enforcement actions against PRPs, the State is required to culminate successful actions by entering into an enforceable order, or decree or issuing some other enforceable document requiring the PRP to conduct the response action in accordance with the NCP and relevant EPA policy and guidance.

"The State agrees to culminate a successful [type of enforcement action] by issuing a [type of enforceable document] for the [name of site], requiring the private parties to conduct the response action in accordance with CERCLA, as amended by SARA, NCP, and applicable EPA policy and guidance."

G. Administrative Record

"The State agrees to compile and maintain an administrative record consistent with Section 113 of CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA policy and guidance, including but not limited to:

- U.S. EPA, Office of Waste Programs Enforcement/Office of Emergency and Remedial Response, Administrative Records for Decisions on Selection of CERCLA Response Actions, May 29, 1987.

The record shall contain information upon which the decision on selection of the response action was based. The record shall be maintained at or near the site, and a copy shall be maintained at the [name of State lead agency receiving the cooperative agreement].

H. Community Relations

"The State agrees to prepare and implement a community relations plan for this site. The State further agrees to comply with the National Contingency Plan and all relevant EPA policy and guidance on community relations, especially Chapter 6, Community Relations in Superfund: A Handbook when implementing the community relations plan throughout the response."

I. Deviation From CERCLA, As Amended By SARA

State laws or other restrictions may prevent States from acting consistent with CERCLA, as amended by SARA. In those instances, the State must agree to promptly notify and consult with EPA regarding the use of such laws or other restrictions.

"Where State laws or other restrictions may prevent the State from acting consistent with CERCLA, as amended by SARA, the State agrees to promptly notify and consult with EPA regarding the use of such laws or other restrictions."

J. Maintaining Enforcement-Related Documents in a Central File

"The State agrees to maintain a central file of all documents produced, collected, received, or issued as part of the enforcement activities funded under this Cooperative Agreement. The State understands that these documents may be required for subsequent State or Federal enforcement action or future cost recovery activities."

K. Changes to Scope of Work

The State must agree to notify EPA in the event that State or PRP plans or actions substantially change the scope of work for tasks funded under the CA.

"The State agrees to notify EPA in the event that State or PRP plans or actions substantially change the scope of work for tasks funded under this Agreement. Prior to issuance, such changes will be submitted to EPA for review to ensure technical adequacy and compliance with the terms of this Agreement."

CERCLA FUNDING OF POTENTIALLY RESPONSIBLE PARTY OVERSIGHT BY STATES AT NATIONAL PRIORITIES LIST SITES

CERCLA FUNDING OF POTENTIALLY RESPONSIBLE PARTY OVERSIGHT BY STATES AT NATIONAL PRIORITIES LIST SITES

PURPOSE

The purpose of this guidance is to assist EPA Regional offices and States in funding, under a CERCLA cooperative agreement (CA), of State oversight of potentially responsible parties (PRP) conducting remedial investigations (RI), feasibility studies (FS), remedial designs (RD), and remedial actions (RA) at sites on the National Priorities List (NPL). The guidance also discusses funding of States during an EPA-lead enforcement response action.

BACKGROUND

The Office of General Counsel has concluded that CERCLA funding may be provided to States to support a broad range of enforcement-related response activities. This is in addition to State-conducted, Fund-financed RI/FS activities to support enforcement actions at NPL sites. The reason is that such activities are included under CERCLA Section 104(b) and consequently are eligible for CERCLA funding.[a]

The role of States in oversight of a PRP-conducted RI/FS and RD/RA depends on whether the State or EPA negotiated and entered into the administrative order (AO) or consent decree (CD). If the State negotiated the AO or CD, then the State has the lead for oversight of the PRP's work. If EPA negotiated the AO or CD, then EPA has the lead for oversight of the PRP's work. When EPA has the lead for oversight, the State may receive management assistance funding in order to review PRP response activities at the site.

The State may also, under certain circumstances, undertake various, mutually agreed upon oversight activities at Federal lead sites. These circumstances include Federal CERCLA Section 104 and 106 settlements with PRPs in which the State is a participant, as authorized under Section 121(f) of CERCLA, as amended by SARA, and State oversight that can result in a more effective and timely response to PRP implementation activities. Furthermore, States may be used in place of EPA contractors to meet the qualified third party oversight requirements outlined in Section 104(a)(1) of CERCLA, as amended by SARA.

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[a] L.A. DeHihns, Authority to Use CERCLA to Provide Enforcement Funding Assistance to States, July 20, 1984, and February 12, 1986.

GUIDANCE

In determining whether to fund a State to provide oversight of a PRP response action, the Region should employ the same standard of review it uses to evaluate contractors providing oversight for the Regional office. The Region should also assess the State's ability to meet the classification criteria outlined in the EPA and Association of State and Territorial Solid Waste Management Officials (ASTSWMO) policy memorandum of October 2, 1984, entitled "EPA/State Relations in Enforcement Actions for Sites on the National Priorities List." In addition, EPA Headquarters is in the process of developing additional classification guidance based upon SARA and the upcoming revisions to the National Contingency Plan (NCP). In reviewing a CA for award, the criteria should be applied to the site. Once the State requests CA funding, the Region should pay particular attention to the itemized budget submitted along with the CA application. The budget should be carefully reviewed to ensure that adequate resources and staff expertise are devoted to the site. Along with these considerations, the conditions and requirements outlined in this guidance must be incorporated in the CA application prior to award.

The guidance explains the conditions for awarding funds and lists the fundable tasks for each activity. This guidance does not preclude the Regions from including additional enforcement-related conditions in the application, if warranted. Furthermore, it is imperative that applicable provisions outlined in Appendix F of the EPA manual State Participation in the Superfund Program be incorporated in each CA application. See Attachment A for those applicable provisions and sample language for the enforcement provisions.

State yearly funding requirements for activities outlined in this guidance must be included in the Region's Superfund Comprehensive Accomplishments Plan (SCAP). The Region and State should be working closely during the SCAP development process to ensure that State funding requirements are adequately addressed in the final plan. When developing CA applications for these activities, the State Project Officer (SPO) should work closely with the Remedial Project Manager (RPM) and Regional Counsel to ensure that the application is sufficient and complete. SPOs should also coordinate closely with their Headquarters Regional Coordinator in the Office of Waste Programs Enforcement (OWPE). The Regions will continue to be responsible for awarding the CA.

I. Funding State Oversight of PRPs - State Enforcement Response

If a State successfully negotiates to have the PRPs conduct the RI/FS or RD/RA, it will be in the State's interest to oversee their work. States should obtain a commitment from PRPs to pay for their RI/FS oversight costs when negotiating with PRPs, prior to either requesting funds from EPA or drawing down on monies already awarded in a CA. The PRPs may want to reimburse States for their oversight costs at the end of each year or at the completion of the response action, rather than providing the monies up front. In this case, States should assure initial funding of oversight of the PRPs' RI/FS. This may be done using State funds or EPA funds, to the extent available. Where EPA funds are used, States may pay back EPA upon receipt of the PRPs' money, or EPA may receive the money directly from the PRPs.

There may be situations where post-SARA State RI FS negotiations and settlements by States do not include a PRP commitment to pay for oversight. The Regional office must remind the States of the CERCLA Section 104(a)(1) requirement and closely scrutinize State capability or willingness to seek oversight costs before proceeding with a CA. Ordinarily, Regions will not fund State oversight costs when States have not obtained such costs in an order or decree. In addition, States should arrange for PRPs to pay for their RD/RA oversight as well when negotiating with PRPs.

A.1 Conditions for Funding Under a Cooperative Agreement: Oversight of RI/FS

In order to receive funding from EPA for oversight of a PRP-conducted RI/FS, the State must include the following information in its CA application and be prepared to make the following assurances in the final CA. Except where noted, the following information and assurances must be certified by the State's Governor, Attorney General, designee, or appropriate State agency.

1. The State must have issued or negotiated an enforceable order, decree, or other enforceable document requiring the PRP to conduct an RI/FS in accordance with CERCLA, as amended by SARA, the NCP, and applicable EPA policy and guidance. A copy of the order must be included in the CA application.[b]

2. The State must provide a letter outlining the State enforcement authorities that resulted in the issuance or negotiation of the enforcement document.

3. The State must assure that it believes the PRPs have the technical, managerial, and financial capability to conduct the RI/FS.

4. The State must assure that it will prepare a Record of Decision (ROD) or other decision document and select a remedy that is consistent with CERCLA, as amended by SARA, the NCP, and relevant EPA policy and guidance.

5. The State must conduct a community relations program in accordance with the NCP and applicable EPA guidance.[c]

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[b] If the enforceable document is a three party agreement (EPA, State, and PRP), the CA need only cite it since a copy should already be in EPA's possession.

[c] See the document Community Relations in Superfund: A Handbook, especially Chapter 6 which deals with community relations during enforcement actions.

6. The State must compile and maintain an administrative record as required under Section 113 of CERCLA, the NCP and applicable EPA guidance.

7. The State must agree to the following general principles concerning PRP payment of RI/FS oversight costs, which may be spelled out in the State's order or decree:

   a. The State will document its oversight costs.

   b. PRPs will reimburse EPA for its oversight costs (either directly or through the State).

   c. PRPS agree that they are liable to EPA under Section 107 of CERCLA for unpaid oversight costs, plus associated enforcement costs and interest from the date of demand by EPA or State.

8. In the event that the State determines after execution of the CA that State laws or other restrictions prevent the State from acting consistent with CERCLA, as amended by SARA, the State must agree to promptly notify and consult with EPA regarding the use of such laws or other restrictions[d].

A.2 Conditions for Funding Under a Cooperative Agreement: Oversight of RD/RA

In order to receive funding from EPA for oversight of a PRP-conducted RD/RA, the State must include the following information in its CA application and be prepared to make the following assurances in the final CA. Except where noted, the following information and assurances must be certified by the State's Governor, Attorney General, designee, or appropriate State agency.

1. The State must have issued or negotiated an enforceable order, decree, or other enforceable document requiring the PRP to conduct an RD/RA in accordance with CERCLA, as amended by SARA, the NCP, and applicable EPA policy and guidance. A copy of the order must be included in the CA application.[e]

2. The State must provide a letter outlining the State enforcement authorities that resulted in the issuance or negotiation of the enforcement document.

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[d] In the course of negotiating the CA, consistency with Section 121 and Section 122 (notice, public participation and covenants not to sue) should be assured.

[e] If the enforceable document is a three party agreement (EPA, State, and PRP), the CA need only cite it since a copy should already be in EPA's possession.

3. The State must assure that it believes the PRPs have the technical, managerial, and financial capability to conduct the RD/RA.

4. The State must submit a ROD or other decision document consistent with CERCLA, as amended by SARA, the NCP and relevant EPA policy and guidance. This documentation must be included in the CA application or be submitted as a condition to drawing down on oversight funds.[f] Funding will not be allowed unless EPA formally concurs in writing with the State's ROD or other decision document.

5. The State must conduct a community relations program in accordance with CERCLA, as amended by SARA, the NCP and applicable EPA guidance.

6. In the event that the State determines after execution of the CA that State laws or other restrictions prevent the State from acting consistent with CERCLA, as amended by SARA, the State must agree to promptly notify and consult with EPA regarding the use of such laws or other restrictions[g].

B.1 Fundable Oversight Tasks: RI/FS

In preparing and reviewing the CA application, it might be helpful for States and Regions to consider oversight as consisting of review tasks, field-related tasks, and enforcement tasks. A community relations program is also an essential aspect of the response action. States should attempt to specify, in the enforceable document, the roles and responsibilities of the PRP as distinguished from the roles and responsibilities of the State in each of these major activities.

1. Review tasks conducted by the State include:

   a. Review preliminary planning documents;

   b. Review and comment on scope of work and work plans;

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f If the enforceable document is a three party agreement (EPA, State, and PRP), the CA need only cite the ROD since a copy should already be in EPA's possession.

g In the course of negotiating the CA, consistency with Section 121 and Section 122 (notice, public participation and covenants not to sue) should be assured.

c. Review and comment on standard operating procedures (such as quality assurance quality control plans, sampling plans, health and safety plans, and data management plans);

d. Review and comment on draft RI reports;

e. Review final RI reports;

f. Review and discuss FS objectives;

g. Review and comment on draft FS;

h. Review final FS;

i. Prepare the proposed plan for remedial action and draft and final ROD;

j. Compile and respond to public comments on the RI/FS and proposed plan for remedial action;

k. Review PRP monthly progress reports;

l. Organize and participate in technical meetings on the RI/FS with the PRPs, PRP contractors, and/or EPA.

2. Field-related tasks conducted by the State include:[h]

a. Conduct environmental monitoring (e.g., air, water);

b. Take and analyze split samples or confirmatory samples;

c. Provide on-site presence/inspection of PRP field activities.

3. Enforcement tasks conducted by the State include:

a. Track deliverable schedules and submission dates spelled out in the enforcement document;

b. Initiate enforcement action for non-compliance with terms and conditions of the enforcement document.

4. Community relations tasks conducted by the State include:

a. Notify local newspapers of site activities planned or underway;

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[h] The amount and scope of field-related tasks to be funded by EPA during oversight should be negotiated on a case-by-case basis.

b. Conduct discussions with the affected community in the locale of the site;

c. Prepare community relations plans;

d. Hold public comment period on the RI/FS;

e. Brief local and State officials;

f. Hold public meetings on technical aspects of the site;

g. Prepare fact sheets and press releases and disseminate information;

h. Prepare summaries of public concerns.

B.2 Fundable Oversight Tasks: RD/RA

1. Fundable oversight tasks: RD

a. Review tasks conducted by the State for RD include:

- o Participate in technical design briefings for RD initiation;
- o Review design scopes of work;
- o Conduct technical meetings on the RD with the PRPs, PRP contractors, and/or EPA;
- o Assist in reviewing preliminary design documents and design changes which may affect remedy selection;
- o Review and comment on value engineering screening submittals;
- o Review and comment on quality assurance project plans, site safety plans, and intermediate design documents;
- o Review and comment on plans for operation and maintenance developed by PRP;
- o Review final RD.

b. Enforcement tasks conducted by the State for RD include:

- o Track deliverable schedules and submission dates spelled out in the enforcement document.
- o Initiate enforcement action for non-compliance with terms and conditions of the enforcement document.

c. Community relations tasks conducted by the State for RD include:

- o Prepare fact sheets and notify public on RD activities and on what the RD is expected to entail;
- o Continue prior community relations activities as needed.

2. Fundable oversight tasks: RA

a. Review tasks conducted by the State for RA include:

- o Review and comment on PRP or PRP contractor work plans, site safety plans, and QA/QC procedures;
- o Review any construction change orders that may alter the approved remedy and amend the CA, prepare a discussion of significant changes from the proposed plan in the Record of Decision (ROD), and/or amend the ROD as appropriate subject to adoption of the amended ROD by EPA;
- o Review and comment on draft and final RA reports;
- o Participate in pre-construction and pre-final construction conferences;
- o Review PRP or PRP contractor monthly progress reports;
- o Organize and participate in technical meetings on the RA with the PRPs, PRP contractors, and/or EPA;
- o Ensure that the remedy is completed and operational.

b. Field-related tasks conducted by the State for RA include:

- o Provide monitoring and oversight of construction activities;
- o Take and analyze split samples or confirmatory samples;
- o Be present at trial runs and shakedowns of major equipment;
- o Participate in pre-final and final inspections and project acceptance.

c. Enforcement tasks conducted by the State for RA include:

- o Track deliverable schedules and submission dates spelled out in the enforcement document;

- o Initiate enforcement action for non-compliance with terms and conditions of the enforcement document.

d. Community relations tasks conducted by the State for RA include:

- o Revise original community relations plans to incorporate any changes required due to remedial design and construction activities;
- o Conduct discussions with the affected community on the selected remedy and planned construction activities;
- o Hold meetings with the public during the RA.

II. Funding State Management Assistance and Oversight of PRPs - Federal Enforcement Response

A. Management Assistance During a Federal Enforcement Response

If EPA has negotiated the administrative order or consent decree with the PRPs, EPA will have the lead for oversight of PRP activities and for community relations. In this situation, States may receive funding for management assistance. Management assistance essentially will involve review tasks and is explained in Volume I of the EPA manual State Participation in the Superfund Program. EPA will not fund States to hire contractors for management assistance tasks.

B. Oversight During a Federal Enforcement Response

The State may also, under certain circumstances, undertake various, mutually agreed upon oversight activities in place of EPA. These circumstances may include the following:

1. Federal CERCLA settlements with PRPs in which the State is a participant, as authorized under Section 121(f) of CERCLA, as amended by SARA.
2. State oversight that can result in a more effective and timely response to PRP implementation activities.
3. Furthermore, States may be used in place of EPA contractors to meet the qualified third party oversight requirements outlined in Section 104(a)(1) of CERCLA.[i]

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[i] Under this scenario, the State would conduct oversight activities in-house.

This means the State would be conducting some review, field-related, and/or community relations tasks along with or in place of EPA or EPA's contractor. For each task, the CA application should clearly outline the roles and responsibilities of the State as distinguished from the roles and responsibilities of EPA or EPA's contractor.

Where EPA has the lead for oversight, EPA encourages the State to conduct oversight tasks only if it has the in-house capability to do the work. Generally, EPA will not fund the State to hire contractors for oversight tasks unless it provides adequate justification for their use. Furthermore, EPA will not fund States to conduct oversight tasks that duplicate EPA's efforts.

ATTACHMENT A

PROVISIONS SPECIFIC TO STATE-LEAD ENFORCEMENT OVERSIGHT OF POTENTIALLY RESPONSIBLE PARTIES

State-lead enforcement oversight Cooperative Agreements (CA) should contain the provisions found in Sections 1 (A-F) and 2 (B-M, O-T) of Appendix F of the EPA manual State Participation in the Superfund Program. In addition, they should also contain the following provisions.

A. Issuing an Enforceable Order, Decree, or Other Enforceable Document

Before EPA funds oversight, the State is required to issue an enforceable order, decree, or other document that requires the PRP to conduct a RI/FS and/or RD/RA in accordance with CERCLA, as amended by SARA, the NCP, and applicable EPA guidance. A copy of this enforcement agreement must be included in the CA application.

> "The State issued a [type of enforceable document] for the [name of site] dated [_____], requiring a [type of response action] in accordance with CERCLA, as amended by SARA, the NCP, and applicable EPA policy and guidance. A copy of this enforcement agreement is attached to the Cooperative Agreement application."[1]

B. State Enforcement Authorities

In providing CERCLA funds for State-lead oversight of PRPs, the State has shown it possesses the legal authorities to pursue administrative or judicial enforcement action to ensure performance of the response action. EPA asks the State to outline these authorities in the CA application.

> "The State possesses the legal authorities to pursue administrative or judicial enforcement action to ensure performance of the private party response action. The State agrees to use these authorities if private parties (1) do not meet the terms of the order, decree, or other enforceable document, or (2) are unwilling to undertake subsequent phases of the response action. These legal authorities are outlined in a letter from [official providing letter], dated [_____], and is attached to the Cooperative Agreement application."

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[1] If the enforceable document is a three party agreement (EPA, State, and PRP), the CA should read "and EPA" after "The State" and only cite the enforceable document since a copy should already be in EPA's possession.

C. Ability of PRPs to Undertake and Finance the Response Action

In settling with PRPs to undertake the response action, the State believes that the PRPs have the technical, managerial, and financial capability to conduct the response action.

For RI/FS oversight:

"The State believes that the PRP has the technical, managerial, and financial capability to undertake the RI/FS."

For RD/RA oversight:

"The State believes that the PRP has the technical, managerial, and financial capability to undertake the RD/RA."

D. Consistency with EPA Policy and Guidance[2]

In overseeing PRP conduct of response actions, the State must assure that such actions are consistent with CERCLA, as amended by SARA, the NCP, and applicable EPA policy and guidance.

For RI/FS oversight:

"In conducting RI/FS oversight funded by this Cooperative Agreement, the State agrees to ensure that the private party RI/FS is consistent with CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA policy and guidance, including but not limited to:

- U.S. EPA, Office of Emergency and Remedial Response, Guidance on Remedial Investigations Under CERCLA and Guidance on Feasibility Studies Under CERCLA, June 1985.
- U.S. EPA, Office of Solid Waste and Emergency Response, Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies, (pending).
- U.S. EPA, Office of Solid Waste and Emergency Response, Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements, Federal Register, August 27, 1987."

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[2] The policies cited in this section should not be construed as all inclusive or entirely relevant to each site-specific enforcement action. Other policies that may exist or be developed in the future may also need to be referenced in a Cooperative Agreement. In addition, some of the policies listed above are currently being revised (such as the RI/FS and RD/RA guidances).

For RD RA oversight:

"In conducting RD RA oversight funded by this Cooperative Agreement, the State agrees to ensure that the private party RD/RA is consistent with CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA policy and guidance, including but not limited to:

- o U.S. EPA, Office of Emergency and Remedial Response, Manual Superfund Remedial Design and Remedial Action Guidance, June, 1986."

E. Selection of Remedy

"At the completion of the private party RI/FS, the State agrees to recommend a proposed remedial action plan, develop a Record of Decision (ROD) or other decision document, and select the remedy consistent with CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA policy and guidance, including but not limited to:

- o U.S. EPA, Office of Solid Waste and Emergency Response, Interim Guidance on Superfund Selection of Remedy, December 24, 1986."

F. Changes to Scope of Work

The State must agree to notify EPA in the event that State or PRP plans or actions substantially change the scope of work for tasks funded under the CA.

"The State agrees to notify EPA in the event that State or PRP plans or actions substantially change the scope of work for tasks funded under this Agreement. Prior to issuance, such changes will be submitted to EPA for review to ensure technical adequacy and compliance with the terms of this Agreement."

G. Community Relations

"The State agrees to prepare and implement a community relations plan for this site. The State will not initiate oversight field activities until EPA has approved the plan. The State further agrees to comply with the National Contingency Plan and relevant EPA policy and guidance on community relations, especially Chapter 6, Community Relations in Superfund: A Handbook when implementing the community relations plan throughout the response."

H. Administrative Record

"The State agrees to compile and maintain an administrative record consistent with Section 113 of CERCLA, as amended by SARA, the National Contingency Plan, and relevant EPA policy and guidance, including but not limited to:

- o U.S. EPA, Office of Waste Programs Enforcement/Office of Emergency and Remedial Response, Administrative Records for Decisions on Selection of CERCLA Response Actions, May 29, 1987.

"The record shall contain information upon which the decision on selection of the response action was based. The record shall be maintained at or near the site, and a copy shall be maintained at the [name of State lead Agency receiving the cooperative agreement]."

I. PRP Payment of Oversight Costs

"The State agrees with the following general principles concerning PRP payment of RI/FS oversight costs, which may be spelled out in the State's order or decree:

- o The State will document its oversight costs;
- o PRPs will reimburse EPA for its oversight costs (either directly or through the State); and
- o PRPs agree that they are liable to EPA under Section 107 of CERCLA for unpaid oversight costs, plus associated enforcement costs and interest from the date of demand by EPA or State."

J. Deviation From CERCLA, As Amended By SARA

State laws or other restrictions may prevent States from acting consistent with CERCLA, as amended by SARA. In those instances, the State must agree to promptly notify and consult with EPA regarding the use of such laws or other restrictions.

"Where State laws or other restrictions may prevent the State from acting consistent with CERCLA, as amended by SARA, the State agrees to promptly notify and consult with EPA regarding the use of such laws or other restrictions."

COST ESTIMATES FOR BUDGETING STATE ENFORCEMENT ACTIVITIES

COST ESTIMATES FOR BUDGETING STATE ENFORCEMENT ACTIVITIES

Cost estimates have been developed for CERCLA enforcement activities, which are fundable through EPA cooperative agreements (CA). The cost estimates are to be used solely as a guide in assisting the State and EPA in budgeting these activities during development of the Superfund Comprehensive Accomplishments Plan (SCAP).

EPA has set forth policy on the types of activities to be funded through CAs in the Office of Solid Waste and Emergency Response (OSWER) guidances which are listed below and are part of this package.

- CERCLA Funding of State Enforcement Actions at National Priorities List Sites (OSWER Directive Number 9831.6a).
- CERCLA Funding of Oversight of Potentially Responsible Parties by States at National Priorities List Sites (OSWER Directive Number 9831.6b).

Each of these guidances describes the conditions for funding under a cooperative agreement and the activities that will be funded. What follows are cost estimates which States and EPA may use, at their discretion, for budgeting each of the activities during the SCAP development process.

In developing these cost estimates, staff were interviewed in the EPA Office of Enforcement and Compliance Monitoring (OECM) and the Office of Waste Programs Enforcement (OWPE). Both offices maintain workload budget models which assign resources to different activities. In both models, the activities are similar to those fundable under CAs.

The OECM model contains budget estimates for EPA attorneys and other legal costs. The OWPE model contains budget estimates for both intramural (EPA technical and administrative) and extramural (contractor) costs. The extramural costs were based on a separate OWPE report. At enforcement sites all three general cost categories -- (1) legal, (2) technical and administrative, and (3) contractor -- are realized in varying proportions depending on the activity taking place.

The following sections discuss the EPA budget models. The first section discusses the underlying assumptions applicable to the models and to each enforcement activity. The remaining sections provide budget estimates for each activity and the considerations that may have an impact on the estimates.

ASSUMPTIONS

The three following general assumptions should be made:

1. One full time equivalent (FTE) is equal to 2,080 hours per year based on 220 active days (out of 260). An FTE includes technical and administrative costs, as well as travel and communications. One FTE, based on a mean salary of $30,000 a year, is equal to $52,500.

2. An overall rate of $60 per Level of Effort (LOE) hour was used to estimate the extramural costs.

3. These cost estimates are based solely on Federal experience. Although States may employ similar cost estimates when developing their SCAP requests actual State costs funded through CA may be significantly lower than described by the models.

POTENTIALLY RESPONSIBLE PARTY SEARCHES*

PRP search procedures have become more clearly defined as EPA's program experience has increased. Additionally, EPA has developed a PRP search manual which serves to streamline the process and reduce the variance in costs. The costs may vary depending on the number of PRPs at the site. The point at which a PRP search is terminated is an additional consideration in the cost estimate. PRP searches are to be substantively completed in order to issue general notice letters sufficiently in advance of the RI/FS special notice to allow PRPs to come together. Nonetheless, at some sites, EPA Regions are continuing PRP search activities during negotiations and throughout the remedial investigation and feasibility study (RI/FS) and even into the remedial design and remedial action (RD/RA). While these search actions are appropriate, the costs of PRP searches should not be attributed to these activities but rather should be attributed to the PRP search activity.

Average Duration of PRP Search: 2 Quarters (or 6 months)

Average Cost Estimate:		
	$15,225 -	Technical and Administrative
	$50,000 -	Extramural
	$ 7,875 -	Legal
	=======	
	$73,100 -	Total

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* The PRP search cost includes names and addresses of generators, but does not include information on the volume or nature (especially hard evidence that the materials were hazardous substances) of the hazardous substances or a volumetric ranking, or the PRP's ability to pay. Information on the volume and nature of the substances, a volumetric ranking, and ability to pay are part of the NBAR process. This is described as "NBAR information Collection" in the OWPE workload budget model.

ISSUANCE OF NOTICE LETTERS AND NEGOTIATIONS[b]

Costs for issuing notice letters and conducting negotiations vary depending on the number of PRPs at a site. The cost of issuing notice letters and conducting negotiations also varies depending on the phase of response, RI/FS or RD/RA. Since RD/RA negotiations involve selection of the remedy and development of the Record of Decision (ROD) or other decision document, this activity usually takes longer but requires less extramural support.

Average Duration of Notice Letter Issuance and Negotiations for RI/FS:	2 Quarters (or 6 months)
Average Cost Estimate:	$14,175 - Technical and Administrative
	$50,000 - Extramural
	$13,125 - Legal
	=======
	$77,300 - Total

Average Duration of Notice Letter Issuance and Negotiations for RD/RA and Operation and Maintenance:	3 Quarters (or 9 months)
Average Cost Estimate:	$18,375 - Technical and Administrative
	$30,000 - Extramural
	$ 7,875 - Legal
	=======
	$56,250 - Total

ADMINISTRATIVE AND JUDICIAL ENFORCEMENT ACTIONS

Most of the current data on 106 injunctive cases were based upon cases referred prior to completing the RI/FS. Future cases will not be referred until after the RI/FS is completed. Remedies and supporting data should be well-defined for future cases. The Administrative Record will serve as the basis of support for the technical remedy that is selected. The estimates below reflect these factors.

Average Duration of Administrative and Judicial Enforcement Actions:	14 Quarters (or 42 months)
Average Cost Estimate:	$ 68,250 - Technical and Administrative
	$284,000 - Extramural
	$ 10,500 - Legal
	========
	$362,750 - Total

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b This category includes issuance of the notice letters. Also, for RI/FS it includes a draft order and SOW. For RD/RA it includes a draft consent decree and proposed work plan. It does not include judicial referral of the consent decree.

OVERSIGHT OF RI/FS

RI/FS oversight costs may increase because of the new requirements of the Superfund Amendments and Reauthorization Act (SARA). For a PRP-conducted RI/FS, SARA requires competent third party oversight personnel and allows qualified contractors to conduct the work. EPA is currently developing guidance that will define more clearly what appropriate oversight should entail during hazardous waste site cleanups (RI/FS and RD/RA). This guidance when issued should help with more effective cost estimates of such oversight.

Average Duration of RI/FS Oversight:	10 Quarters (or 30 months)	
Average Cost Estimate:	$ 99,750	- Technical and Administrative
	$200,000	- Extramural
	$ 0	- Legal
	========	
	$299,750	- Total

OVERSIGHT OF RD/RA

A project's construction costs cannot be precisely predicted at the completion of the RI/FS, and the project error range is as much as 50 percent more to 30 percent less than estimated costs. Non-construction specifications and environmental controls may require more review than a typical construction project not related to hazardous waste. The costs for these controls are difficult to predict. Overall, however, project design and construction costs and the costs to review the design are interrelated and somewhat predictable given the following assumptions:

- Construction costs for Superfund remedies are approximately 50 percent of the cost of total remedial action; and they exclude transportation, disposal, incineration, and other such costs.
- The estimated average RA cost is $10 million, but may increase to $20 million by 1989 due to SARA's requirement of more permanent remedies which may call for using alternative technologies.
- Design costs are roughly 6 percent of the total project construction costs.
- Design review costs are roughly 25 percent of design costs.

Again, EPA is currently developing oversight guidance that will set forth detailed procedures for RD/RA oversight.

Average Duration of RD Oversight:	4 Quarters (or 12 months)
Average Cost Estimate:	$ 31,500 - Technical and Administrative $150,000 - Extramural $ 0 - Legal ======== $181,500 - Total
Average Duration of RA Oversight:	12 Quarters (or 36 months)
Average Cost Estimate:	$ 94,500 - Technical and Administrative $300,000 - Extramural $ 0 - Legal ======== $394,500 - Total

RECOMMENDED PROCEDURES FOR HEADQUARTERS/REGIONAL REVIEW AND CONCURRENCE OF INITIAL ENFORCEMENT COOPERATIVE AGREEMENTS

RECOMMENDED PROCEDURES FOR HEADQUARTERS/REGIONAL REVIEW AND CONCURRENCE OF INITIAL ENFORCEMENT COOPERATIVE AGREEMENTS

1. PROCEDURES FOR REQUESTING FUNDS AND REVISING THE CASE MANAGEMENT-BUDGET DRAFT COOPERATIVE AGREEMENT APPLICATION

- The Region should request cooperative agreement funds during the SCAP development process. The SCAP should be revised quarterly, if necessary. The Region should consult with the respective States prior to developing and revising the SCAP.

- The State may develop a cooperative agreement application and submit it to the Regional State Project Officer (SPO).

- The Regional Coordinator (RC) in the Compliance Branch, Office of Waste Programs Enforcement (OWPE), will review the draft application in coordination with the Contracts Management Section (CMS) in the Technical Support Branch, OWPE.

- OWPE will send its comments on the application to the SPO. The Region should give the State combined EPA comments (HQ and Region). The State will then prepare a final application for submittal to the Regional Administrator for award.

2. REGIONAL SUBMITTAL AND HEADQUARTERS SIGN-OFF FINAL COOPERATIVE AGREEMENT APPLICATION

- CMS will receive a copy of the final cooperative agreement application, which will have a commitment notice attached. The dollar amount for award, cooperative agreement number, and description should already be entered on the commitment notice.

- CMS and the RC will review the final application and have the commitment notice signed by the appropriate Headquarters managers. For CAs of $250K or less, the Director of OWPE's signature is required. For CAs of over $250K, the Assistant Administrator of the Office of Solid Waste and Emergency Response's signature is required.

- After signatures have been obtained, CMS will obtain the proper accounting information from OWPE's Program Management and Support Office (PMSO).

- After signatures are obtained and accounting information has been entered on the commitment notice, the CMS will send only the commitment notice back to the Region for use in awarding the CA. Delegation has given CA award authority to the RA. (CMS will keep the copy of the CA application and a photocopy of the commitment notice on file for budget purposes). The SPO will send a signed copy of the CA document to CMS after award and acceptance by the State.

CERCLA ENFORCEMENT POLICY COMPENDIUM

VOLUME 2

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

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JAN 14 1988

RECEIVED
JAN 1 1988
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING
EPA - Region 1

MEMORANDUM

SUBJECT: Expansion of Direct Referral of Cases to the Department of Justice

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators, Regions I - X
Deputy Regional Administrators, Regions I - X
Regional Counsels, Regions I - X
Assistant Administrators
Associate Enforcement Counsels
OECM Office Directors

I. BACKGROUND

During the past year, my office has worked closely with the Regions, the Headquarters program offices, and the Land and Natural Resources Division of the U.S. Department of Justice (DOJ) to expand the use of direct referral of cases. On January 5, 1988, EPA and DOJ entered into an agreement which expanded the categories of civil judicial cases to be referred directly to DOJ Headquarters from the EPA Regional offices without my prior concurrence. In entering into this agreement, EPA has taken a major step towards streamlining the enforcement process and more fully utilizing our Regional enforcement capabilities.

On January 13, 1988, the Administrator signed an interim delegations package which will allow the Agency to immediately implement expanded direct referrals to DOJ. A final delegations package is now being prepared for Green Border review.

This memorandum provides guidance to EPA Headquarters and Regional personnel regarding procedures to follow in implementing the expanded direct referral agreement. Prior guidance on direct referrals appears in a November 28, 1983, memorandum from Courtney Price entitled "Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983." That guidance is superseded to the extent that the current guidance replaces or changes procedures set forth therein; otherwise the 1983 document remains in effect.

II. SUMMARY

Effective immediately for non-CERCLA cases, and effective April 1, 1988, for CERCLA cases, the Regions will directly refer to the Department of Justice all civil cases other than those listed in the attachment to this memorandum entitled "Cases Which Will Continue to be Referred Through Headquarters." This attachment lists cases in new and emerging programs and a few, highly-selected additional categories of cases where continued referral through EPA Headquarters has been determined to be appropriate. EPA Headquarters will have 35 days to review the case simultaneously with DOJ. EPA Headquarters will focus its review primarily on significant legal or policy issues. If major legal or policy issues are raised during this review, EPA Headquarters will work with the Region to expedite resolution.

Attached is a copy of the agreement between EPA and DOJ, which is incorporated into this guidance. Many of the procedures for direct referral of cases are adequately explained in the agreement. However, there are some points I would like to emphasize.

III. PROCEDURES

A. CASES SUBJECT TO DIRECT REFERRAL

The attached agreement lists those categories of cases which must continue to be referred through the Office of Enforcement and Compliance Monitoring (OECM). All other cases should be referred directly by the Regional Office to DOJ Headquarters, with the following two exceptions:

(1) cases which contain counts which could be directly referred <u>and</u> counts which require prior EPA Headquarters review should be referred through EPA Headquarters, and

(2) any referral which transmits a consent decree should be referred through EPA Headquarters, except where existing delegations provide otherwise.

If you are uncertain whether a particular case may be directly referred, you should contact the appropriate Associate Enforcement Counsel for guidance.

B. PREPARATION AND DISTRIBUTION OF REFERRAL PACKAGES

The contents of a referral package (either direct to DOJ or to EPA Headquarters) should contain three primary divisions: (1) a cover letter; (2) the litigation report; (3) the documentary file supporting the litigation report.

The cover letter should contain a summary of the following elements:

(a) identification of the proposed defendant(s);

(b) the statutes and regulations which are the basis for the proposed action against the defendant(s);

(c) the essential facts upon which the proposed action is based, including identification of any significant factual issues;

(d) proposed relief to be sought against defendant(s);

(e) significant or precedential legal or policy issues;

(f) contacts with the defendant(s), including any previous administrative enforcement actions taken;

(g) lead Regional legal and technical personnel;

(h) any other aspect of the case which is significant and should be highlighted, including any extraordinary resource demands which the case may require.

<u>A direct referral to DOJ is tantamount to a certification by the Region that it believes the case is sufficiently developed for filing of a complaint, and that the Region is ready, willing and able to provide such legal and technical support as might be reasonably required to pursue the case through litigation.</u>

Referral packages should be addressed to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington D.C. 20530. Attention:

Chief, Environmental Enforcement Section. Copies of all referral packages should also be sent to the Assistant Administrator for OECM and the appropriate Headquarters program office.

DOJ has reaffirmed the time frame of the Memorandum of Understanding, dated June 15, 1977, for the filing of cases within 60 days after receipt of the referral package, where possible. DOJ can request additional information from a Region on a case or return a case to a Region for further development. In order to avoid these delays, referral packages should be as complete as possible and the Regions should work closely with DOJ to develop referral packages.

C. IDENTIFICATION AND RESOLUTION OF SIGNIFICANT LEGAL AND POLICY ISSUES

A major element in assuring the success of the expanded direct referral program is an efficient process to identify and resolve significant legal and policy issues. This should be done as early as possible to assure that unresolved issues not delay a referral. Early identification and resolution will also help the Agency to avoid devoting significant Regional resources to preparing a litigation report for a case which will ultimately be considered inappropriate for referral.

The procedures make clear that the Regional office has the initial responsibility for identification of significant legal and policy issues. Such issues should be identified to OECM and the appropriate Headquarters program office as soon as a decision is made to proceed with litigation. All parties should then work to address the issues as quickly as possible, preferably before the referral package is sent to Headquarters.

The agreement with DOJ also outlines procedures for Headquarters review of referral packages to determine whether any significant legal or policy issues exist which would impact filing, and the process for resolution of such issues. If an issue surfaces during the 35-day Headquarters review period, OECM will work for quick resolution of the issue, with escalation as necessary to top Agency management. This should serve primarily as a "safety valve" for those few issues not previously identified, rather than as the point at which issues are first raised.

Finally, if DOJ raises a significant legal or policy issue during its review, OECM will work with the Region and the Headquarters program office to expedite resolution of the issue. If DOJ makes a tentative determination to return a

referral, DOJ will consult with OECM and the Regional Office in advance of returning the referral.

D. CASE QUALITY/STRATEGIC VALUE

OECM will evaluate Regional performance as to the quality and strategic value of cases on a generic basis. While OECM will not request withdrawal of an individual referral based on concerns about quality or strategic value, it will consider these factors during the annual audits of the Offices of Regional Counsel and the annual Regional program office reviews. Concerns relative to issues of quality or strategic value will also be raised informally as soon as they are identified.

E. WITHDRAWAL OF CASES PRIOR TO FILING

Cases should be fully developed and ready for filing at the time they are referred to DOJ Headquarters. Thus, case withdrawal should be necessary only under the most unusual circumstances. If, after consultation with OECM, withdrawal is determined to be appropriate, the Regions may request that DOJ withdraw any directly referred case prior to filing. Copies of the Region's request should be sent to the Assistant Administrator for OECM and the appropriate program office.

F. MAINTENANCE OF AGENCY-WIDE CASE TRACKING SYSTEM

In order to assure effective management of the Agency's enforcement program, it is important to maintain an accurate, up-to-date docket and case tracking system. Regional attorneys must continue to report the status of all cases, including directly referred cases, on a regular basis through use of the national Enforcement Docket System. All information for the case required by the case docket system must appear in the docket and be updated in accordance with current guidance concerning the automated docket system.

If you have any questions concerning the procedures set forth in this memorandum, please contact Jonathan Cannon, Deputy Assistant Administrator for Civil Enforcement, at FTS 382-4137.

Attachment

cc: Hon. Roger J. Marzulla
David Buente
Nancy Firestone
Assistant Section Chiefs

98915A

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

... 24

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Honorable Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
Washington, D.C. 20530

Dear Roger:

As you know, the Agency has been considering changes in existing procedures to increase the effectiveness of its enforcement program. One change, which we discussed at our recent meeting with you, is a major expansion of the direct referral program for civil judicial enforcement actions, whereby such cases are referred directly from the Regional Administrators to your office.

We believe the past successes of this program and the increased maturity of Regional staff warrant adopting direct referrals as the basic mode of operation. Thus, with your acceptance, we intend to utilize direct referrals to your office for virtually all civil cases other than those relating to certain new statutory authorities or emerging programs where judicial enforcement experience is limited. As such programs mature, we will expand the scope of direct referrals to cover them. In addition, as new programs are implemented under new statutory or regulatory requirements, we contemplate an initial period of referrals through Headquarters for these cases prior to their incorporation into the direct referral process.

Based on discussions within the Agency and with your staff, we would propose that direct referrals cover all civil cases but those listed in Attachment A. This list includes cases in new and emerging programs and a few, highly-selected additional categories of cases where continued referral through Headquarters has been determined to be appropriate. This would allow direct referral of the vast majority of civil cases, including those which would still require significant national coordination to assure a consistent approach (such as auto coating VOC air cases). For this reason, the procedures applicable to this small subset of cases as outlined in the memorandum entitled "Implementing Nationally Managed or Coordinated Enforcement Actions: Addendum to Policy Framework for State/EPA Enforcement Agreements" dated January 4, 1985 will remain in effect.

For all but CERCLA cases, this expansion would be effective on January 1, 1988. For CERCLA cases, direct referrals would take effect on April 1, 1988. We anticipate joint issuance by our offices of the model CERCLA litigation report prior to that date.

Also attached (Attachment B) is the outline of the direct civil referral process as the Agency intends to implement it. This outline refines current direct referral procedures by more clearly focusing authority and accountability within the Agency.

Under these modified procedures, the Regional Office has the lead on direct referrals. The Region will be solely responsible for the quality of the referral. In this context, quality encompasses both the completeness and accuracy of the litigation report and the strategic value of the case. Any problems involving case quality should be raised directly with the Region.

OECM will evaluate Regional performance as to the quality and strategic value of cases on a generic basis. While OECM will not request withdrawal of an individual referral on the basis of concerns about quality or strategic value, we are committed to working with the Regional Offices to assure that current standards are maintained or even exceeded in future referrals. We welcome your input on Agency performance to assist us in this regard.

As the procedures detail, OECM (as well as the appropriate Headquarters office) will continue to be actively involved in identification and resolution of significant legal and policy issues. Such issues normally should be raised and resolved prior to the actual referral. If such an issue surfaces during the 35-day Headquarters review period, we will work for quick resolution of the issue, with escalation as necessary to top Agency management. During the period required for resolution, DOJ will treat the referral as "on hold". In the unusual circumstance where an issue is still unresolved after 60 days from the date of referral, we would contemplate withdrawal of the referral by the Agency pending resolution unless a formal "hold" letter has been submitted in accordance with the procedures contained in the memorandum entitled "Expanded Civil Judicial Referral Procedures" dated August 28, 1986.

If a significant policy or legal issue is raised by DOJ during its review, OECM remains committed to work with the Regional and program offices to assure expedited resolution of the issue. Obviously, these procedures are not intended to inhibit discussions between our offices to facilitate a resolution. In addition, if DOJ makes a tentative determination to return a referral, we understand that you will consult with OECM and the Regional Office in advance of returning the referral.

We believe this expansion in use of direct referrals represents a major advance in streamlining the Agency's enforcement process and appreciate your support in its implementation. This letter, upon your acceptance, will supersede the letters of September 29, 1983, October 28, 1985, and August 28, 1986 on this subject and constitute an amendment to the June 15, 1977 Memorandum of Understanding between our respective agencies.

I appreciate your continuing cooperation and support in our mutual efforts to make our enforcement process more effective. I hope this letter meets with your approval. If so, please sign in the space provided below and return a copy of the letter to me for distribution throughout the Agency.

Sincerely,

Thomas L. Adams, Jr.
Assistant Administrator

Attachments

Approved:

Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

JAN 05 1988
Date

RESPONSIBILITIES AND PROCEDURES FOR DIRECT REFERRALS OF CIVIL JUDICIAL ENFORCEMENT ACTIONS TO THE DEPARTMENT OF JUSTICE

(1) Regional Offices have the lead on direct referrals to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice (DOJ); Regions will be responsible for the quality of referrals.

(2) Regions will identify any significant legal/policy issues as soon as the decision is made to proceed with litigation. Such issues will be raised in writing for consideration by OECM and the appropriate Headquarters program office. All parties will attempt to resolve such issues as early as possible, preferably before the referral package is sent to Headquarters. Regions will also flag such issues in the cover memo transmitting the referral.

(3) At the same time the referral is sent to DOJ, it will be sent to OECM and the appropriate Headquarters program office for a simultaneous and independent review to determine whether any other significant policy/legal issues exist which would impact filing.

(4) Headquarters offices will complete their reviews within 35 days of receipt of the referral. Each Headquarters office will notify the Region in writing of any significant issues identified or that no such issues have been identified. A copy of this memorandum will be sent to DOJ. The Headquarters offices will coordinate their reviews and, to the extent possible, provide a consolidated response.

(5) If significant issues are identified and not readily resolved, Headquarters (the Assistant Administrator for OECM), after consultation with the program office Assistant Administrator, may request the Regional Administrator to withdraw the case. If the Regional Administrator and the Assistant Administrator for OECM (and, as applicable, the program office Assistant Administrator) are unable to agree on the appropriate resolution of the issue, the issue would be escalated to the Deputy Administrator.

(6) If a significant issue is not resolved within 60 days of the date of referral, the case will normally be withdrawn pending resolution unless an appropriate "hold" letter is sent to DOJ in accordance with the procedures contained in the memorandum entitled "Expanded Civil Judicial Referral Procedures" dated August 28, 1986 (document GM-50 in the General Enforcement Policy Compendium.)

(7) Headquarters will NOT request withdrawal of a referral package for any of the following reasons:

-- overall quality of referral package
-- strategic value of case
-- adequacy of documentation

(8) If DOJ makes a tentative decision to return a referral to EPA, it will consult with the Regional Office and OECM prior to making a final decision to return the case.

(9) Headquarters will evaluate on a generic basis (e.g., trends or repeated concerns) the quality/strategic value of a Region's referrals. Concerns relative to issues of quality or strategic value will be raised informally as soon as they are identified.

(10) Headquarters oversight will be accomplished primarily through annual program and OGC/OECM reviews, or ad hoc reviews as problems are identified in a given Region.

Note: Where a referral also transmits a signed consent decree for Headquarters approval, the procedures applicable to processing settlements shall apply in lieu of these procedures.

CASES WHICH WILL CONTINUE TO BE REFERRED THROUGH HEADQUARTERS

ALL MEDIA: Parallel Proceedings -- Federal civil enforcement matters where a criminal investigation of the same violations is pending

RCRA/CERCLA: UST enforcement

Enforcement of RCRA land ban and minimum technology regulations

Enforcement of administrative orders for access and penalty cases for failure to comply with requests for access (Section 104)

Referrals to enforce Title III of SARA, the Community Right-to-Know provisions

TSCA/FIFRA: Referrals to compel compliance with or restrain violations of suspension orders under FIFRA Section 6(c)

FIFRA actions for stop sales, use, removal, and seizure under Section 13

Referrals to enforce Title III of SARA, the Community Right-to-Know provisions

Injunctive actions under Section 7 of TSCA (actions for injunctive relief to enforce the regulations promulgated under Section 17 or Section 6 could be directly referred)

WATER: Clean Water Act pretreatment violations --failure of a POTW to implement an approved local pretreatment program

Clean Water Act permit violations relating to or determined by biological methods or techniques measuring whole effluent toxicity

PWSS cases to enforce against violations of administrative orders which were not issued using an adjudicatory hearing process

WATER (contd.)	Cases brought under the Marine Protection, Research and Sanctuaries Act (MPRSA)
	UIC cases[1]
AIR:	Smelter cases

[1] The ten cases referred to date indicate that the regulations raise interpretive issues of continuing national significance. There also appears to be a need for greater experience at gathering the facts necessary to prove violations and support appropriate relief. For this reason, the first 3 UIC cases from each Region shall be referred through Headquarters. Once the Associate Enforcement Counsel for OECM determines that the Region has completed three successful referrals, the Region may proceed to refer these cases directly to DOJ.

	Allotment
Osage County	$238,800
Navajo Lands	$89,000
Reserved	$247,400
Total	2,000,000

Dated: February 5, 1988.

Lawrence J. Jensen,

Assistant Administrator for Water.

[FR Doc. 88-3776 Filed 2-22-88; 8:45 am]

BILLING CODE [illegible]

[FRL-3330-6]

Superfund Program; Notice Letters, Negotiations and Information Exchange

AGENCY: Environmental Protection Agency.

ACTION: Request for Public Comment.

SUMMARY: The Agency is publishing the "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" today to inform the public about these guidelines and to solicit public comment. This guidance covers the use of the section 122(e) special notice procedures and other related settlement authorities under section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (hereinafter referred to as "CERCLA").

DATE: Comments must be provided on or before April 25, 1988.

ADDRESS: Comments should be addressed to Kathy MacKinnon, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, Guidance and Oversight Branch (WH-527), 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kathy MacKinnon, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, Guidance and Oversight Branch (WH-527), 401 M Street, SW., Washington, DC 20460 (202) 475-8770.

SUPPLEMENTARY INFORMATION: The guidance emphasizes the importance of reaching voluntary settlements with potentially responsible parties (PRPs) and uses notice letters, negotiations, and information exchange as mechanisms for facilitating settlements. The guidance establishes a process for issuing notice letters to PRPs, including the use of the special notice procedures under section 122(e) of CERCLA. The guidance establishes separate notification processes for removal and remedial actions.

The guidance also discusses the Agency's general policy for exchanging information with PRPs, including a discussion about EPA's release of information under section 122(e)(1) of CERCLA and EPA's authorities to request information from PRPs under sections 104(e) and 122(e)(3)(b) of CERCLA and section 3007(a) of the Resource Conservation and Recovery Act (RCRA).

Finally, the guidance discusses various aspects of the negotiation process. This includes a discussion about negotiation moratoriums that are triggered by the use of the section 122(e) special notice procedures. This also includes a discussion about concluding negotiations and managing negotiation deadlines.

The Agency encourages public comment and will reevaluate this interim guidance in response to such comments.

The interim guidance follows.

Date: November 25, 1987.

J.W. McGraw

Acting Assistant Administrator for Solid Waste and Emergency Response.

INTERIM GUIDANCE ON NOTICE LETTERS, NEGOTIATIONS, AND INFORMATION EXCHANGE

Table of Contents

I. Introduction
II. Purpose and Scope of Guidance
III. Statutory Authority
A. Settlements
B. Special Notice Procedures and Information Release
IV. Information Exchange
A. Information Requests
B. Information Release
V. Notice Letters and Negotiation Moratorium for RI/FS and RD/RA
A. Purpose of Notice Letters
B. General Notice Letter
1. Whether to Issue General Notice
2. Timing of General Notice
3. Recipients of General Notice
4. Contents of General Notice
C. RI/FS and RD/RA Special Notice Letters
1. Whether to Issue RI/FS and RD/RA Special Notice
2. Notifying PRPs When Not Appropriate to Issue RI/FS and RD/RA Special Notice
3. DOJ Role in RI/FS and RD/RA Negotiations
4. Timing of RI/FS Special Notice
5. Timing of RD/RA Special Notice
6. Recipients of RI/FS and RD/RA Special Notice
7. Contents of RI/FS and RD/RA Special Notice
D. Conclusion of Negotiation Moratorium and Deadline Management for RI/FS and RD/RA
VI. Notice Letters and Negotiation Moratorium for Removal Actions
A. Notice Letters
1. Whether to Issue Notice for Removals
2. When to Use Special Notice Procedures for Removals
3. Notifying PRPs When Not Appropriate To Utilize Special Notice Procedures for Removals
4. DOJ Role in Removal Negotiations
5. Timing of Notice for Removals
6. Recipients of Notice for Removals
7. Contents of Notice for Removals
B. Conclusion of Negotiation Moratorium and Deadline Management for Removals
C. Administrative Orders and Negotiation Moratorium for Removals
VII. Disclaimer
VIII. For Further Information

Appendices

Appendix A: Timing of RD/RA Special Notice Letter Appendix B: PRP Settlement process for RI/FS and RD/RA
Appendix C: Model Notice Letters (To be sent to EPA regions at a later date)

Memorandum

SUBJECT: Interim Guidance on Notice Letters, Negotiations, and Information Exchange
FROM: J. Winston Porter, Assistant Administrator
TO: Regional Administrators

I. Introduction

The Superfund Amendments and Reauthorization Act of 1986 (SARA), which amends the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), maintains the importance of a strong Superfund enforcement program.[1] In particular, SARA emphasizes the importance of entering into negotiations and reaching settlements with potentially responsible parties (PRPs) to allow PRPs to conduct or finance response actions. SARA generally codified the Agency's Interim CERCLA Settlement Policy but also established some new authorities and procedures that were designed to facilitate settlements.

A fundamental goal of the CERCLA enforcement program is to facilitate voluntary settlements. EPA believes that such settlements are most likely to occur when EPA interacts frequently with PRPs. Frequent interaction is important because it provides the opportunity to share information about a site and may reduce delays in conducting response actions caused by the lack of communication. Important mechanisms for promoting interaction and facilitating communication between EPA and PRPs

[1] CERCLA of 1980 as amended by SARA of 1986 is referred to in this guidance as CERCLA.

include issuing notice letters, entering into negotiations, and exchanging information with PRPs.

This guidance replaces the October 12, 1984 guidance on "Procedures for Issuing Notice Letters" and the October 9, 1985 guidance on "Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information." [8] Although certain procedures and the timing of various activities have been modified, this guidance retains many fundamental aspects of the October 12, 1984 and October 9, 1985 guidances. In particular, this guidance re-emphasizes the importance of timely issuance of notice letters and the exchange of information between EPA and PRPs. In addition, this guidance incorporates a moratorium and "formal" period of negotiation (referred to as a negotiation moratorium) into the settlement process. EPA's commitment to carrying out these activities is crucial for supporting our fundamental goal of facilitating negotiated settlements.

II. Purpose and Scope of Guidance

The purpose of this guidance is to assist the Regions in establishing procedures for the issuance of notice letters to PRPs, for the conduct of negotiations between EPA and PRPs, and for the exchange of information between EPA and PRPs.

This guidance addresses the use of both "general" and "special" notice letters for removal and remedial actions. Special notice letters differ from general notice letters because special notices trigger the negotiation moratorium. The negotiation moratorium is the period of time where a moratorium is imposed on certain EPA actions and a period of "formal" negotiations is established between EPA and PRPs.

Use of both general and special notice letters are discretionary. However, the Regions are expected to issue general and special notices for the vast majority of remedial actions. Such notice letters will be issued for remedial investigations/feasibility studies (RI/FSs) and remedial designs/remedial actions (RD/RAs). Although it is generally appropriate to issue a "removal notice" for all removal actions, the Regions are not expected to invoke the section 122(e) special notice procedures for most removals.

This guidance also addresses the timing, duration, and conclusion of the negotiation moratorium. Finally, this guidance discusses the process of information exchange between EPA and PRPs, including requests for and releases of site-specific information.

III. Statutory Authority

A. Settlements

Sections 104(a), 122(a), and 122(e)(6) authorize settlements and establish certain conditions for allowing PRPs to conduct or finance response actions. Section 104(a) authorizes EPA to enter into an agreement with PRPs to allow PRPs to conduct or finance response actions in accordance with section 122 if EPA determines that the PRPs will conduct the response action properly and promptly. Under section 104(a), PRPs cannot conduct the RI/FS unless EPA determines that the PRP is qualified to perform the RI/FS. EPA contracts with or arranges for a qualified person other than the PRP to assist EPA in overseeing and reviewing the RI/FS, and the PRP agrees to reimburse the Fund for the costs EPA incurs in overseeing and reviewing the PRP's RI/FS.

Section 122(a) similarly authorizes EPA to enter into agreements with PRPs to perform response actions if EPA determines the action will be conducted properly. Section 122(a) also provides for EPA, when practicable and in the public interest, to facilitate settlements with PRPs to expedite effective remedial actions and to minimize litigation.

Section 122(e)(6) provides that no PRP may undertake any remedial action at a facility where EPA or a PRP pursuant to an administrative order or consent decree under CERCLA has initiated an RI/FS unless the remedial action has been authorized by EPA.

B. Special Notice Procedures and Information Release

Sections 122(e) and 122(a) contain provisions relating to the special notice procedures and the release of information to PRPs. Section 122(e) provides for EPA to utilize the special notice procedures if EPA determines that a period of negotiation would facilitate an agreement with PRPs and would expedite remedial actions. Section 122(e) also provides for EPA to release certain information to PRPs. Such information includes, to the extent available, the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of the substances at the facility.[9] In addition, this section provides for EPA to make such information available in advance of the special notice upon request by a PRP in accordance with procedures provided by EPA.

Issuance of a special notice triggers a moratorium on the commencement of certain actions by EPA under section 104 or section 106. The purpose of the moratorium is to provide for a period of negotiation between EPA and PRPs. The moratorium prohibits EPA from commencing any response action under section 104(a), and an RI/FS under section 104(b), or an action under section 106 for 60 days after receipt of the notice. If EPA determines that a "good faith offer" has been submitted by the PRP within 60 days after receipt of the special notice, EPA shall not commence an action under section 104(a) or take any action against any person under section 106 for an additional 60 days or commence an RI/FS under section 104(b) for an additional 30 days.

Under section 122(e)(2)(a), EPA may commence any additional other studies or investigations authorized under section 104(b), including the remedial design, during the negotiation period. Under section 122(e)(2)(C), if an additional PRP is identified during the negotiation period or after an agreement has been entered into, EPA may bring the additional party into the negotiation or may enter into a separate agreement with the PRP. Under section 122(e)(5), EPA is not prohibited from undertaking a response or enforcement action during the negotiation period when there is a significant threat to public health or the environment.

Section 122(a) provides that if EPA decides not to use the special notice procedures established under section 122(e), EPA is required to notify PRPs in writing of this decision along with an explanation why it is inappropriate to use such procedures. The decision by EPA to use or not to use the special notice procedures is not subject to judicial review.

IV. Information Exchange

The exchange of information between EPA and PRPs is crucial for facilitating settlements. Information exchange should be an ongoing process of communication. EPA uses information

[8] These guidances were issued under OSWER Directive Numbers 9834.1 and 9834.2, respectively.

[9] Congress recognized that there may be limitations to the availability of information at early phases of the response action. In particular, Congress noted that the RI/FS special notice need not be accompanied by information on volume and nature of waste and ranking if this information is not available at the start of the RI/FS. A separate notice and information release should be provided for private parties who actually conduct the remedial action and information on volume, nature and ranking of wastes should be made available routinely at this time. See the Conference Report on the Superfund Amendments and Reauthorization Act of 1986, 99 Cong., 2d Sess. Report 99-962, pp. 253 (1986).

obtained from PRPs to determine potential liability, to determine the need for response, and to support the selection of the remedy. PRPs use information obtained from EPA to organize among themselves and to develop a "good faith offer" to conduct or finance response actions.

A. Information Requests

EPA may request information from PRPs about various activities and conditions under section 104(e) of CERCLA and under section 3007(a) of the Resource Conservation and Recovery Act (RCRA). In addition, EPA may issue administrative subpoenas under section 122(e)(3)(b) of CERCLA. Information commonly requested includes details concerning waste operations and waste management practices, the type and amount of substances contributed by each PRP, as well as the name of other PRPs that contributed substances to the site.

Information requests should be issued as early as practicable and may be issued as a separate letter during the PRP search process, as part of the general notice letter, or through an administrative subpoena. A detailed discussion about the use of information request letters and administrative subpoenas is contained in the forthcoming "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas under CERCLA sections 104(e) and 122(e)."

The Regions have the discretion to decide whether to issue an information request as a separate letter during the PRP search or as a component of a general notice letter. Issuing a separate information request letter in advance of the general notice may be advantageous in situations where information from PRPs is needed to determine whether it is appropriate to issue a notice letter to such parties.

Information requests should be developed in accordance with the forthcoming guidance on information requests and administrative subpoenas as mentioned above. An information request should also indicate that EPA plans to vigorously enforce information requests with the new enforcement tools authorized under SARA which include issuing orders under section 104(e)(5). Finally, the information request should indicate that it is the PRPs responsibility to inform EPA whether information they provide to EPA is confidential and subject to protection under section 104(e) of CERCLA.

B. Information Release

It is important to gather and release site-specific information to PRPs as soon as reasonably practicable. Gathering and releasing such information early in the process will not only expedite response and enforcement activities but will help PRPs organize and negotiate among themselves as well.

As indicated, section 122(e)(1) provides for the release of certain information to PRPs to the extent such information is available. Such information includes the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of the substances at the facility. This information is to be provided to PRPs in advance of the special notice in accordance with procedures developed by EPA.

Congress recognized the limitations to EPA's ability to make certain information available to PRPs, especially early in the response process. Therefore, this information can be released only to the extent such information is available. If the Regions have information on volume, the Regions should develop volumetric rankings and should make such information available to PRPs as soon as practicable. However, due to their preliminary and summary nature, EPA will not expand resources to explain or defend any list or ranking. Lists or rankings released to PRPs and others should always contain appropriate disclaimers.

The Regions are encouraged to release information to PRPs as soon as reasonably possible. The Regions may respond directly to individual PRP requests for information, may use the notice letters as vehicles to release such information to PRPs, or may establish alternative mechanisms in some situations as discussed below. The Regions are strongly encouraged to use the notice letters to release site-specific information. In particular, use of the general notice may provide a convenient opportunity to release information in advance of the special notice pursuant to the statutory provision that EPA release such information in advance of the special notice in accordance with procedures developed by EPA.

Although it is generally preferable to release information to individual PRPs through notice letters, alternative mechanisms may be used in unusual circumstances. For example, in instances where there are many PRPs and/or where there is a substantial amount of information to be released, the Regions may consider making the information available through a central mechanism (e.g. through a PRP steering committee if one has been formed and if the committee has agreed to be a clearinghouse for distributing information to other PRPs). An alternative would be to indicate in the notice letter that the Region has site-specific information that will be made available to the PRPs in a manner specified in the letter.

V. Notice Letters and Negotiation Moratorium for RI/FS and RD/RA

This guidance creates a systematic process for issuing three separate notice letters for remedial actions. The three notice letters are (1) the general notice, (2) the RI/FS special notice, and (3) the RD/RA special notice. Even though the RI/FS and RD/RA special notice letters are separate letters, the are discussed in the same section below since the content of these letters is basically the same. In instances where the content of the RI/FS and RD/RA special notices differ, separate sections are presented.

Also, this guidance is written with the assumption that each notice letter will be issued in sequence. Consequently, the guidance has been structured so that certain information provided or requested in one letter is not repeated in a subsequent letter. The content of actual letters may, however, need to be modified in situations where this process is not followed.

For example, there may be a situation where site activities are already underway and where the Region is ready to issue the RI/FS special notice but has not issued a general notice. In this instance, it would not be necessary to wait to send the special notice until after a general notice is issued. However, it may be appropriate to include certain aspects of the general notice into the special notice.

A. Purpose of Notice Letters

The purpose of the general notice is to inform PRPs of their potential liability for future response costs, to begin or continue the process of information exchange, and to initiate the process of "informal" negotiations. In addition, the general notice informs PRPs about the possible use of the section 122(e) special notice procedures and the subsequent moratorium and "formal" negotiation period.

The purpose of the special notice is similar to the general notice, except that the special notice is also used to invoke the statutory moratorium on certain EPA actions and to initiate the process of "formal" negotiations. Although the general notice does not trigger a moratorium on any EPA action and does not invoke a "formal" period of negotiation, the general notice is expected to initiate a dialogue between

EPA and PRPs. Issuance of a general notice should be viewed as a mechanism for initiating negotiations whereas issuance of a special notice should be viewed as a mechanism for concluding negotiations.

The term "informal" negotiations does not mean that such negotiations are not serious efforts to reach a settlement. Rather "informal" negotiations refers to any negotiations that are not conducted as part of the negotiation moratorium triggered by issuance of a special notice under section 122(e). The terms "informal" and "formal" negotiations are used to draw a distinction between negotiations which are and are not covered by the section 122(e) moratorium.

B. General Notice Letter

Agency notification procedures should provide PRPs with sufficient time to organize and develop a reasonable offer to conduct or finance the response action. Toward this end, the Regions should contact PRPs prior to issuing a section 122(e) special notice by issuing a general notice letter.

1. Whether To Issue General Notice

A general notice letter should be issued at the vast majority of sites that are proposed for or listed on the National Priorities List (NPL) where negotiations for the RI/FS and RD/RA have not yet been initiated. Circumstances where it may not be appropriate to issue the general notice include sites where a notice pursuant to previous guidance was issued prior to the reauthorization of CERCLA or where the Region is ready to issue a special notice at the site. These exceptions are important for minimizing any possible disruption to ongoing activities.

2. Timing of General Notice

The general notice letter should be sent to PRPs as early in the process as possible, preferably once the site has been proposed for inclusion on the NPL. Early receipt of the general notice will ensure that PRPs have adequate knowledge of their potential liability as well as a realistic opportunity to participate in settlement negotiations. When a separate information request letter has been sent to PRPs prior to the general notice, the information request should be sent as early as possible to avoid any delay in issuing the general notice.

3. Recipients of General Notice

General notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. If there is doubt about whether available information supports issuance of the general notice, separate information request letters may be sent to such parties prior to issuing the notice. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

If additional PRPs are identified after the general notice but before the RI/FS special notice is issued, the Regions should provide a general notice to those additional PRPs. If additional PRPs are identified after general and special notices are issued, the additional PRPs need not receive a general notice before receiving the appropriate special notice. However, relevant aspects of the general notice should be incorporated into the special notice.

Copies of the general notice should be provided to the Regional administrative record coordinator, the appropriate State representative, the State or Federal trustee if a trustee for natural resources has been designated, and to EPA headquarters at the same time notices are sent to PRPs. The copies of notices to headquarters should be sent to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement (OWPE).

Providing copies to the administrative record coordinator is important for ensuring that the notice is placed in the administrative record.[6] Providing copies to the State representative and the State or Federal trustee is important for ensuring that States are appropriately informed about possible future negotiations.[8] Providing copies to OWPE is essential for permitting entry into the Superfund Enforcement Tracking System (SETS). Entry into sets will facilitate our efforts to track site activities and to respond to Congressional and other inquiries. Direct Regional input of data into SETS on notice letter recipients is planned for FY 1988.

It is not necessary to provide copies of each general notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one general notice with a list of other parties who have received the letter would suffice.

4. Contents of General Notice

The general notice letter should contain the following components: (a) A notification of potential liability for response costs, (b) a discussion about future notices and the possible future use of special notice procedures, (c) a general discussion about site response activities, (d) a request for information about the site (if appropriate), (e) the release of certain site-specific information (where available), (f) a discussion about the merits of forming a PRP steering committee, (g) a notice regarding the development of an administrative record, and (h) a deadline for response to the letter and information on the EPA representative to contact.

a. *Potential liability:* The letter should inform parties that they are potentially liable for response costs under section 107 of CERCLA, including the costs of conducting the RI/FS and RD/RA. The letter should define the scope of potential liability and should briefly explain why the parties have been identified as PRPs.

b. *Future notice under section 122(a) and section 122(e):* The letter should indicate that EPA will notify the party at an appropriate point in the future. The letter should specify that this notice will either be a section 122(a) notice or a section 122(e) special notice and should explain what these notices are.

The letter should indicate that the section 122(a) notice is a notice which informs parties that EPA will not use the section 122(e) special notice procedures. The letter should indicate that the notice will provide an explanation for the decision not to use the special notice procedures.

The letter should also indicate that a section 122(e) special notice will invoke the negotiation moratorium. The letter should make clear that issuance of a section 122(e) special notice letter is discretionary and may be used if EPA determines that use of such procedures would facilitate an agreement and expedite remedial action. The letter should also explain the purpose of the special notice and the subsequent negotiation moratorium. Informing PRPs about the special notice procedures and the negotiation moratorium will alert PRPs to possible future negotiations and increase their awareness of their opportunities for participation in such negotiations.

[6] A discussion about placing notice letters in the administrative record is covered in the forthcoming "Guidance on the Administrative Record for Selecting a Response Action Under CERCLA" and in the preamble to the forthcoming revisions to the National Contingency Plan.

[8] State participation in negotiations is covered in the forthcoming "Interim Guidance on EPA-State Relations in CERCLA Enforcement."

c. *Site response activities:* The letter should generally discuss the activities EPA plans to undertake at the site. Where appropriate, such activities should include scheduled start or completion dates for the RI/FS or RD/RA. Instances where it may not be appropriate to provide start or completion dates include situations where the general notice is issued very early in the process and where specific dates have not yet been set, or where it is expected that target dates are likely to change significantly.

d. *Information request:* The letter should request information on substances sent to or present at the site and the names of other PRPs pursuant to section 104(e) of CERCLA and/or section 3007(a) of RCRA if a separate information request has not already been issued. The content of the information request should be consistent with the forthcoming "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas Under CERCLA Sections 104(e) and 122(e)."

e. *Information release:* At a minimum, the letter should release the names and addresses of other PRPs who have received the general notice letter. In addition, to the extent such information is available, the letter should include the volume and nature of substances contributed by each PRP and a ranking by volume of the substances at the facility if such information has not been previously released.

f. *PRP steering committee:* The letter should request that the PRPs identify a member of their organization who will represent their interests. In addition, the letter should recommend that PRPs form a steering committee to represent the group's interests in possible future negotiations. The letter should indicate that establishing a steering committee is important for facilitating negotiations with EPA.

g. *Administrative record:* The letter should be used as a vehicle for informing PRPs of the availability of an administrative record that will contain documents which form the basis for the Agency's decision on the selection of remedy. The letter should indicate that the record will be open to the public for inspection and comment. The letter should also provide information regarding the opening of the record and where it will be located.

h. *PRP response and EPA contact:* The letter should encourage PRPs to notify EPA by a specified date of their interest to participate in future negotiations. The letter should indicate that PRPs may respond as a group through a steering committee if one has been formed. The letter should also provide a cut off date for voluntary compliance with information requests (if a request for information is contained in the general notice). An appropriate time frame for the PRP response to an information request is generally thirty days from receipt of the letter. Finally, the letter should provide the name, phone number, and address of the EPA representative to contact.

C. RI/FS and RD/RA Special Notice Letters

Prior to EPA's conduct of the RI/FS and RD/RA, the Regions should either issue the special notice to PRPs or provide PRPs with an explanation why it was not appropriate to use the special notice procedures. Issuance of the special notice triggers a moratorium on EPA's conduct of the RI/FS and remedial action. While the statute does not impose a moratorium on EPA's conduct of the remedial design, the Agency will not generally conduct such activities during the moratorium. The purpose of the moratorium is to provide for a formal period of negotiation between EPA and PRPs where the PRPs will be encouraged to conduct or finance response activities.

The negotiation moratorium may last a total of 90 days for the RI/FS and 120 days for the RD/RA if EPA receives a "good faith offer" from PRPs within the first 60 days of the moratorium. The negotiation moratorium would conclude after 60 days if the PRPs do not provide EPA with a "good faith offer."

The initial 60 day moratorium begins on the date the PRPs receive the special notice via certified mail. In instances where there is more than one PRP and PRPs are likely to receive the special notice on different days, the date the moratorium begins should be seven days from the date the letters are mailed to the PRPs. In either case, the special notice must make clear when the negotiation moratorium begins and ends.

1. Whether To Issue RI/FS and RD/RA Special Notice

EPA has the discretion to use the special notice procedures when EPA determines that a period of negotiation would facilitate an agreement with PRPs and would expedite remedial actions. The Agency believes entering into such negotiations would generally facilitate settlements and plans to utilize the RI/FS and RD/RA special notice procedures in the vast majority of cases.

There are, however, some circumstances where it would generally not be appropriate to use such procedures. Such circumstances include (1) where past dealings with the PRPs strongly indicate they are unlikely to negotiate a settlement, (2) where EPA believes the PRPs have not been negotiating in good faith, (3) where no PRPs have been identified at the conclusion of the PRP search, (4) where PRPs lack the resources to conduct response activities, (5) where there are ongoing negotiations, or (6) where notice letters were already sent prior to the reauthorization of CARCLA and ongoing negotiations would not benefit by issuance of a special notice.

Special notices may be issued for operable units of remedial actions. The test for determining whether to issue a special notice for an operable unit is generally the same as for full-scale remedial actions. The general expectation is that separate special notices will be issued for each separate operable unit as long as issuing the notice would facilitate an agreement and would expedite the remedial action. However, special notices may also be issued for only major operable units or may cover a series of operable units if appropriate under the circumstances at the site.

For example, if several operable units will be conducted at a site as relatively separate and distinct response actions, it may be appropriate to consider using separate special notices which would trigger separate negotiation moratoriums. If a series of operable units will make up a remedial action it may be appropriate to issue the special notice to cover only the major operable unit(s) or to cover several operable units.

2. Notifying PRPs When Not Appropriate To Issue RI/FS and RD/RA Special Notice

In instances where EPA decides it is inappropriate to issue the special notice, section 122(a) provides for EPA to notify PRPs in writing of that decision. The notice must indicate the reasons why the Region determined that issuing the special notice and entering into "formal" negotiations was not appropriate. The notice should be provided to all PRPs that have been identified to date as well as to the Regional administrative record coordinator for placement in the record. Such notices should be provided as soon as practicable. In instances where the RI/FS or RD/RA have not yet been initiated, the notice should be sent prior to the initiation of such activities if possible.

In addition, the section 122(a) notice should be used as a vehicle for informing PRPs that the Agency will establish or has established an

administrative record containing technical documents supporting the Agency's decision on the selection of remedy. The notice should indicate that the record is open for public inspection and comment and should specify where the record will be or has been located.

3. DOJ Role in RI/FS and RD/RA Negotiations

The Regions should notify the Chief of the Environmental Enforcement Section in the Department of Justice (DOJ) prior to issuing special notice letters where settlement by a consent decree is contemplated. A copy of this memorandum should also be provided to the Office of Waste Programs Enforcement and the Office of Enforcement and Compliance Monitoring in Headquarters.

The memorandum to DOJ should indicate when the Region intends to issue the special notice. Because most RI/FS negotiations involve consent orders, notice to DOJ on the RI/FS is not ordinarily necessary. However, where a site is in litigation or where settlement by consent decree is expected, DOJ should be notified at least 30 days prior to issuing the RI/FS special notice. In addition, where the resolution of the matter by an administrative order is expected to involve a compromise of past or future response costs and the total response costs will exceed $500,000, DOJ is to be notified. DOJ's role will be to review the compromise of the claim pursuant to section 122(h)(1) but not to review the administrative order for the RI/FS. For RD/RA negotiations, the notice should be sent to DOJ at least 60 days prior to issuing the RD/RA special notice. The memorandum should also identify the EPA Regional representative DOJ should contact.

In addition, the Regions should consult with the Chief of the Environmental Enforcement Section prior to sending a copy of any draft consent decree or any outline of a draft consent decree to PRPs. The Regions are encouraged to include a draft consent decree with the RD/RA special notice or soon thereafter as discussed below.

4. Timing of RI/FS Special Notice

It is important that PRPs receive the RI/FS special notice letter as soon as practicable. Of greater importance, the letter must be sent sufficiently in advance of obligations for the RI/FS so that negotiations do not delay the initiation of the RI/FS by the Fund in the event the negotiations do not result in an agreement providing for the PRPs to conduct or finance the RI/FS. Timely receipt of the special notice will have a significant effect on the PRPs ability for meaningful participation in formal negotiations.

The RI/FS special notice letter should be sent to PRPs no later than 90 days prior to the scheduled date for initiating the RI/FS. The scheduled date for initiating the RI/FS refers to the date funds will be obligated to commence response activities. A minimum of 90 days is important for ensuring that the negotiation moratorium does not delay initiation of the RI/FS in the event negotiations do not result in a settlement. The time for service by mail should be taken into account.

5. Timing of RD/RA Special Notice

The timing of the RD/RA special notice letter will have a significant impact on both the success of negotiations and on EPA's ability to move forward with implementing a remedy without delay. As indicated earlier, "formal" negotiations pursuant to special notice are not the sole vehicle for reaching settlements. "Informal" negotiations must occur throughout the process and in advance of the special notice. To assure that "formal" negotiations are productive, EPA must initiate PRP search and information exchange activities as well as "informal" negotiations as early as possible.

The primary purpose of the special notice procedures is to facilitate settlements through negotiation. A primary concern in determining when to issue an RD/RA special notice is whether there is a likelihood that meaningful negotiations can be conducted at a given stage in the process. Another concern is that, to the extent practicable, the negotiations must be scheduled to minimize any delay in the remedial design and remedial action. A final concern is that negotiations be carried out in a way that does not undermine or have the appearance of undermining the public participation process.

This guidance establishes an approach which identifies when the Regions must generally issue the RD/RA special notice letter. The Regions may, however, adopt an alternative approach under appropriate circumstances. Appendix A contains illustrations of the three approaches discussed below.[6]

a. *General Approach: Issue special notice when release draft FS and proposed plan for public comment.* The Regions generally must issue the RD/RA special notice when the draft feasibility study (FS) and proposed plan [7] are released to the public for comment. As shown in Appendix A, issuance of the special notice with the release of the draft FS and proposed plan triggers the initial 60 day negotiation moratorium. The initial 60 day negotiation moratorium begins at the start of the 30 day public comment period and, in conjunction with the first 30 days of the 60 day extended negotiation moratorium, is concurrent with the Record of Decision (ROD) review and approval process. The remaining 30 days of the extended negotiation moratorium is concurrent with the initial phases of the remedial design. EPA's ability to sign the ROD is not affected by the duration of the negotiation moratorium. The ROD may be signed at any point after the close of the public comment period and the preparation of the responsiveness summary for the public.

In most cases, commencing formal negotiations at the same time that the draft FS and proposed plan are released will properly balance the considerations stated earlier relating to EPA's ability to conduct meaningful negotiations, to minimize delay in implementing the RD/RA, and to maintain the integrity of the public participation process. Under this approach, formal opportunity for PRP involvement would begin at an early yet concrete stage in the process. Early participation may be especially advantageous in situations where PRPs have not been previously or substantially involved in RI/FS activities. In addition, PRPs and the public would have knowledge of the possible range of alternatives through the draft FS and proposed plan prior to "formal" negotiations. This information is important for assisting the PRPs in developing a meaningful "good faith offer" for conducting or financing the RD/RA.

b. *Alternative Approach: Issue special notice prior to release of draft FS and proposed plan for public comment.* Although the Regions generally will issue the RD/RA special notice when

[6] The time period depicted in the following discussion and illustrated in Appendix A reflect "best case" scenarios where various response and enforcement activities are expected to be carried out without delay. For example, the public comment period lasts 30 days and does not take into account a possible extension.

[7] The proposed plan refers to the public participation document developed pursuant to section 117(a). This is a non-legal, non-technical document that describes the alternatives in the FS and specifies and provides a brief analysis of EPA's preferred alternative. A more detailed discussion of the proposed plan will be contained in the forthcoming "Guidance on Documenting Decisions at Superfund Sites" (referred to as the ROD Guidance).

the draft FS and proposed plan are released to the public for comment, the Regions are encouraged to issue the special notice earlier in the process if this action would facilitate the prospects for reaching a settlement. If a Region chooses to follow this approach, the Region should include with the special notice a summary or fact sheet of the alternatives EPA has screened and the alternatives the Agency is currently considering.[8]

As shown in Appendix A, the RD/RA special notice may be issued prior to EPA's release of the draft FS and proposed plan. Issuance of the special notice triggers the initial 60 day negotiation moratorium. The initial negotiation moratorium is concurrent with the review and release of the draft FS and proposed plan. The initial negotiation moratorium is completed prior to the initiation of the public comment period. The public comment period is concurrent with the first 30 days of the extended negotiation moratorium. The remaining 30 days of the extended negotiation moratorium is concurrent with the ROD review and approval process. The ROD could be signed and the negotiation moratorium could be concluded at about the same time. EPA's ability to sign the ROD is not affected by the negotiation moratorium. The ROD may be signed at any point after the close of the public comment period and the preparation of the responsiveness summary for the public.

In many cases, providing special notice at this early stage may be inappropriate because too much uncertainty would exist about the remedy to allow for meaningful negotiations. However, under other circumstances it may be appropriate to issue the special notice early in the process, especially in situations where there is a relatively small group of PRPs, it is clear what the remedy is likely to be, and the remedy is not likely to be controversial.

Where circumstances permit issuance of the special notice at this early stage, an advantage to this approach is that the ROD review and approval process and the negotiation moratorium could be concluded at about the same time. This would help assure that cleanup occurs as soon as possible whether through a negotiated settlement or Fund-financed action. In addition, there would be an early opportunity to inform PRPs of various remedial alternatives under consideration by EPA prior to EPA's identification of the proposed plan. Early participation may be advantageous where PRPs have not been previously or substantially involved in RI/FS activities.

c. *Alternative Approach: Issue special notice when the ROD is signed.* Although the Regions generally will issue the RD/RA special notice letter when the draft FS and proposed plan are released to the public for comment, there may be some limited circumstances where it is appropriate to issue the notice later in the process (i.e. when the ROD is signed). This approach may be followed, however, only where the Region can provide adequate justification and where the Region has obtained prior approval from Headquarters. Approval must be obtained in writing from the Directors of the Office of Waste Programs Enforcement and the Office of Emergency and Remedial Response.

As shown in Appendix A, under this approach the RD/RA special notice would not be issued until the ROD is signed. Thus, the entire 60 to 120 day negotiation moratorium would not occur until the remedial design phase.

An advantage to this approach is that since the ROD would be signed and the remedy would be selected at the start of the RD/RA negotiation moratorium, the PRPs would know precisely which remedy the "good faith offer" and the negotiations should focus on. In addition, since the negotiations would begin after the close of the public comment period, the PRPs and EPA would have the benefit of knowing the public comments.

The major disadvantage to this approach is that the negotiation moratorium would not occur until the end of the process (i.e. not until the beginning of the remedial design phase). Issuing the special notice at this point would create the greatest potential for a subsequent delay in implementing the remedy.

Instances where it may, however, be appropriate to issue the special notice later in the process (i.e. not until the ROD is signed) may be where more time is needed to conduct informal negotiations, where the site is particularly complex, or where there is an extraordinarily large number of PRPs (e.g. hundreds of PRPs). Another example may be where there is little expectation that a Fund-financed remedial action will occur in the near future at an enforcement-lead site. If Fund-financed activities are not expected to occur and a later moratorium would facilitate cleanup, it may be less important to initiate and conclude negotiations early in the process.

6. Recipients of RI/FS and RD/RA Special Notice

The RI/FS and RD/RA special notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. If there is doubt about whether available information supports issuance of the RI/FS and RD/RA special notices, separate information request letters may be sent to such parties prior to issuing such notice. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

Section 122(e)(2)(C) authorizes EPA to bring additional parties into negotiations or to enter into a separate agreement with parties when additional PRPs are identified during the negotiation period or after an agreement has been entered into. The Regions may provide a special notice to additional parties if they are identified after issuance of the RI/FS special notice letter. However, issuance of a special notice to additional parties would not change the duration of the negotiation moratorium. The special notice may invite PRPs to participate in remaining negotiations, but would not extend the pre-existing negotiation moratorium.

Copies of the special notices should be provided to the Regional administrative record coordinator, the appropriate State representative, the State or Federal trustee if a trustee for natural resources has been designated, and to EPA headquarters at the same time notices are sent to PRPs. The copies of notices to headquarters should be sent to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement (OWPE).

Providing copies to the administrative record coordinator is important for ensuring that the notice to be placed in the record. Providing copies to the State representative and the State or Federal trustee is important for ensuring that States are appropriately informed about possible future negotiations. Providing copies to OWPE is essential for permitting entry into the Superfund

[8] Release of a summary or fact sheet on the alternatives that have been screened and the alternatives that are being considered is important for facilitating negotiations at this early stage in the remedial process. This information will be useful to PRPs in developing their "good faith offer" for conducting or financing a response action and will be important for informing PRPs about the alternatives the Agency is considering at the site. The Regions should include the summary of alternatives or fact sheet in the administrative record for each site

Enforcement Tracking System (SETS). Entry into SETS will facilitate our efforts to track site activities and to respond to Congressional and other inquiries. Direct regional input of data into SETS on notice letter recipients is planned for FY 1988.

It is not necessary to provide copies of each special notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one special notice with a list of other parties who have received the letter would suffice.

7. Contents of RI/FS and RD/RA Special Notices

The RI/FS and RD/RA special notice letters should contain the following components: (a) A notification of potential liability, (b) a discussion about the special notice and subsequent negotiation moratorium, (c) a discussion about the response activities to be conducted, (d) a copy of a statement of work or workplan and a draft administrative order on consent for the RI/FS, (e) a copy of a draft consent decree for the RD/RA (if possible), (f) a discussion about what constitutes a "good faith offer" for the RI/FS, (g) a discussion about what constitutes a "good faith offer" for the RD/RA, (h) a release of certain site-specific information (where available and appropriate), (i) a demand for payment of EPA costs incurred to date, (j) a notification about the administrative record, and (k) a deadline for response to the letter and the name of the EPA representative to contact.

a. *Potential liability:* The letter should specify that PRPs are potentially liable for the costs of conducting the RI/FS or the RD/RA. A detailed discussion about potential liability is not necessary particularly if the RI/FS or RD/RS special notice references the general notice.

b. *Special notice and formal negotiations:* The letter should discuss the purpose of the special notice and the subsequent negotiation moratorium. The level of detail will depend upon whether the PRP has received the general notice and whether the general notice provided an adequate discussion. At a minimum, the letter should make clear that EPA is inviting PRPs to participate in "formal" negotiations for PRP conduct of the RI/FS or RD/RA and that this letter automatically triggers the formal negotiation period. In addition, it is important that the special notice indicate the date the negotiation moratorium will conclude in the absence of and in the event of a "good faith offer." Finally, the letter should explain that a consent order or consent decree should be finalized by the end of the moratorium.

c. *Response actions to be conducted:* The letter should identify the response activities EPA plans to conduct at the site and provide scheduled dates for initiating such activities if appropriate.

d. *Statement of work or workplan and draft administrative order on consent for RI/FS special notice:* The letter should provide a statement of work or workplan and draft administrative order (AO) on consent. Such information is crucial to PRPs in their development of a "good faith offer" to EPA for conducting or financing the RI/FS and for ultimately facilitating settlements. The Regions are encouraged to provide the draft AO on consent with the notice letter if practicable. At a minimum, the letter should contain a copy of the statement of work with the expectation that the draft AO will follow as soon as practicable.

e. *Draft consent decree for RD/RA special notice:* The letter should contain a copy of the draft consent decree if possible. It is important that PRPs have the draft consent decree at the start of negotiations or soon thereafter since the decree contains important information which will assist PRPs in developing their "good faith offer" to EPA.

f. *"Good faith offer" for RI/FS:* The letter should indicate that a "good faith offer" is a written proposal which demonstrates the PRP's qualifications and willingness to conduct or finance the RI/FS. A "good faith offer" for the RI/FS should include the following:

- A statement of the PRPs willingness to condut or finance the RI/FS which is generally consistent with EPA's statement of work or work plan and draft administrative order on consent or provides a sufficient basis for further negotiations;
- A paragraph-by-paragraph response to EPA's statement of work or workplan and draft administrative order on consent;
- A detailed statement of work or workplan identifying how the PRPs plan to proceed with the work;
- A demonstration of the PRPs technical capability to undertake the RI/FS. This should include a requirement that PRPs identify the firm they expect will conduct the work or that PRPs identify the process they will undertake to select a firm;
- A demonstration of the PRPs financial capability to finance the RI/FS;
- A statement of the PRPs willingness to reimburse EPA for the costs EPA incurs in overseeing the PRP conduct of the RI/FS as required by section 104(a)(1); and
- The name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

g. *"Good faith offer" for RD/RA:* The letter should indicate that a "good faith offer" is a written proposal which demonstrates the PRPs qualifications and willingness to conduct or finance the RD/RA. A "good faith offer" for the RD/RA should include the following:

- A statement of the PRPs willingness to conduct or finance the RD/RA which is generally consistent with EPA's proposed plan or which provides a sufficient basis for further negotiations in light of EPA's proposed plan;
- A paragraph-by-paragraph response to EPA's draft consent decree, including a response to other documents that may have been attached to the decree such as a technical scope of work for the proposed plan or access or preauthorization agreements;
- A detailed "statement of work" or "workplan" identifying how PRPs plan to proceed with the work;
- A demonstration of the PRPs technical capability to undertake the RD/RA. This should include a requirement that PRPs identify the firm they expect will conduct the work or that PRPs identify the process they will undertake to select a firm;
- A demonstration of the PRPs capability to finance the RD/RA;
- A statement of the PRPs willingness to reimburse EPA for past response and oversight costs;
- A discussion about the PRPs position on releases from liability and reopeners to liability; and
- The name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

h. *Information release:* To the extent such information is available and to the extent such information has not been previously released, the letter should contain information on the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of the substances at the facility. Note that the release of information with the RI/FS and RD/RA special notices is not intended to require the release of information previously provided to PRPs.

i. *Demand for payment:* The letter should include a demand that PRPs reimburse EPA for the costs the Agency has incurred in conducting response activities at the site pursuant to section 107(a). The letter should identify the

action EPA undertook and the cost of conducting the action. The letter should also indicate that the Agency anticipates expending additional funds on activities covered by this notice and other specified future activities. Finally, the letter should demand payment of interest for past and future response costs incurred by EPA pursuant to section 107(a). Notice letters should not be delayed to obtain cost information where such information has not been previously collected.

j. *Administrative record:* The letter should be used as a vehicle for informing PRPs of the availability of an administrative record containing documents that form the basis for the Agency's decision on the selection of remedy. The letter should indicate that the record is open to the public for inspection and comment. The letter should also indicate where the record will be or has been located.

k. *PRP response and EPA contact person:* The letter should encourage PRPs to notify EPA of their interest to participate in negotiations. The letter should indicate that PRPs may respond as a group through a steering committee if a committee has been formed. In addition, the letter should provide the name, phone number, and address of the EPA representative to contact.

D. Conclusion of Negotiation Moratorium and Deadline Management for RI/FS and RD/RA

At the conclusion of the section 122(e) negotiation moratorium, the Regions should have a fully negotiated administrative order on consent for the RI/FS and a fully negotiated consent decree for the RD/RA which has been signed by the PRPs. A signed document is necessary to show that an agreement has, in fact, been reached.[9]

At the conclusion of the 120 day moratorium for the RD/RA a determination must be made on whether to continue settlement activities, whether the site should be cleaned up using Superfund money, or whether to initiate a section 106 enforcement action. A continuation of settlement activities may include seeking an extension to the 120 day negotiation moratorium as discussed below, or sending a consent decree to the Department of Justice for lodging in the appropriate district court.

[9] Pre-SARA guidance for drafting an administrative order is provided in "Superfund Administrative Order: Workshop and Guidance Materials" (1986) and for drafting a consent decree in "Guidance on Drafting Consent Decrees in Hazardous Waste Cases" (May 1, 1985). These guidances are being revised to include SARA's requirements.

In instances where an agreement has been reached and fully negotiated but PRPs have not yet obtained signatures, it may be necessary to obtain an extension to the negotiation moratorium. Extensions may also be necessary where the agreement has not been fully negotiated but all major issues are resolved and outstanding issues are well defined and final language is imminent. Extensions to the negotiation moratorium can be obtained only in certain circumstances as discussed in the February 12, 1987 "Interim Guidance: Streamlining the CERCLA Settlement Decision Process."[10]

The timing of special notice letters will have a significant effect on our ability to successfully conclude negotiations at the end of the moratorium period. The Streamlined Settlement Policy provides for two different processes for obtaining extensions for the RI/FS and RD/RA moratoriums. The policy indicates that the Regional Administrator has the discretion to terminate or extend negotiations for the RI/FS after 90 days. However, extension of negotiations beyond an additional 30 days should be authorized by the Regional Administrator only in limited cases.

Relating to the RD/RA moratorium, the Streamlined Settlement Policy provides for either Regional or Headquarters approval of an extension under certain circumstances. An extension to the 120 day RD/RA moratorium may be granted for an additional 30 days by the Regional Administrator when settlement is likely and imminent. An additional extension beyond the 30 days may be approved only by the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER) and only in rare and extraordinary circumstances.

This guidance re-emphasizes the importance of meeting the 90 day moratorium for the RI/FS and the 120 day moratorium for the RD/RA. To aid that policy, this guidance identifies three circumstances where the Regional Administrator and Assistant Administrator for OSWER may consider granting such extensions for the RD/RA moratorium.

First, it may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day moratorium for the RD/RA if EPA selects a remedy in the ROD which is significantly different from the Agency's stated preference in the proposed plan.

[10] This guidance was issued under OSWER Directive #9835.0.

This could mean that the focus of negotiations could change significantly, requiring additional time to reach agreement with PRPs.

The second example applies to Fund-lead sites. It may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day negotiation moratorium for the RD/RA if non-enforcement activities at the site (e.g. an extended public comment period or an extended ROD review and approval process) cause a significant delay in the Agency's ability to move forward in implementing a fund-financed remedy. An extension to the negotiation moratorium may be especially appropriate if there is reason to believe a negotiated settlement is imminent. In other words, if the Fund is not ready to move forward in implementing the remedy at the end of the 120 day negotiation moratorium there is no reason to conclude negotiations if there is reason to believe an agreement can be reached.

The third example applies to enforcement-lead sites. It may be appropriate for the Regional Administrator or the Assistant Administrator to extend the 120 day negotiation moratorium for the RD/RA after a section 106 litigation referral has been prepared and referred to the Department of Justice (DOJ) for action. In fact, the preparation and referral of a case to DOJ may be an important mechanism for providing the necessary impetus for reaching a voluntary settlement. In many cases it may be appropriate to issue a unilateral administrative order concurrent with the referral.

VI. Notice Letters and Negotiation Moratorium for Removal Actions

The notice letter process for removal actions differs from the notification process for remedial action. As discussed above, the notification process for remedial actions involves issuance of three notice letters. The notification process for removals will involve only one notice letter which may or may not invoke the section 122(e) special notice procedures as discussed below.

A. Notice Letters

1. Whether To Issue Notice for Removals

The Regions should attempt to contact PRPs prior to initiating a Fund-financed removal action to inform PRPs of their potential liability where EPA will incur response costs or to secure a private party response. This guidance

encourages the Regions to seek PRP response through a written notice letter but the Regions may contact PRPs verbally (with a written follow-up notice). This is consistent with the guidance on "Issuance of Administrative Orders for Immediate Removal Actions" (2/21/84).

The Regions should issue notice letters to readily identifiable PRPs for removal actions in the vast majority of cases. The content of the notice will vary depending whether the notice will be used simply to notify PRPs of their potential liability for an action EPA has already taken or is about to take, whether the notice will be used to encourage a private party response through "informal" negotiations (i.e. negotiations not triggered by the section 122(e) special notice procedures), or whether the notice will be used as a mechanism for invoking the section 122(e) special notice procedures which provide for "formal" negotiations between EPA and PRPs.

2. When to Use Special Notice Procedures for Removals

The Regions should consider using the section 122(e) special notice procedures only for those removals where the threat is of a nature that is not necessary to initiate an onsite removal action for at least six months. The "six month planning time period" begins once a site evaluation is completed. This means that for the vast majority of removal actions the Regions will not be required to utilize the special notice procedures. It is not appropriate to utilize special notices for most removal actions because the subsequent moratorium may interfere with the Agency's ability to implement the remedy in a timely manner. In addition, it may not be worth expending the time and resources to enter into formal negotiations when a removal will be a relatively short term and inexpensive response action.

The Regions should include the following factors in their determination of whether it is appropriate to utilize the special notice procedures for removals with a six month planning lead time: (1) Whether viable PRPs have been identified, (2) whether the PRPs are expected to respond favorably to the invitation to participate in negotiations and to conduct or finance the removal action, (3) whether issuance of the special notice could delay implementation of the removal action, and (4) whether it may be more appropriate to enter into "informal" negotiations in lieu of "formal" negotiations under section 122(e).

In determining the PRPs viability, the Region should inquire about the PRPs financial and technical capability for conducting and/or financing the removal action in an effective and timely manner. In determining the PRPs willingness to undertake or finance the removal action, the Region should, at a minimum, obtain a verbal agreement from the PRPs prior to issuance of the special notice. In determining whether the special notice may delay implementation of the remedy or in determining whether to enter into "informal" rather than "formal" negotiations, the Regions should consider whether the section 122(e) negotiation moratorium would interfere with other activities at the site.

3. Notifying PRPs When Not Appropriate To Utilize Special Notice Procedures for Removals

EPA's decision on whether to use the special notice procedures for any response action is clearly discretionary. However, section 122(a) requires the Agency to notify PRPs in writing when the Agency decides not to utilize such procedures. The removal notice provides a convenient vehicle for informing PRPs of EPA's decision not to utilize the special notice procedures. The notice should, therefore, inform PRPs of EPA's decision not to utilize such procedures when this determination has been made and should provide an explanation for that decision.

4. DOJ Role in Removal Negotiations

The Regions should consult with the Chief of the Environmental Enforcement Section of DOJ prior to issuing a special notice letter for removal actions where settlement by consent decree is contemplated, or where the settlement is expected to involve a compromise of past or future response costs and the total response costs will exceed $500,000. The Regions should consult with DOJ prior to releasing a draft consent decree to PRPs.

5. Timing of Notice for Removals

A removal notice that does not invoke the special notice procedures should be provided to PRPs as soon as practicable. For removal notices that invoke the special notice procedures, the notice should be issued as early as possible but no later than 120 days before the scheduled date for initiating the removal action. The scheduled date for initiating the removal action is the date removal extramural cleanup contractor funds will be obligated and onsite cleanup will begin.

The timing of a notice which invokes the special notice procedures is critical because issuance of the notice triggers the subsequent 60 to 120 day moratorium on EPA conduct of the removal action. (The moratorium would last only 60 days in instances where the PRPs do not provide EPA with a "good faith offer"). Issuing the special notice at least 120 days before EPA will begin the removal ensures that the subsequent 120 day moratorium does not affect EPA's ability to implement the removal action in the event negotiations do not result in an agreement for PRP conduct of the removal action.

6. Recipients of Notice for Removals

The removal notice should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. If a Federal agency has been identified as a generator at a facility not owned/operated by the Federal agency, such agency should be routinely notified like other PRPs.

Copies of removal notices should be provided to the Regional administrative record coordinator, the appropriate State representative, and to headquarters. Providing copies to the administrative record coordinator is important for ensuring that the notice be placed in the record. Providing copies to the State representative is important for ensuring that States are appropriately informed about possible future negotiations.

Providing copies to the Information Management Section within the Program Management and Support Office of the Office of Waste Programs Enforcement for entry into the Superfund Enforcement Tracking System (SETS). Copies should be sent to OWPE at the same time they are sent to PRPs. Providing copies to OWPE is essential for facilitating our efforts to track site activities and to respond to Congressional and other inquiries.

It is not necessary to provide copies of each removal notice to the administrative record coordinator, State representative, State or Federal trustee, or headquarters in instances where identical notices are provided to multiple PRPs. Where there are multiple PRPs at a site, a copy of one removal notice with a list of other parties who have received the letter would suffice.

7. Contents of Notice for Removals

As indicated, the content of the removal notice will vary depending upon whether the purpose of the letter is to simply inform PRPs of their potential liability or whether the letter will also be used to provide an opportunity for PRP involvement in negotiations either through "informal" or "formal"

negotiations. The following highlights the components that should be included in the three different types of removal notices. The specific content of each component of the removal notice should be essentially the same as described earlier for RI/FS and RD/RA general and special notices, except where otherwise specified.

a. *Notice of potential liability:* If the purpose of the removal notice is simply to inform PRPs of their potential liability and to provide notice that the Agency has or is about to take a response action, the notice should contain the following components: a notice of potential liability; a discussion about site response activities that have been or will be conducted at the site; a notice on the availability of an administrative record; and a notice pursuant to section 122(a) that the special notice procedures will not be used.

The notification under section 122(a) should inform PRPs that the Agency will not (or did not) use the section 122(e) special notice procedures for this particular response action and should provide an explanation for that decision. The letter should indicate that it is the Agency's policy not to use the special notice procedures for removals unless there is a six month planning lead time prior to the initiation of the response action. If the response action does involve a removal with a six month planning lead time but the Agency made a case-specific determination not to use the special notice procedures, the letter should provide an explanation why the use of such procedures was determined to be inappropriate for that particular response action.

b. *Notice of potential liability and opportunity to enter into "informal" negotiations:* If the purpose of the removal notice is to inform PRPs of their potential liability and to provide PRPs with an opportunity to enter into negotiations with EPA without invoking the section 122(e) special notice procedures, the notice should contain the following components: a notice of potential liability; a discussion about site response activities that will be conducted at the site; a copy of the statement of work or workplan and draft administrative order on consent; a notification pursuant to section 122(a) that the special notice procedures will not be used; a request that PRPs notify EPA within a specified period of time of their interest to participate in negotiations; a notice on the availability of the administrative record; and information on the EPA representative to contact. The section 122(a) notification should contain the same information discussed in the preceding paragraph.

c. *Notice of potential liability and opportunity to enter into "formal" negotiations pursuant to section 122(e) special notice procedures:* If the purpose of the removal notice is to inform PRPs of their potential liability and to provide PRPs with an opportunity to enter into negotiations with EPA using the section 122(e) special notice procedures, the notice should contain the following components: a notice of potential liability; a discussion about site response activities that will be conducted at the site; a discussion about the special notice procedures and the negotiation moratorium; a copy of the statement of work or workplan and draft administrative order on consent; a discussion about what constitutes a "good faith offer"; a request that PRPs notify EPA within a specified period of time indicating their interest to participate in negotiations; a notice on the availability of the administrative record; and information on the EPA representative to contact. The "good faith offer" should contain essentially the same components as described above for the RD/RA.

B. Conclusion of Negotiation Moratorium and Deadline Management for Removals

At the conclusion of the section 122(e) negotiation moratorium for removal actions, the Regions should have a fully negotiated administrative order on consent which has been signed by the PRPs. (Where appropriate, a signed consent decree should be provided). A signed administrative order on consent (or a consent decree) will show that the negotiations have been successfully completed.

The expectation is that the negotiations will be concluded at the end of the 120 day moratorium and the Regions are strongly encouraged to conclude the negotiations within this period of time. In instances where the negotiations do not result in an agreement, the Regions may seek an extension to the 120 day moratorium, issue an administrative order, or proceed with a Fund-financed removal. Note that the Regional Administrator may grant an extension to the 120 day moratorium only in limited and appropriate circumstances.

C. Administrative Orders and Negotiation Moratorium for Removals

In most instances, use of the special notice procedures for removal actions will not affect existing policy on issuing administrative orders for removals since the special notice procedures will be issued for only a small portion of removals. For details on the Agency's policy on administrative orders refer to the guidance on "Issuance of Administrative Orders for Immediate Removals" (2/21/84).

It is necessary, however, to modify existing policy in one respect. In instances where Regions use the special notice procedures for a removal action and where issuance of an administrative order is necessary and appropriate, the Regions should not issue the order until the end of the negotiation moratorium. This ensures that the negotiation moratorium will be used to negotiate voluntary settlements.

VII. Disclaimer

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

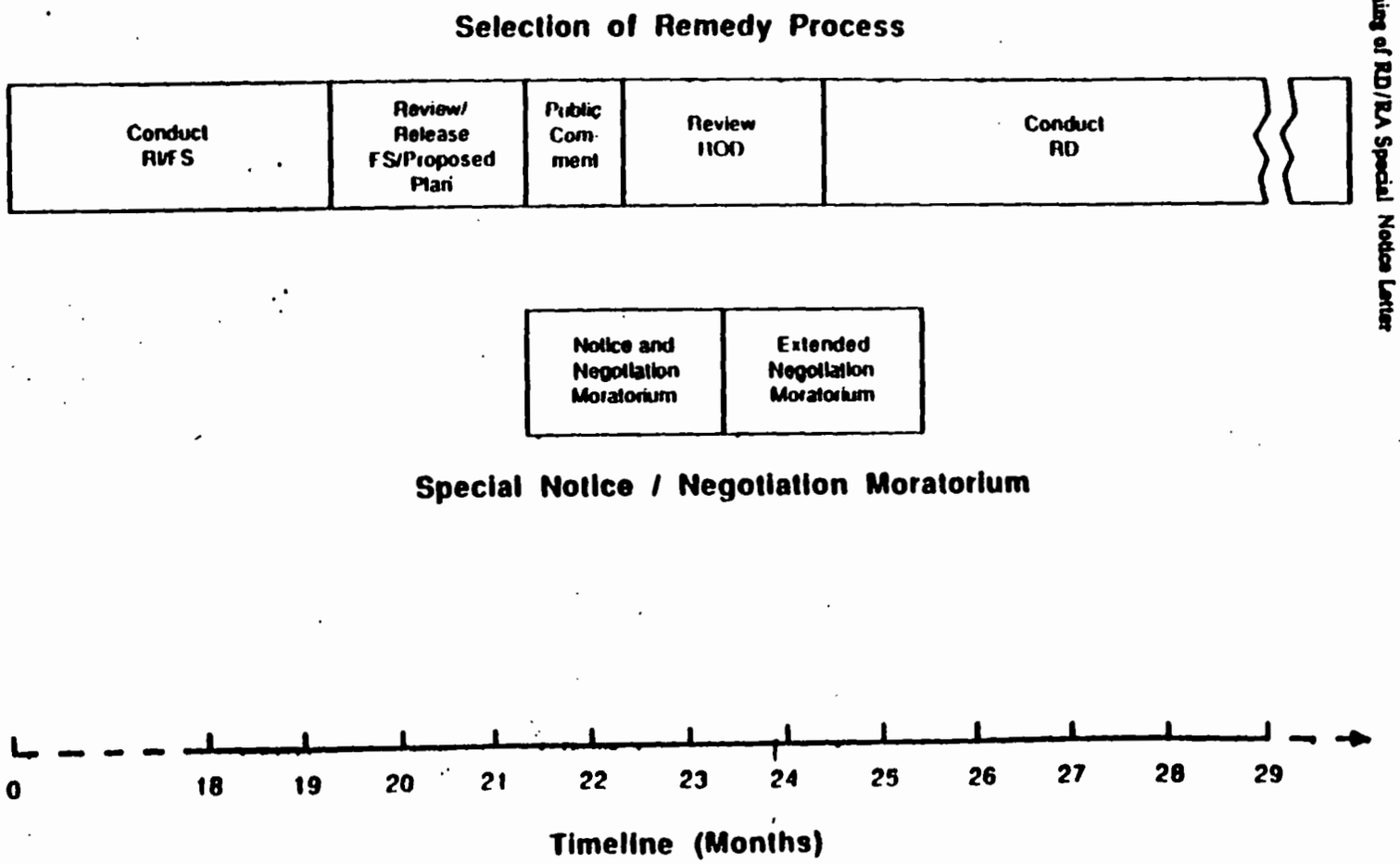
VIII. For Further Information

For further information or questions concerning this guidance, please contact Kathy MacKinnon in the Office of Waste Programs Enforcement at FTS-475-6770.

BILLING CODE 6560-50-M

Appendix A—Timing of RD/RA Special Notice Letter

A. General Approach: Issue RD / RA Special Notice When Release Draft FS and Proposed Plan



Office location and telephone number: Rm. 716, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA. (703-557-1806).

SUPPLEMENTARY INFORMATION: Pursuant to section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), the Administrator may, at his discretion, exempt a state agency from any provisions of FIFRA if he determines that emergency conditions exist which require such exemption.

The Applicant has requested the Administrator to issue a specific exemption to permit the use of an unregistered herbicide, (±)-2-(4,5-dihydro-4-methyl-4-(1methylethyl)-5-oxo-1*H*-imidazol-2-yl)-5-ethyl-3-pyridinecarboxylic acid (CAS 81335-77-5), manufactured as Pursuit ™, by American Cyanamid Company, on soybeans in Minnesota. Information in accordance with 40 CFR Part 166 was submitted as part of this request.

The Applicant indicated that Jerusalem artichoke poses a serious threat to the Minnesota soybean industry due to resultant reductions in yields. This weed, if not controlled produces numerous tubers which lie dormant over winter and produce plants the following spring. Only two herbicides (Paraquat and Roundup) are labelled for control of Jerusalem artichokes in Minnesota soybeans, according to the Applicant. Neither of these herbicides are satisfactory, according to the Applicant, due to required delays in planting or ineffective application techniques.

The Applicant indicates that without adequate control a 30 percent yield loss for soybeans due to this weed will result. This would amount to approximately 1.4 million dollars. Producers are reporting that infestations are increasing, and weed scientists are concerned that the week will become more widespread in the absence of effective control measures.

Pursuit ™ will be applied by ground postemergence to the crop at a rate of 0.06 pound active ingredient per acre.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 require publication of receipt of an application for a specific exemption proposing use of a new chemical (i.e., an active ingredient not contained in any currently registered pesticide). Such notice provides for the opportunity for public comment on the application.

Accordingly, interested persons may submit written views on this subject to the Program Management and Support Division at the address above. The comments must be received on or before March 29, 1988 and should bear the identifying notation "OPP- 180764 ." All written comments filed pursuant to this notice will be available for public inspection in Rm. 236, Crystal Mall No. 2, at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Agency, accordingly, will review and consider all comments received during the comment period in determining whether to issue the emergency exemption requested by the Minnesota Department of Agriculture.

Dated: February 29, 1988.

Edwin F. Tinsworth,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 88-5476 Filed 3-11-88; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3338-5]

Superfund Program; Mixed Funding Settlements

AGENCY: Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The Agency is publishing the guidance on "Evaluating Mixed Funding Settlements under CERCLA" today to inform the public and to solicit comment on these types of settlements. Mixed funding, as described, in part, under section 122(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (hereinafter referred to a "CERCLA") refers to three types of arrangements in which money from potentially responsible parties (PRPs) and the Hazardous Substances Superfund ("the Fund") is used to conduct a response action. This guidance first describes a process for determining whether a settlement involving mixed funding in any form is appropriate. It then describes issues related to each of the three types of mixed funding individually, as well as the procedure required for approval of mixed funding settlements.

DATE: Comments must be provided on or before May 13, 1988.

ADDRESS: Comments should be addressed to Kathy MacKinnon, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, Guidance and Oversight Branch (WH-527), 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kathy MacKinnon, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, Guidance and Oversight Branch, WH-527, 401 M Street SW., Washington, DC 20460, (202) 475-6770.

SUPPLEMENTARY INFORMATION: The term "mixed funding", as used in this document, refers to three types of arrangements in which the Government, at its discretion, agrees to conduct and/or pay for a portion of a response action. In one arrangement, as described in section 122(b)(1) of CERCLA, the PRPs agree to conduct the response action, and the Government agrees to allow these parties to bring a claim against the Fund for a portion of their costs. The process by which the Government agrees to allow a claim against the Fund is known as "preauthorization."

In a second type of mixed funding known as a "cash-out," the PRPs pay the Agency for a portion of the costs in lieu of conducting the response action. A third type of mixed funding, known as "mixed work," involves an agreement which addresses the entire response action, but the PRPs and the Agency agree to conduct and pay for discrete portions or segments of the response action.

The Agency supports the use of mixed funding to promote settlements and hazardous site cleanups. These settlements also may simplify the Government's litigation of cost recovery cases under section 107 by reducing the number of PRPs to be sued.

The process for evaluating mixed funding settlements is based, in part, on the Interim CERCLA Settlement Policy (50 FR 5034), which provides ten criteria to evaluate a PRP settlement offer for less than 100% of the cost of a cleanup at a site. For mixed funding settlements, criteria of particular importance include the strength of the liability case against settlors and any non-settlors, the size of the portion for which the Fund will be responsible, and other mitigating and equitable factors.

The use of mixed funding does not change EPA's established criteria for evaluating settlement offers. As stated in the Interim CERCLA Settlement Policy, liability under CERCLA is strict, joint and several unless the PRPs can clearly demonstrate that the harm at the site is divisible. Thus, approval of a mixed funding settlement will be a policy decision, made in the Government's discretion, based on an evaluation of the totality of the circumstances in each case.

Mixed funding settlements represent one portion of a comprehensive effort to facilitate settlements of enforcement actions under CERCLA. In particular, *de minimis* settlements (sections 122(g)).

covenants not to sue (sections 122(f)), and non-binding allocations of responsibility (NBARs) (sections 122(e)(3)) may be used in conjunction with mixed funding as a means of increasing the flexibility with which CERCLA cases may be settled in order to expedite cleanups.

The Agency encourages public comment on this guidance, especially related to particular types of mixed funding arrangements. The Agency will reevaluate this interim guidance in response to public comments.

The interim guidance follows.

Date: February 29, 1988.

J. W. McKerow,

Acting Assistant Administrator for Solid Waste and Emergency Response.

Date: February 12, 1988.

Thomas L. Adams, Jr.,

Assistant Administrator for Enforcement and Compliance Monitoring.

October 20, 1987.

Memorandum

Subject: Evaluating Mixed Funding Settlements Under CERCLA

From: J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response

Thomas L. Adams, Jr., Assistant Administrator, Office of Enforcement and Compliance Monitoring

To: Regional Administrators, Regions I–X

I. Introduction

This document provides guidance for use when a party proposes, as part of a settlement negotiation, that both private and Fund resources be used at a site. This type of arrangement is generally referred to as a "mixed funding" settlement. Section 122(b) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 (hereinafter cited as "CERCLA") provides explicit authority for the Government to enter into these types of arrangements.

The primary goals of this guidance are to:

(1) Encourage the Regions to consider mixed funding settlements, based on the statutory approval of these settlements in section 122(b) of CERCLA;

(2) Present a method for Regional enforcement personnel to analyze mixed funding in the context of a settlement offer, and

(3) Indicate broad Agency preferences by specifying acceptable and poor candidates for mixed funding in general.

Historically, the term "mixed funding" has been used to describe three types of arrangements. Section 122(b)(1) of CERCLA describes one mixed funding arrangement, in which one or more of the potentially responsible parties (PRPs) agree to perform a response activity and the Agency agrees to reimburse those PRPs for a portion of their response costs. In such cases, the statute provides that the cost incurred by the Fund be recovered from non-settlors when possible.

Settlement agreements involving cleanups by PRPs and reimbursement of their response costs require the Agency to "preauthorize" the claim against the Fund prior to the initiation of the response action. The term "preauthorization" refers to the approval that must be granted by the Agency prior to cleanup actions if a claim for response costs is to be considered against the Fund. If preauthorization is granted, it serves as an Agency commitment that, if response costs are conducted pursuant to the settlement agreement and the costs are reasonable and necessary, reimbursement will be available from the Fund as dictated by the agreement, subject to the availability of appropriated monies.

Two other kinds of settlement agreements also constitute forms of mixed funding, but do not require preauthorization. Section 122(b)(3) describes one type of arrangement, in which the Agency conducts the response action and the PRPs pay the Agency for a portion of the costs. This type of settlement is known as a settlement for cash, or "cash-out." A third type of mixed funding, known as "mixed work," involves an agreement which addresses the entire response action, but the PRPs and the Agency agree to conduct and pay for discrete portions or segments of the response action. The term "mixed funding", as used in this document, applies to any of the aforementioned types of settlements. It should be noted, however, that section 122(b)(4), concerning future obligation of the Fund for remedy failure, only applies to mixed funding in the form of preauthorization, as described in section 122(b)(1).

As noted above, the 1986 Amendments to CERCLA included an explicit statutory authorization of mixed funding settlements. Prior to these Amendments, the primary document which made reference to mixed funding was the Interim CERCLA Settlement Policy (50 FR 5034). This policy set out ten criteria to use when evaluating a settlement offer for less than 100% of the cost or cleanup at a site. In mixed funding settlements, the PRPs agree to pay for a portion of the response cost, and may conduct some or all of the response action.

A major portion of this guidance addresses the application of the Interim Settlement Policy to mixed funding settlements. Section II outlines the key principles underlying the Agency's Interim Settlement Policy, and the role of mixed funding within these general principles. Section III then provides an approach for applying the ten settlement criteria to mixed funding settlement offers in general (e.g., without regard to any specific funding arrangement.) This section first highlights factors of key importance to mixed funding settlements, and then suggests the Agency's preferences among various combinations of these factors.

Section IV identifies criteria to be used to determine if a particular type of mixed funding is appropriate for a site, and then lists secondary considerations related to all mixed funding settlements. Section V outlines the general procedure for review and approval of mixed funding.

II. The Role of Mixed Funding in the CERCLA Cleanup Program

The Interim CERCLA Settlement Policy identified negotiated private response actions as an essential component of the Agency's overall program for obtaining cleanup of the nation's hazardous waste sites. This program, to be effective, depends upon a balanced approach, which includes a mix of Fund-financed cleanups, enforceable settlement agreements reached through negotiations, and litigation. Expeditious cleanups reached through negotiated settlements are preferable to protracted litigation.

Section 122 of the 1986 Amendments, which is devoted entirely to settlement issues, indicates Congressional affirmation of the emphasis in the Interim Settlement Policy toward increased flexibility in settling CERCLA cases in order to expedite cleanups. Like the Interim Settlement Policy, section 122 covers a wide range of mechanisms designed to promote settlements. In particular, in section 122(b), Congress acknowledged the need to consider settlements for less than 100% of the costs of cleanups" * * * by using monies from the Fund on behalf of parties who are unknown, insolvent, similarly unavailable, or refuse to settle." (See the Conference Report on Superfund Amendments and Reauthorization Act of 1986, 99 Cong., 2d Sess. Report 99–962 pp. 183, 252 (1986)).

The Agency encourages the use of mixed funding to promote settlement and hazardous site cleanup. For example, preauthorization offers the

advantage of PRP performance of the response activity and funding of a substantial portion of the response costs, thus conserving Agency resources for use at other sites. In addition, section 122(b)(1) requires the Agency to make all reasonable efforts to recover these costs. The Agency will therefore pursue nonsettlors to make the Fund whole, unless it would be unwarranted to undertake such efforts. To the extent that mixed funding reduces the number of PRPs to be sued in such cost recovery cases, it will also reduce the Agency's costs for litigation.

Support of mixed funding as a settlement tool, however, does not imply that the standard and scope of liability under CERCLA has changed. As established by court decisions prior to the 1986 Amendments, PRP liability under CERCLA remains strict, joint and several, unless the PRPs can clearly demonstrate that the harm at the site is divisible. Thus, the Agency will assess mixed funding settlements in a manner consistent with the Interim Settlement Policy, where complete cleanup or collection of 100% of costs remains a primary goal.

For example, the Agency will not approve mixed funding simply on the basis that a share of wastes at a site may be attributable to an unknown or financially non-viable party. The Agency may conduct an allocation of liability among PRPs at a site, or may evaluate the PRP's allocation and allow volume to be considered as one factor used to assess the reasonableness of the PRPs' offer. However, the availability or the amount of any Fund-financing for a particular site will not be dependent solely on consistency with any volumetric or "fair-share" allocation. The Agency may, as a policy decision, determine that mixed funding is the best method to promote cleanup at a particular site, based on the totality of the circumstances. Mixed funding should be viewed as one tool, approved by Congress, to be used to promote settlements in the context of the existing Interim Settlement Policy.

Section 122 also contains settlement provisions related to: (a) *de minimis* settlements (section 122(g)), in which parties who are liable for only a minor portion of the hazard or cost of cleanup at a site may resolve their liability to the Government in an expedited process; (b) non-binding allocations of responsibility (NBARs), (section 122(e)(3)), which involve a discretionary EPA allocation of the total response costs among PRPs at a site; and (c) covenants not to sue, (section 122(f)), in which the Government agrees to certain releases from liability at a site.

These settlement mechanisms may influence the decision as to whether a settlement should include mixed funding. Thus, the use of mixed funding at a site should be evaluated both in the context of section 122 as a whole, which encourages settlement in general, as well as individual section 122 settlement provisions and their relevance to the proposed mixed funding settlement.

For further guidance on these settlement provisions, see "Interim Guidelines for Preparing Non-Binding Preliminary Allocations of Responsibility (NBAR)," 52 FR 19919; "Interim Guidelines on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA," Adams/Porter, June 19, 1987; "Covenants Not to Sue Under SARA," Adams/Porter July 10, 1987.

III. Assessment of Mixed Funding Settlement Proposals Using the Interim Settlement Policy Criteria

In the evaluation of a proposed mixed funding settlement, Agency enforcement personnel should first focus on the quality of the overall settlement offer. Thus, the initial determination in each case will not be whether a particular type of mixed funding should be used, but whether the underlying offer for a mixed funding settlement is a good one. This determination should be made by applying the ten settlement criteria set out in the Interim Settlement Policy.

The factors and hypothetical examples set forth below provide guidance as to how to apply the ten settlement criteria to settlement offers in which PRPs have requested some form of mixed funding. The Agency does not intend to limit the availability of mixed funding to the fact patterns described below, but recommends the following approach as a means of focusing the analysis of the settlement. Regions must continue to consider the totality of the circumstances for each mixed funding settlement offer.

In settlement offers in which any form of mixed funding is proposed, factors of primary importance include:

- Strength of the liability case against settlors and any non-settlors. This factor includes:
  - —Litigative risks in proceeding to trial against settlors, and
  - —The nature of the case remaining against non-settlors after the settlement;
- Government's options in the event settlement negotiations fail (e.g., if a state cost-share will be available for a Fund-lead action);
- Size of the portion or operable unit for which the Fund will be responsible (or the amount of the PRP's offer);
- Good-faith negotiations and cooperation of settlors and other mitigating and equitable factors.

The following examples indicate the combinations of the above factors which may be considered acceptable candidates for any type of mixed funding, and those cases considered poor candidates for mixed funding:

Acceptable Candidates for Mixed Funding

The best candidates for mixed funding are cases in which the following features are present:

- The potential portion or operable unit to be covered by the Fund is small, or the settling PRPs offer a substantial portion of the total cost or cleanup. In this context, substantial portion may be defined as a commitment by the PRPs to undertake or finance a predominant portion of the total remedial action.[1]
- The Government has a strong case against financially viable non-settling PRPs, from which the Fund portion may be recovered.

While this combination of factors represents the optimum conditions under which mixed funding may be approved, cases will more typically involve one or more variations of this scenario. Thus, the Agency anticipates that a range of cases will be considered acceptable candidates for mixed funding. The following examples indicate the circumstances under which a mixed funding settlement may represent the Government's preferred alternative:

Example one: A strong case against potential settlors may initially weigh in favor of litigation, especially if the case against non-settlors is weak. However, a mixed funding settlement may still be acceptable upon evaluation of additional factors, such as:

- The settling PRPs offer to conduct, or pay for a substantial portion of the response;
- Public interest considerations (e.g., if settlement would expedite cleanup and/or a section 104 Fund-financed action is not feasible);
- Whether settlors have negotiated in good-faith;
- The Government's time and resources saved by simplification or avoidance of litigation.

Example two: If a substantial portion of the waste at a site cannot be

[1] As noted, later, the Agency's preference is for the PRPs to perform the response action, rather than finance a Governmental response action.

attributed to known and financially-viable parties, as determined, for example, by a preliminary nonbinding allocation of responsibility by the Government), the Agency may initially consider pursuing the recovery of all costs under joint and several liability. However, if the litigative risks appear substantial, a mixed funding settlement may represent more than the Government would recover in litigation, especially when the cost and time required for litigation is considered. Litigative risks which may weigh in favor of settlement include:

• Weak evidence against financially viable potential settlors;

• Equitable considerations which weigh against the imposition of joint and several liability.

In addition, if the hazard at the site is serious and no Fund-financed response is possible, a delay in the response action pending the conclusion of litigation might represent an unacceptable risk to the public and the environment.

Poor Candidates for Mixed Funding

Cases considered poor candidates for mixed funding have the following features:

• The case against settling parties is strong, and thus the potential for successful litigation is high;

• The potential Fund portion is large (e.g., the potentially settlors' offer is insufficient.)

These factors do not *automatically* preclude mixed funding for a case. However, for mixed funding to be seriously considered in such instances, other compensating factors must be present, such as the ability of the settlors to initiate the response action more quickly than the Government in a Fund-financed action.

IV. Selection of the Mixed Funding Technique

As noted in the above Introduction, the term mixed funding has been used to refer to three different types of settlement arrangements:

(1) Preauthorization, in which the PRPs conduct a response action and the Agency agrees to allow a claim against the Fund for a portion of the response costs;

(2) Cash-outs, in which the PRPS pay for a portion of the response costs up front, and the Agency conducts the response action;

(3) Mixed work, in which the PRPs and the Agency each agree to conduct discrete portions of the response activity.

Once Regional enforcement personnel have determined that a mixed funding settlement is appropriate, based on the settlement criteria as described in Section III and the Interim Settlement Policy, then the Agency must decide which type of mixed funding best suits the situation at hand. Among the three major types of mixed funding, the Agency generally prefers preauthorization, since the PRPs conduct the response action. However, as noted below, cashouts and mixed work may be appropriate under certain circumstances.

Preauthorization

The assessment and approval of preauthorization, once a mixed funding settlement is approved, is a two-part process. The first stage, as described below, is the determination by the Agency enforcement personnel that preauthorization is appropriate in the context of the settlement as a whole. The second stage represents the actual process of preauthorization of the claim against the Fund by the Office of Emergency and Remedial Response (OERR) (see Section V.) The Response Claims regulations, which are presently in draft form, will provide guidance on the preauthorization process itself.

(a) Technical and timing concerns related to preauthorization.

For the first stage of the review, the nature of the proposed remedy and the PRPs' ability to perform it in a timely manner are major factors to consider when assessing a settlement offer which contemplates preauthorization. In addition, the size of the PRPs' portion is important. When PRPs are responsible for a sufficiently high percentage, they will have a strong economic incentive to keep the actual response costs within or close to estimates. The nature and the severity of the threat posed by the site may also weigh in favor of settlement, if preauthorization would increase the speed at which the hazard could be addressed. For example, prompt initiation of the remedial action would be of particular importance for sites which are not currently scheduled for full Fund-financing.

On the other hand, Regional negotiators must also consider the time required for the preauthorization process itself when determining if preauthorization is appropriate for particular types of response actions. While the Agency has set a goal of completing review of individual preauthorization applications within a 45-day period, this timing limitation will vary on a case-by-case basis. The Agency is unlikely to have time to consider preauthorization requests when action is required to avert an immediate threat to the public health or the environment, therefore, no reimbursement would be possible. Regions should anticipate the processing time in managing negotiations.

(b) Availability of preauthorization for various response actions.

For agreements involving activities such as an RI/FS or a removal, preauthorization in general will not be warranted, because the process of preauthorization will prove too burdensome for the small amounts or short time-frames often encountered in these cases. Limited exceptions may be considered in unusual circumstances, as where preauthorization will facilitate a broader agreement (e.g., an area-wide RI/FS) which will be less resource intensive than several agreements of smaller scope. A large, extensive removal (e.g., greater then $2 million) may also qualify as an extraordinary circumstance justifying preauthorization. However, Headquarters approval must be obtained before preauthorization may be offered during negotiations for such activities.

(c) Covenants not to sue for preauthorization settlements.

For preauthorization of remedial design and remedial action (RD/RA) activities, the statute contains a specific provision related to remedy failure. Section 122(b)(4) of CERCLA states that for cases involving preauthorization, as described in section 122(b)(1), the Fund will be responsible for costs of remedy failure, up to a proportion equal to that contributed for the original remedial action. This section also states that the Fund portion may be met either through Fund expenditures or by recovering such costs from parties who were not signatories to the original agreement. However, it should be noted that remedy failure due to negligence of the PRP will not trigger any Fund obligation. In any case, a covenant not to sue granted in preauthorize settlements must comport with Agency guidance on covenants not to sue, as cited above.

(d) Settlement provisions needed to process claims.

Settlement agreements involving preauthorization should contain the following restrictions to facilitate the processing of claims:

• Settlement agreements should specify a percentage of the total estimated cost to be included in the preauthorization claim for PRP reimbursement, subject to a maximum dollar limit.

• Claims against the Fund are *not* subject to the section 104(c)(3) requirement that States contribute 10 percent of the cost of the remedial

ction. However, prospective claimants re encouraged to file a letter of cooperation from the State along with heir request for preauthorization. This etter should describe any agreements esulting from the claimants' onsultation with the State, including ny State assurance of cooperation with he remedial action. Further, all actions onducted pursuant to a preauthorized laim must be consistent with the NCP ind the proposed draft Response Claim egulations, when promulgated.

• Claims may be filed only for costs ncurred after the date of preauthorization. Parties will not be eligible to make a claim against the Fund until the entire cleanup or agreed-upon preauthorized phase (e.g., an operable unit) is completed according to specifications set out in the settlement agreement and the Preauthorization Decision Document.

• Applicants must demonstrate that their proposed response costs are reasonable. The applicant should justify any proposal to perform an activity in-house, or, to contract it out. Applicants may look to Federal and State procurement practices for guidance on how to meet EPA's objectives in the area of contracting and subcontracting.

• PRPs must be financially and technically capable of implementing all of the agreed upon response action. Parties may be required to submit financial assurances or performance bonds to substantiate their financial capability for completing the response action.

Cash-out:

For settlement proposals involving a cash-out by some of the PRPs, the nature of the remedy and the public interest factors are generally not decisive, since the Government will be conducting the response action. Thus, of the criteria in the Interim Settlement Policy noted in Section III, the key issues in these agreements include:

• The percentage of the total costs to be paid by settlors (i.e., a substantial portion should be offered);

• The Agency's level of confidence in information related to liability and cost estimates at the time of settlement;

• Equitable considerations for both the settling and non-settling parties, including the nature of any covenants not to sue in the cash-out settlement.

In general, cash-out settlements may occur at any stage of the remedial process. Such offers should generally be assessed in light of the criteria in Part IV of the Interim CERCLA Settlement Policy. It is important to note that, once a Fund-lead response action is ongoing, the potential benefit of mixed funding as a means of expediting cleanup is largely eliminated. In addition, a cash-out of some of the PRPs during the response action may serve to fragment the Government's enforcement proceedings, since cost recovery will generally be pursued once the remedial action is completed. Other issues related to cash-outs include:

(a) Information needs related to cash-out settlements.

One example of the use of cash-out settlements could involve PRPs which have contributed a low percentage of the waste to a site, and are not technically or financially capable of conducting the entire response action (e.g., preauthorization is not an option.) In order for this type of settlement to be appropriate for both settling and non-settling responsible parties, the Agency should have sufficient information to determine a settlement amount for the settlors as a group. This amount should be based on the Settlement Policy, and should include their waste contribution and other relevant information. Thus, the Agency should have a fairly high level of confidence in the information concerning the liability at the site and the expected cost of the remedy in order to determine an appropriate cash-out settlement.

The settlement may include a risk premium which may partially offset the Government's risk due to uncertainties such as remedy failure or cost overruns, as well as uncertainties which may be present if the necessary information is less than complete.

(b) Covenants not to sue in cash-out settlements.

The sufficiency of the Agency's information related to PRP liability and the nature, stage of development and the cost of the potential remedy has particular bearing on the scope of any covenant not to sue in cash-out settlements. In general, if the Agency has only limited information in these areas (e.g., if the cash-out settlement entered into early in the remedial process), then covenants not to sue should contain appropriate reopeners to reflect this uncertainty. In reference to these reopeners, it is important to note that the obligation of the Fund to pay for a portion of any costs incurred due to remedy failure, under section 122(b)(4), is limited to mixed funding in the form of preauthorization under section 122(b)(1). Thus, for cash-outs, the statute does not limit the potential PRP liability for costs resulting from remedy failure. Any future obligations will be specified in the cash-out agreement, including the covenants not to sue. Further guidance concerning covenants not to sue is provided in the Agency guidance "Covenants Not to Sue Under SARA" cited above.

In addition, although cash-out settlements need not involve *de minimis* parties, as defined by section 122(g), similar analytical factors are important in both instances. Thus, Agency guidance entitled "Interim Guidelines on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA", cited above, may also be helpful for cash-out settlements.

(c) State cost-Share requirements for cash-out settlements.

When the Federal government uses its response authority to conduct a remedial action, section 104(c)(3) of CERCLA requires that the State "pay(s) or will assure payment" of 10% of the remedial action, including all future maintenance, or 50% or greater for sites involving a state operated facility. Since cash-out settlements involve PRP payment toward a federally-conducted remedial action, the applicable cost share is required for these settlements. The cost-share will be calculated using the total remedial costs, rather than the percentage of the Fund share alone.

There are a variety of ways that the State can "pay or assure payment" of the appropriate cost-share. For example, the State, the Federal government and PRPs may enter into an agreement under State law and CERCLA in which the PRPs pay 10% to the State, and the State obligates the money for use at the site in question. The State may also use its own funds to pay for any portion of its share that cannot be paid for by PRPs. In general, cash-out settlements should only be considered when the litigation team is reasonably certain that the State is willing and able to pay for its 10% share, although the cost-share need not be part of the consent decree between the Federal government and the PRPs.

Mixed Work

Mixed funding in the form of mixed work may be appropriate for cases in which the Agency can identify discrete phases or operable units of the response action. One common example involves a settlement with the PRPs to conduct the RD/RA once the Agency has conducted the RI/FS.

A second, more complicated mixed work arrangement could involve an agreement in which the Agency and the PRPs agree to conduct separate portions of an area-wide RI. In this example, the Agency might agree to conduct soil testing if the PRPS conduct ground-water monitoring. Regional enforcement personnel should be reasonably assured of PRP cooperation and the ability to identify in detail the individual activities

for which each party will be responsible before entering into any mixed work settlement. In addition, any covenants not to sue in mixed work settlements should be clearly limited to the operable units addressed in the agreement. Mixed work should be avoided where there is a significant potential for delays in response actions as a result of inadequate coordination or potential conflicts. Thus, due to the high potential for technical and legal complications, mixed work in the form of mixed construction should generally not be considered.

Additional Considerations Regarding Mixed Funding

Operation and Maintenance: For preauthorized settlements, full responsibility for payment of operations and maintenance (O & M) activities remains with the PRPs. In some circumstances, a State may agree, as a party to the settlement, to manage O & M activities which are financed by PRPs. The Agency will generally resort to enforcement actions rather than committing Fund money for cleanup at the site when both the PRPs and the State refuse to be responsible for O & M.

Actions Against Non-settlors: It is the policy of the Department of Justice that the Federal government will not commit in a consent decree or other agreement to sue other non-settling parties. Consistent with this policy, mixed funding settlement agreements should not contain provisions which commit the Federal government to sue non-settling parties at a particular site. At most, the agreement may indicate that the Government has a "present intention" to sue non-settlors, subject to the exercise of the Government's enforcement discretion. Such provisions, however, must be approved by Headquarters and the Department of Justice (DOJ) on a case-by-case basis, and may not be offered in negotiations until such approval is obtained.

Reservation of Rights: Potential settlors occasionally will agree to allow the Government to reserve the right to bring an enforcement action against them, contingent upon a certain event, such as an unsuccessful enforcement action against non-settlors. Such an arrangement is not desirable, although it may be acceptable in limited circumstances. Such an offer should not be used by settlors as a means of reducing the amount offered up front. In addition, the negotiation team should consider the practical problems that might arise in implementing such an arrangement, including statute of limitation issues and fragmented enforcement actions involving successive suits covering similar issues. The Government generally prefers to settle for a substantial portion up front, rather than being required to bring a second enforcement action against settlors for an additional amount.

Documentation: For preauthorization and mixed workcases in which the Agency will take enforcement actions against non-settling parties, the Agency must assure that the settling PRPs agree to provide the necessary documentation and any other assistance required for support of the cost recovery cases. This assistance may include an agreement to provide witnesses to substantiate response costs. Government oversight will also be required, not only to assure that reimbursement by the Government is appropriate, but also that PRP documentation constitutes sufficient and admissible evidence for the cost recovery cases.

V. Procedural Considerations for Review of Settlements Involving Mixed Funding

As noted in Section I, consideration of a site for any type of mixed funding involves a two-stage process. The site first should be evaluated to determine if an offer for a mixed funding settlement in general (e.g., without regard to the particular funding arrangement) should be accepted. This analysis includes the settlement criteria, with the hypothetical examples in Section III indicating the Agency's preferences among various combinations of factors. Once the Regional enforcement personnel determines that a mixed funding settlement will be acceptable, then the factors noted in Section IV should be used to evaluate whether a particular type of mixed funding is appropriate.

The Agency has developed guidance on streamlining and improving the CERCLA settlement decision process, which, in part, highlights the need for improved preparation for negotiations and for a more systematic management review process. (See "Interim Guidance: Streamlining the CERCLA Settlement Decision Process", Porter/Adams, Feb. 12, 1987.) In keeping with the goals of this improved process, Regions should conduct both stages of the mixed funding analysis as early as possible (e.g., prior to the appropriate special notice.)

Timely Headquarters and DOJ notification is particularly important for cases involving preauthorization, since the use of preauthorization in settlements requires both the approval of the settlement for preauthorization, as described above, and the review by OERR of the request for preauthorization itself. Early DOJ involvement is necessary in mixed funding negotiations, as it is for other types of negotiations. While the preauthorization process need not be completed at the time of settlement, the settlement document must describe the major parameters of the proposed preauthorization agreement. Therefore, OERR should be contacted once the mixed funding analysis has been completed and the Region supports further consideration of preauthorization. For further information on the draft Response Claims regulations and the procedure for preauthorization with OERR, contact William O. Ross, Office of Emergency and Remedial Response (WH-548), (FTS) 382-4645.

Issues which cannot be resolved at the staff level may be raised to the Settlement Decision Committee (SDC), a Headquarters-based review panel. Like all consent decrees, mixed funding settlements will require final approval by the Assistant Administrator (AA) for the Office of Solid Waste and Emergency Response (OSWER), the AA-OECM, and the Assistant Attorney General for Lands and Natural Resources. If the amount to be paid by the Fund exceeds $750,000 or 10% of the total response cost (whichever is greater), approval by the Deputy Attorney General at DOJ will also be required. Regional enforcement personnel may, of course, decline to consider mixed funding at a particular site without prior Headquarters consultation.

VI. Conclusion

Settlement agreements incorporating mixed funding provisions, as described in part under section 122(b) of CERCLA, offer an alternative to either up front Fund financing of the total costs of response actions at a site, or possible delays in cleanup resulting from litigation required to force PRP action. Mixed funding represents one component of the Agency's comprehensive approach toward increased flexibility in settling CERCLA cases. This approach originates from the CERCLA Interim Settlement Policy as well as the codification of much of this Policy Section 122 of the 1986 Amendments.

The assessment of mixed funding for a particular site must always begin with the determination as to whether any type of mixed funding settlement is appropriate, based on the ten settlement criteria. At the broadest level, this evaluation will involve a determination as to the most effective means of promoting cleanup at a site while

insuring the most efficient use of the Agency's resources, including the Fund itself. Regions are encouraged to consider a mixed funding settlement when an assessment of the settlement criteria, including the strength of the evidence, the equities of the settlement, and the public interest, indicate that mixed funding is in the best interest of the Government, the public and the environment.

For further information or questions concerning this guidance, contact Kathy MacKinnon, OWPE (WH-527) at FTS: 475-6770.

Disclaimer:

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

[FR Doc. 88-5477 Filed 3-11-88; 8:45 am]

BILLING CODE 6560-50-M

EXPORT-IMPORT BANK OF THE UNITED STATES

Advisory Committee of the Export-Import Bank of the United States; Open Meeting

SUMMARY: The Advisory Committee was established by Pub. L. 98-181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank to the United States Congress.

Time and Place: Tuesday, March 29, 1988 from 9:30 a.m. to 12 noon. The meeting will be held in Room 1143, 811 Vermont Avenue NW., Washington, DC 20571.

Agenda: The meeting agenda will include a discussion of the following topics: Financial Report, Summary of Hearings, Medium-Term Report to Congress and Competitiveness Report, Review of 1988 Issues for Advisory Committee, Briefing on FCIA Strategic Plan, State/City Update, and other topics.

Public Participation: The meeting will be open to public participation; and the last 20 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. In order to permit the Export-Import Bank to arrange suitable accommodations, members of the public who plan to attend the meeting should notify Joan P. Harris, Room 935, 811 Vermont Avenue NW., Washington, DC 20571, (202) 566-8871, not later than March 28, 1988. If any person wishes auxiliary aids (such as a language interpreter) or other special accommodations, please contact prior to March 22, 1988 the Office of the Secretary, Room 935, 811 Vermont Avenue NW., Washington, DC 20571, Voice: (202) 566-8871 or TDD: (202) 535-3913.

Further Information: For further information, contact Joan P. Harris, Room 935, 811 Vermont Avenue NW., Washington, DC 20571, (202) 566-8871.

Hart Fessenden,

General Counsel.

[FR Doc. 88-5537 Filed 3-11-88; 8:45 am]

BILLING CODE 6690-01-M

FEDERAL COMMUNICATIONS COMMISSION

Specialized Mobile Radio Service Frequencies To Be Available for Reassignment

The following channels were recently recovered from licensees who failed to meet the Commission's loading or construction requirements and will be available for reassignment to trunked Specialized Mobile Radio (SMR) applicants. They were previously licensed at the coordinates indicated and are available at any location within the geographic area which will protect existing SMR systems pursuant to Rules 90.562 and 90.621.

856/860.1125 MHz
Rockford, IL
42-16-50 North
89-02-16 West

856/860.0375 MHz
Front Royal, VA
38-58-29 North
78-12-09 West

861/865.4875 MHz
Swanton, OH
41-35-00 North
83-50-59 West

856/860.5375 MHz
Murrison, CO
39-40-23 North
105-13-04 West

857/860.0625 MHz
Phoenix, AZ
33-33-33 North
112-33-20 West

856/860.5125 MHz
Baton Rouge, LA
30-25-56 North
91-11-08 West

856/860.5625 MHz
Woburn, MA
42-21-30 North
70-57-00 West

863.8875, 864.4375,
864.8875, 866.3375,
865.7875 MHz
Syracuse, NY
43-02-38 North
76-09-09 West

Pursuant to the Public Notice of January 6, 1988, Mimeo No. 1805, these channels will be available for reassignment on March 31, 1988. All applications received before March 31, 1988 will be dismissed. The first application received after the channels become available for reassignment opens the filing window. The window stays open only for the day on which the first application is received. *All applications MUST reference the date and DA number of this Public Notice in order to be considered for these frequencies.*

There is a $30.00 fee required for each application filed. All checks should be made payable to the FCC. Applications should be mailed to: Federal Communications Commission, 800 Megahertz Service, P.O. Box 360416M, Pittsburgh, PA 15251-6416. Applications may also be filed in person between 9:00 AM and 3:00 PM at the following address: Federal Communications Commission, c/o Mellon Bank, Three Mellon Bank Center, 525 William Penn Way, 27th Floor, Room 153-2713, Pittsburgh, PA 15259, Attention: (Wholesale Lockbox Shift Supervisor).

For further information, refer to Public Notice of January 6, 1988 or contact Riley Hollingsworth or Betty Woolford (202) 632-7125 of the Private Radio Bureau's Land Mobile and Microwave Division.

Federal Communications Commission

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-5494 Filed 3-11-88; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL RESERVE SYSTEM

Cheshire Financial Corp. et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal

REVISED PROCEDURES FOR IMPLEMENTING OFF-SITE RESPONSE ACTIONS

I. INTRODUCTION

The off-site policy describes procedures that should be observed when a response action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Section 7003 of RCRA involves off-site storage, treatment or disposal of CERCLA waste. The procedures also apply to actions taken jointly under CERCLA and another statute.

The purpose of the off-site policy is to avoid having CERCLA wastes contribute to present or future environmental problems by directing these wastes to facilities determined to be environmentally sound. It is EPA's responsibility to ensure that the criteria for governing off-site transfer of CERCLA waste result in decisions that are environmentally sensible and that reflect sound public policy. Therefore, in developing acceptability criteria, the Agency has applied environmental standards and other sound management practices to ensure that CERCLA waste will be appropriately managed.

EPA issued the original off-site policy in May 1985. See "Procedures for Planning and Implementing Off-Site Response Actions", memorandum from Jack W. McGraw to the Regional Administrators. That policy was published in the Federal Register on November 5, 1985. The 1986 amendments to CERCLA, the Superfund Amendments and Reauthorization Act (SARA), adopted EPA's policy for off-site transfer of CERCLA wastes, with some modifications. CERCLA §121(d)(3) requires that hazardous substances, pollutants or contaminants transferred off-site for treatment, storage or disposal during a CERCLA response action be transferred to a facility operating in compliance with §§3004 and 3005 of RCRA and other applicable laws or regulations. The statute also requires that receiving units at land disposal facilities have no releases of hazardous wastes or hazardous constituents. Any releases from other units at a land disposal facility must also be controlled by a RCRA or equivalent corrective action program. While the original policy required compliance with RCRA and other applicable laws, SARA goes beyond the original policy, primarily by prohibiting disposal at units at a land disposal facility with releases, rather than allowing the Agency to judge whether the releases constituted environmental conditions that affected the satisfactory operation of a facility.

The off-site policy has been revised in light of the mandates of SARA. This revised policy also extends the SARA concepts to certain situations not specifically covered by the statute. These requirements apply to CERCLA decision documents signed, and RCRA §7003 actions taken, after enactment of SARA. Specifically, this policy covers:

- Extending SARA's "no release" requirement to all RCRA units receiving CERCLA waste, not just units at RCRA land disposal facilities;

- Expanding SARA's release prohibition to include releases of CERCLA hazardous substances, in addition to releases of RCRA hazardous waste and hazardous constituents;

- Addressing releases from other units at RCRA treatment and storage facilities; and

- Addressing off-site transfer to non-RCRA facilities.

The revised policy also reinterprets the May 1985 policy as it now applies to CERCLA decision documents signed, and RCRA §7003 actions taken, prior to the enactment of SARA.

The revised off-site policy is effective immediately upon issuance. It is considered to be an interim policy as key elements of the policy will be incorporated in a proposed rule to be published in the Federal Register. As part of that rulemaking, the policy will be subject to public comment. Comments received during that period may cause additional revisions to the policy. The final rule will reflect the final policy under CERCLA §121(d)(3) and EPA will issue a revised implementation policy memorandum if necessary.

II. APPLICABILITY

There are a number of variables which will determine whether and how the off-site policy applies: waste type, authority, funding source, and whether the decision document or order supporting the clean-up was signed before or after the enactment of SARA (i.e., before or after October 17, 1986). In order to determine which elements of the policy apply to a specific CERCLA cleanup each factor must be considered.

The first factor to consider is the type of waste to be transferred. The revised policy applies to the off-site treatment, storage or disposal of all CERCLA waste. CERCLA wastes include RCRA hazardous wastes and other CERCLA hazardous substances, pollutants and contaminants. RCRA hazardous wastes are either listed or defined by characteristic in 40 CFR Part 261. CERCLA hazardous substances are defined in 40 CFR 300.6.

Because RCRA permits and interim status apply to specific wastes and specific storage, treatment or disposal processes, the Remedial Project Manager (RPM) or On-Scene Coordinator (OSC) must determine that the facility's permit or interim

status authorizes receipt of the wastes that would be transported to the facility and the type of process contemplated for the wastes. Therefore, it is important that facility selection be coordinated with RCRA personnel.

A CERCLA hazardous substance that is not a RCRA hazardous waste or hazardous constituent (i.e., non-RCRA waste) may be taken to a RCRA facility if it is not otherwise incompatible with the RCRA waste, even though receipt of that waste is not expressly authorized under interim status or in the permit. Non-RCRA wastes can also be managed at non-RCRA facilities. Criteria applicable to CERCLA wastes that can be disposed of at non-Subtitle C facilities are discussed later in this revised policy.

The second factor to consider in determining whether this revised policy applies is the statutory authority for the action. This revised off-site policy applies to any remedial or removal action involving the off-site transfer of any hazardous substance, pollutant, or contaminant under any CERCLA authority or under RCRA §7003. This policy also applies to response actions taken under §311 of the Clean Water Act, except for cleanups of petroleum products. The policy also covers cleanups at Federal facilities under §120 of SARA.

The third factor to assess is the source of funding. The revised policy applies to all Fund-financed response actions, whether EPA or the State is the lead agency. The policy does not apply to State-lead enforcement actions (even at NPL sites) if no CERCLA funds are involved. It does apply to State-lead enforcement actions where EPA provides any site-specific funding through a Cooperative Agreement or Multi-Site Cooperative Agreement, even though the State may be using its own enforcement authorities to compel the cleanup. Similarly, non-NPL sites are covered by this policy only where there is an expenditure of Fund money or where the cleanup is undertaken under CERCLA authority.

The final factor that affects how this revised policy applies is the date of the decision document. As noted earlier, there are two classes of actions subject to slightly different procedures governing off-site transfer: first, those actions resulting from pre-SARA decision documents or RCRA §7003 orders issued prior to October 17, 1986, are subject to the May 1985 policy as updated by this revised policy; and second, those actions resulting from post-SARA decision documents or RCRA §7003 orders issued after October 17, 1986, are subject to the requirements of SARA as interpreted and expanded by this revised policy. Although the procedures in this policy are similar for these two classes of actions, there are important differences (e.g., the requirements pertaining to

releases from other units at a facility) that will be highlighted throughout this document.

Compliance with the revised procedures is mandatory for removal and remedial actions. However, there is an emergency exemption for removals if the OSC determines that the exigencies of the situation require off-site treatment, storage or disposal without following the requirements. This exception may be used when the OSC believes that the threat posed by the substances makes it imperative to remove the substances immediately and there is insufficient time to observe these procedures without endangering public health, welfare or the environment. In such cases, the OSC should consider temporary solutions (e.g., interim storage) to allow time to locate an acceptable facility. The OSC must provide a written explanation of his or her decision to use this emergency exemption to the Regional Administrator within 60 days of taking the action. In Regions in which authority to make removal decisions has not been fully delegated by the Regional Administrator to the OSC, the decisions discussed above must be made by the Regional official to whom removal authority has been delegated. This emergency exemption is also available to OSC's taking response actions under §311 of the Clean Water Act.

III. DEFINITIONS

A. Release

For the purposes of this policy, the term "release" is defined here as it is defined by §101(22) of CERCLA, which is repeated in 40 CFR 300.6 of the NCP, and the RCRA §3008(h) guidance ("Interpretation of Section 3008(h) of the Solid Waste Disposal Act", memorandum from J. Winston Porter and Courtney M. Price to the Regional Administrators, *et al*, December 16, 1985). To summarize, a release is any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, dumping or disposing to the environment. This includes releases to surface water, ground water, land surface, soil and air.

A release also includes a substantial threat of a release. In determining whether a substantial threat of release exists, both the imminence of the threat and the potential magnitude of the release should be considered. Examples of situations where a substantial threat of a release may exist include a weakened or inadequately engineered dike wall at a surface impoundment, or a severely rusted treatment or storage tank.

De minimis releases from receiving units are exempt; that is, they are not considered to be releases under the off-site

policy. De minimis releases are those that do not adversely affect public health or the environment, such as releases to the air from temporary opening and closing of bungs, releases between landfill liners of 1 gallon/acre/day or less, or stack emissions from incinerators not otherwise subject to Clean Air Act permits. Releases that need to be addressed by implementing a contingency plan would not normally be considered de minimis releases.

Federally-permitted releases, as defined by CERCLA §101(10) and 40 CFR 300.6, are also exempt. These include discharges or releases in compliance with applicable permits under RCRA, the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Marine Protection, Research and Sanctuaries Act, and Atomic Energy Act or analogous State authorities.

For purposes of this policy, an interim status unit in RCRA ground-water assessment monitoring (under 40 CFR 265.93) or a permitted unit in compliance monitoring (under 40 CFR 264.99) is not presumed to have a release. EPA will evaluate available information, including the data which led to a determination of the need for assessment or compliance monitoring, data gathered during assessment monitoring, and any other relevant data, including that gathered from applicable compliance inspections. A determination of unacceptability should be made when information will support the conclusion that there is a probable release to ground water from the receiving unit. Finding a release can happen at any time before, during or after an assessment or compliance monitoring program.

On the other hand, it is not necessary to have actual sampling data to determine that there is a release. An inspector may find other evidence that a release has occurred, such as a broken dike or feed line at a surface impoundment. Less obvious indications of a release might also be adequate to make the determination. For example, EPA could have sufficient information on the contents of a land disposal unit, the design and operating characteristics of the unit, or the hydrogeology of the area in which the unit is located to conclude that there is or has been a release to the environment.

B. Receiving Unit

The receiving unit is any unit that receives off-site CERCLA waste:

(1) for treatment using BDAT, including any pre-treatment or storage units used prior to treatment;

(2) for treatment to substantially reduce its mobility,

toxicity or persistence in the absence of a defined BDAT; or

(3) for storage or ultimate disposal of waste not treated to the previous criteria.

Note that the acceptability criteria may vary from unit to unit, and that the receiving unit may vary from transfer to transfer.

C. Other Units

Other units are all other regulated units and solid waste management units (SWMU's) at a facility that are not receiving units.

D. Controlled Release

In order to be considered a controlled release, the release must be addressed by a RCRA corrective action program (incorporated in a permit or order) or a corrective action program approved and enforceable under another applicable Federal or delegated State authority.

E. Relevant Violations

Relevant violations include Class I violations as defined by the RCRA Enforcement Response Policy (December 21, 1984, and subsequent revisions) at or affecting a receiving unit. A Class I violation is a significant deviation from regulations, compliance order provisions or permit conditions designed to:

- Ensure that hazardous waste is destined for and delivered to authorized facilities;
- Prevent releases of hazardous waste or constituents to the environment;
- Ensure early detection of such releases; or
- Compel corrective action for releases.

Recordkeeping and reporting requirements (such as failure to submit the biennial report or failure to maintain a copy of the closure plan at the facility) are generally not considered to be Class I violations.

Violations affecting a receiving unit include all ground-water monitoring violations unless the receiving unit is outside the waste management area which the ground-water monitoring system was designed to monitor. Facility-wide Class I violations (such as failure to comply with financial

responsibility requirements, inadequate closure plan, inadequate waste analysis plan, inadequate inspection plan, etc.) that affect the receiving unit are also relevant violations.

Violations of State or other Federal laws should also be examined for relevance, considering the significance of the requirement that is being violated; the extent of deviation from the requirement; and the potential or actual threat to human health or the environment.

F. Relevant Release

A relevant release under this revised policy includes:

- Any release or significant threat of release of a hazardous substance (defined in 40 CFR 300.6) not previously excluded (i.e., de minimis releases or permitted releases) at all units of a RCRA Subtitle C land disposal facility and at receiving units of a RCRA Subtitle C treatment or storage facility; and

- Environmentally significant releases of any hazardous substance not previously excluded at non-receiving units at RCRA Subtitle C treatment and storage facilities and at all units at other facilities.

G. Relevant Conditions

Relevant conditions include any environmental conditions (besides a relevant violation) at a facility that pose a significant threat to public health, welfare or the environment or that otherwise affect the satisfactory operation of the facility.

H. Responsible Agency

Determinations of acceptability to receive an off-site transfer of CERCLA waste will be made by EPA or by States authorized for corrective action under §3004(u) of RCRA. References in this document to the "responsible Agency" refer only to EPA Regions or to States with this authority.

I. Responsible Government Official

The responsible government official is that person authorized in the responsible Agency to make acceptability determinations under this revised policy.

IV. ACCEPTABILITY CRITERIA

A. Acceptability Criteria for Wastes Generated Under Pre-SARA Decision Documents

CERCLA wastes from actions resulting from pre-SARA decision documents and pre-SARA RCRA §7003 orders may go to a facility meeting the following criteria:

- There are no relevant violations at or affecting the receiving unit; and
- There are no relevant conditions at the facility (i.e., other environmental conditions that pose a significant threat to public health, welfare or the environment or otherwise affect the satisfactory operation of the facility).

In order to determine if there is a relevant violation, an appropriate compliance inspection must be conducted no more than six months before the expected date of receipt of CERCLA waste. This inspection, at a minimum, must address all regulated units. This inspection may be conducted by EPA, a State or an authorized representative. When a State conducts the inspection, it should determine the facility's compliance status. Where a violation or potential violation comes to EPA's attention (e.g., through a citizen complaint or a facility visit by permit staff), the Region or State is expected to investigate whether a violation occurred as soon as is reasonably possible.

The May 1985 policy does not refer specifically to releases. Rather, a corrective action plan is required for relevant conditions. Therefore, in some cases, a facility receiving CERCLA wastes from an action subject to a pre-SARA decision document may not need to institute a program to control releases. Releases will be evaluated by the responsible Agency to determine whether such releases constitute relevant conditions under this policy.

The activities related to determining acceptability, providing notice to facilities, regaining acceptability and implementation procedures are discussed in the "Implementation" section of this document, and apply to off-site transfers of waste generated under pre-SARA and post-SARA decision documents.

B. Acceptability Criteria for Wastes Generated Under Post-SARA Decision Documents

Under this revised policy, there are three basic criteria that are used to determine the acceptability of a facility to receive off-site transfers of CERCLA waste generated under a post-SARA decision document or post-SARA RCRA §7003 cleanup. The criteria are:

- There must be no relevant violations at or affecting the receiving unit;
- There must be no releases from receiving units and contamination from prior releases at receiving units must be addressed as appropriate; and
- Releases at other units must be addressed as appropriate.

The last two criteria are applied somewhat differently, depending on the type of facility. These differences are described below.

1. Criteria Applicable to All RCRA Subtitle C Treatment, Storage and Disposal Facilities. The first criterion that applies to all Subtitle C facilities is that there can be no relevant violations at or affecting the receiving unit. As discussed earlier, this determination must be based on an inspection conducted no more than six months prior to receipt of CERCLA waste.

A second element that applies to all Subtitle C facilities is that there must be no releases at receiving units. Releases from receiving units, except for de minimis releases and State- and Federally-permitted releases, must be eliminated and any prior contamination from the release must be controlled by a corrective action permit or order under Subtitle C, as described in the next section.

The final criterion that applies to all Subtitle C facilities, is that the facility must have undergone a RCRA Facility Assessment (RFA) or equivalent facility-wide investigation. This investigation addresses EPA's affirmative duty under CERCLA §121(d)(3) to determine that there are no releases at the facility.

Releases of RCRA hazardous waste or hazardous constituents and CERCLA hazardous substances are all included under the policy. While the RFA need not focus on identifying releases of hazardous substances that are not RCRA hazardous wastes or hazardous constituents, to the extent such releases are discovered in an RFA or through other means, they will be

considered the same as a release of hazardous waste or hazardous constituents.

o Additional Criteria Applicable to RCRA Subtitle C Land Disposal Facilities. Land disposal facilities must meet additional requirements imposed by SARA and this policy. The term "land disposal facility" means any RCRA facility at which a land disposal unit is located, regardless of whether the land disposal unit is the receiving unit. Land disposal units include surface impoundments, landfills, land treatment units and waste piles.

As stated earlier, there must be no releases at or from receiving units. In addition, releases from other units at a land disposal facility must be controlled under a corrective action program. The RFA will help determine whether there is a release. In addition, land disposal facilities must have received a comprehensive ground-water monitoring evaluation (CME) or an operation and maintenance (O&M) inspection within the last year.

Units at RCRA Subtitle C land disposal facilities receiving CERCLA waste that is also RCRA hazardous waste must meet the RCRA minimum technology requirements of RCRA §3004(o). Only where a facility has been granted a waiver can a land disposal unit not meeting the minimum technology requirements be considered acceptable for off-site disposal of CERCLA waste that is RCRA hazardous waste.

o Criteria Applicable to Subtitle C Treatment and Storage Facilities. The criterion for controlling releases from other units does not apply to all releases at treatment and storage facilities, as it does at land disposal facilities. Releases from other units at treatment and storage facilities must be evaluated for environmental significance and their effect on the satisfactory operation of the facility. If determined by the responsible Agency to be environmentally significant, releases must be controlled by a corrective action program under an applicable authority. Releases from other units at treatment and storage facilities determined not to be environmentally significant do not affect the acceptability of the facility for receipt of CERCLA waste.

2. Criteria Applicable to RCRA Permit-by-Rule Facilities. This revised policy is also applicable to facilities subject to the RCRA permit-by-rule provisions in 40 CFR 270.60. These include ocean disposal barges or vessels, injection wells and publicly owned treatment works (POTWs). Permit-by-rule facilities receiving RCRA hazardous waste must have a RCRA permit or RCRA interim status. RCRA permit-by-rule facilities must also receive an inspection for compliance with applicable RCRA permit or interim status requirements. In addition, these

facilities (and other non-RCRA facilities) should be inspected by the appropriate inspectors for other applicable laws.

In general, except for POTWs (discussed below), these facilities will be subject to the same requirements as RCRA treatment and storage facilities. That is, there can be no releases of hazardous waste, hazardous constituents or hazardous substances from receiving units. There also can be no relevant violations at or affecting the receiving unit, as confirmed by an inspection conducted no more than six months prior to the receipt of CERCLA waste. Releases from other units determined by the responsible Agency to be environmentally significant must be controlled by an enforceable agreement under the applicable authority.

Criteria for discharge of wastewater from CERCLA sites to POTWs can be found in a memorandum titled, "Discharge of Wastewater from CERCLA Sites into POTWs," dated April 15, 1986. That memorandum requires an evaluation during the RI/FS process for the CERCLA site to consider such points as:

- the quantity and quality of the CERCLA wastewater and its compatibility with the POTW;
- the ability of the POTW to ensure compliance with applicable pretreatment standards;
- the POTWs record of compliance with its NPDES permit; and
- the potential for ground-water contamination from transport to or impoundment of CERCLA wastewater at the POTW.

Based on a consideration of these and other points listed in the memorandum, the POTW may be deemed appropriate or inappropriate for receipt of CERCLA waste.

3. <u>Criteria Applicable to Non-Subtitle C Facilities</u>. In some instances, it may be appropriate to use a non-Subtitle C facility for off-site transfer: for example, PCB disposal is regulated under the Toxic Substances Control Act (TSCA); nonhazardous waste disposal is regulated under Subtitle D of RCRA and applicable State laws; and disposal of radionuclides is regulated under the Atomic Energy Act. At such facilities, all releases are treated in the same manner as releases from other units at Subtitle C treatment and storage facilities. That is, the responsible Agency should make a determination as to whether the release is environmentally significant and, if so, the release should be controlled by a corrective action program under the applicable Federal or State authority.

Requirements for the disposal of PCBs are established in 40 CFR 761.60. Generally, these regulations require that whenever disposal of PCBs is undertaken, they must be incinerated, unless the concentrations are less than 50 ppm. If the concentrations are between 50 and 500 ppm, the rule provides for certain exceptions that provide alternatives to the incineration requirements. The principal alternative is disposal in a TSCA-permitted landfill for PCBs. If a TSCA landfill is the receiving unit for PCBs, then that facility is subject to the same criteria applicable if a RCRA land disposal unit is the receiving unit; i.e., no relevant violations, no releases at the receiving unit and controlled releases at other units. PCBs at levels less than 50 ppm may be transported to acceptable Subtitle D facilities as discussed previously.

V. IMPLEMENTATION

A. Determining Acceptability

Acceptability determinations under the off-site policy will be made by EPA or by States authorized for corrective action under §3004(u) of RCRA. Where States have such authority, the State may make acceptability determinations for facilities in the State in consultation with EPA. Regardless of a State's authorization status, the Region and States should establish, in the Superfund Memorandum of Agreement, mechanisms to ensure timely exchange of information, notification of facilities and coordination of activities related to the acceptability of facilities and potential selection of facilities for off-site transfer. The Regions and States also need to establish or enhance coordination mechanisms with their respective RCRA program staffs in order to ensure timely receipt of information on inspections, violations and releases. These agreements can be embodied in State authorization Memoranda of Agreement, State grant agreements, or State-EPA enforcement agreements.

The responsible government official in the Region or State in which a hazardous waste facility is located will determine whether the facility has relevant violations or releases which may preclude its use for off-site transfer of CERCLA wastes. Each Region and State should have a designated off-site coordinator responsible for ensuring effective communication between CERCLA response program staff and RCRA enforcement staff within the Regional Offices, with States, and with other Regions and States.

The off-site coordinator should maintain a file of all information on the compliance and release status of each commercial facility in the Region or State. This information should be updated based on the results of State- or

EPA-conducted compliance inspections or other information on these facilities.

CERCLA response program staff should identify potential off-site facilities early in the removal action or the remedial design process and check with the appropriate Regional and/or State off-site coordinator(s) regarding the acceptability status of the facilities. If one or more facilities is identified that has not received an inspection within the last six months, the Regional off-site coordinator(s) should arrange to have such inspection(s) conducted within a timeframe dictated by the project schedule. The CERCLA REM/FIT contractor may conduct the inspection under the direction of the Deputy Project Officer. If contractor personnel are used, the Region should ensure that such personnel are adequately trained to conduct the inspections.

Responsible Agencies should base their acceptability determinations on an evaluation of a facility's compliance status and, as appropriate, whether the facility has releases or other environmental conditions that affect the satisfactory operation of the facility. States not authorized for HSWA corrective action may assist EPA in making the acceptability determination by determining a facility's compliance status (based on a State inspection) and providing this information to EPA. Regions and States should use the following types of information to make acceptability determinations:

- <u>State- or EPA-conducted inspections</u>. EPA will continue to assign high priority to conducting inspections at commercial land disposal, treatment and storage facilities. Facilities designated to receive CERCLA waste must be inspected within six months of the planned receipt of the waste. In addition, land disposal facilities must have received a comprehensive ground-water monitoring inspection (CME) or an operation and maintenance (O&M) inspection within the last year, in accordance with the timeframes specified in the RCRA Implementation Plan (RIP).

- <u>RCRA Facility Assessments (RFAs)</u>. To be eligible under this policy, a RCRA Subtitle C facility must have had an RFA or equivalent facility-wide investigation. The RFA or its equivalent must be designed to identify existing and potential releases of hazardous waste and hazardous constituents from solid waste management units at the facility.

- <u>Other data sources</u>. Other documents such as the facility's permit application, permit, Ground Water Task Force report, ground-water monitoring data or

ground-water assessment report can contain information on violations, releases or other conditions. Relevant information from these documents should also be used to determine a facility's acceptability to receive waste under the off-site policy.

B. Notice Procedures

EPA expects that Regions and States will take timely and appropriate enforcement action on determining that a violation has occurred. Where a responsible Agency performs an inspection that identifies a relevant violation at a commercial facility likely to accept CERCLA wastes, within five working days of the violation determination, the responsible Agency must provide written notice to the facility of the violation and the effects of applying this policy. States not authorized for HSWA corrective action should inform EPA of the violation so that EPA can notify the facility of the effect of the violation under this policy. (See RCRA Enforcement Response Policy for a discussion of appropriate enforcement responses and timeframes for Class I violations.)

When the responsible Agency determines that a relevant release has occurred, or that relevant conditions exist, the responsible Agency must notify the facility in writing within five working days of that determination. The notice must also state the effect of the determination under this policy. A copy of any notice must also be provided to the non-issuing Region or State in which the facility is located. States not authorized for HSWA corrective action should provide EPA with information on releases so that EPA can determine whether a relevant release has occurred.

Private parties conducting a response action subject to this policy will need to obtain information on the acceptability of commercial facilities. The responsible Agency must respond with respect to both pre-SARA and post-SARA wastes. In addition, the responsible Agency should indicate whether the facility is currently undergoing a review of acceptability and the date the review is expected to be completed. No enforcement sensitive or predecisional information should be released.

A facility may submit a bid for receipt of CERCLA waste during a period of unacceptability. However, a facility must be acceptable in order to be awarded a contract for receipt of CERCLA waste.

Scope and Contents of the Notice. The responsible Agency must send the notice to the facility owner/operator by certified and first-class mail, return receipt requested. The

within 10 calendar days from the date of issuance of the notice, to discuss the basis for a violation or release determination and its relevance to the facility's acceptability to receive CERCLA wastes. Any such meeting should take place within 30 calendar days of the date the initial notice is issued. If unacceptability is based on a State inspection or enforcement action, a representative of the State should attend the meeting. If the State does not attend, EPA will notify the State of the outcome of the meeting. The owner/opeator may submit written comments within 30 calendar days from the date of the notice in lieu of holding the conference. If the responsible Agency does not find that the information submitted at the informal conference or in comments is sufficient to support a finding of acceptability to receive CERCLA wastes, it should so inform the facility orally or in writing.

Within 10 calendar days of hearing from the responsible government official after the informal conference or the submittal of written comments, the facility owner or operator may request a reconsideration of the determination by the Regional Administrator or appropriate State official. The Regional Administrator or appropriate State official may use his or her discretion in deciding whether to conduct a review of the determination. Such a review, if granted, should be conducted within the 60 day period (originating with the notice) to the extent possible. The review will not stay the determination.

The RPM, OSC or equivalent site manager must stop transfer of waste to a facility on the 60th calendar day after issuance of a notice. The facility then remains unacceptable until such time as the responsible Agency notifies the owner or operator otherwise. The off-site coordinator and the OSC/RPM should maintain close coordination throughout the 60-day period.

In limited cases, the responsible Agency may use its discretion to extend the 60 day period if it requires more time to review a submission. The facility should be notified of any extension, and it remains acceptable during any extension.

The responsible Agency may also use its discretion to determine that a facility's unacceptability is immediately effective upon receipt of a notice to that effect. This may occur in situations such as, but not limited to, emergencies (e.g., fire or explosion) or egregious violations (e.g., criminal violations or chronic recalcitrance) or other situations that render the facility incapable of safely handling CERCLA waste.

Implementation of this notice provision does not relieve the Regions or States from taking appropriate enforcement action under RCRA or CERCLA.

certified notice, if not acknowledged by the receipt return card, will be considered to have been received by the addressee if properly sent by first-class mail to the last address known to the responsible Agency. The notice should contain the following:

- A finding that the facility may have conditions that render it unacceptable for receipt of off-site waste, based upon available information from an RFA, an inspection, or other data sources;

- A description of the specific acts, omissions or conditions that form the basis of the findings;

- Notice that the facility owner/operator has the opportunity to request an informal conference with the responsible government official to discuss the basis for the facility's unacceptability determination under this revised policy, provided that such a request is made within 10 calendar days from the date of the notice. The owner/operator may submit written comments within 30 calendar days from the date of the notice in lieu of holding the conference.

- Notice that failure to request an informal meeting or submit written comments will result in no further consideration of the determination by the responsible Agency during the 60 calendar days after issuance of the notice. The responsible Agency will cease any transport of CERCLA waste to the facility on the 60th calendar day after issuance of the notice.

- Notice that the owner/operator may request, within 10 calendar days of hearing from the responsible government official after the informal conference or the submittal of written comments, a reconsideration of the determination by the Regional Administrator or appropriate State official. The Regional Administrator or State official may agree to review the determination at his or her discretion; and

- Notice that such a review by the Regional Administrator or appropriate State official, if agreed to, will be conducted within 60 calendar days of the initial notice, if possible, but that the review will not stay the determination.

The facility may continue to receive CERCLA waste for 60 calendar days after issuance of the initial notice. As indicated above, facility owners or operators may request an informal conference with the responsible government official

C. Procedures for Facilities with Outstanding Unacceptability Determinations

Under the original May 1985 off-site policy, facilities determined to be unacceptable to receive CERCLA wastes were provided with written notice and were generally afforded informal opportunities to comment on the determination (the latter step was not required by the policy). Although the Agency believes that these steps represented adequate procedural safeguards for facilities seeking to receive CERCLA wastes, EPA has decided to provide an additional opportunity for review, in light of this revised policy, for facilities with unacceptability determinations already in place on the effective date of the revised policy.

Any such facility that wishes to meet with the responsible Agency to discuss the basis for a violation or release determination and its relevance to the facility's ability to receive CERCLA wastes, may request an informal conference with or submit written comments to the responsible Agency at any point up to the 60th day after the publication of the proposed rule on the off-site policy in the Federal Register. Such a meeting should take place within 30 calendar days of the request. If the responsible government Agency does not find the information presented to be sufficient to support a finding of acceptability to receive CERCLA wastes, then it should inform the facility orally or in writing that the unacceptability determination will continue to be in force. The facility may, within 10 calendar days of hearing from the responsible government official after the informal conference or submittal of written comments, petition the EPA Regional Administrator or appropriate State official for reconsideration. The Regional Administrator or State official may use his or her discretion in deciding whether to grant reconsideration.

These procedures for review of unacceptability determinations that were already in place on the effective date of this revised policy will not act to stay the effect of the underlying unacceptability determinations during the period of review.

D. Re-evaluating Unacceptability

An unacceptable facility can be reconsidered for management of CERCLA wastes whenever the responsible Agency finds that the facility meets the criteria described in the "Acceptability Criteria" section of this policy.

For the purposes of this policy, releases will be considered controlled upon issuance of an order or permit that

98341

initiates and requires completion of one or more of the following: a facility-wide RCRA Facility Investigation (RFI); a Corrective Measures Study (CMS); or Corrective Measures Implementation (CMI). The facility must comply with the permit or order to remain acceptable to receive CERCLA waste. At the completion of any such phase of the corrective action process, the responsible Agency should again review the facility for acceptability under the off-site policy using the criteria listed in this document, and as necessary and appropriate, make new acceptability determinations, and issue additional orders or modify permit conditions to control identified releases. Releases that require a determination of environmental significance will be considered controlled upon issuance of an order or permit to conduct an RFI, CMS or CMI, or upon completion of an RFI which concludes that the release is not environmentally significant. Again, the facility must comply with the permit or order to remain acceptable to receive CERCLA waste.

If the facility is determined to be unacceptable as a result of relevant violations at or affecting the receiving unit, the State (if it made the initial determination) or EPA must determine that the receiving unit is in full physical compliance with all applicable requirements. Where a State not authorized for HSWA corrective action makes this determination, it should notify EPA immediately of the facility's return to compliance, so that the Agency can expeditiously inform the facility that it is once again acceptable to receive CERCLA wastes.

The responsible Agency will notify the facility of its return to acceptability by certified and first-class mail, return receipt requested.

E. Implementation Procedures

All remedial decision documents must discuss compliance with this policy for alternatives involving off-site management of CERCLA wastes. Decision documents for removal actions also should include such a discussion.

Provisions requiring compliance with this policy should be included in all contracts for response action, Cooperative Agreements with States undertaking Superfund response actions, and enforcement agreements. For ongoing projects, these provisions will be implemented as follows, taking into consideration the differences in applicable requirements for pre- and post-SARA decision documents:

- RI/FS: The Regions shall immediately notify Agency contractors and States that alternatives for off-site

management of wastes must be evaluated against the provisions of this policy.

- Remedial Design: The Regions shall immediately notify Agency contractors, the States, and the U.S. Army Corps of Engineers that all remedies that include off-site disposal of CERCLA waste must comply with the provisions of this policy.

- Remedial Action: The Regions shall immediately assess the status of compliance, releases and other environmental conditions at facilities receiving CERCLA waste from ongoing projects. If a facility is found not to be acceptable, the responsible Agency should notify the facility of its unacceptability.

- Enforcement: Cleanups by responsible parties under enforcement actions currently under negotiation and all future actions must comply with this policy. Existing agreements need not be amended. However, EPA reserves the right to apply these procedures to existing agreements, to the extent it is consistent with the release and reopener clauses in the settlement agreement.

If the response action is proceeding under a Federal lead, the Regions should work with the Corps of Engineers or EPA Contracts Officer to negotiate a contracts modification to an existing contract, if necessary. If the response action is proceeding under a State lead, the Regions should amend the Cooperative Agreement.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OSWER Directive 9835.5

OCT 6 1987

MEMORANDUM

SUBJECT: EPA Interim Guidance on Indemnification of Superfund Response Action Contractors Under Section 119 of SARA

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

C. Morgan Kinghorn, Acting Assistant Administrator
Office of Administration and Resources Management

TO: Regional Administrator, Regions I-X
Regional Counsel, Regions I-X
Director, Waste Management Division
Regions I, IV, V, VII, and VIII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Region III and VI
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X
Director, Environmental Services Division
Regions I, VI, and VII

Purpose

Subject to certain restrictions, Section 119 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) authorizes the Environmental Protection Agency (EPA)[1] to provide indemnification[2] to response action contractors (RACs) working at Superfund sites for States, potentially responsible parties (PRPs), and EPA (including RACs working for the U.S. Army Corps).

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[1] Under Executive Order 12580, the President has also authorized other Federal agencies to indemnify RACs working for those agencies.

[2] "Indemnification" is an agreement whereby one party agrees to reimburse a second party for losses (in this case liability losses) suffered by the second party.

of Engineers at EPA-lead sites)[3]. The purpose of this memo is to describe how EPA may provide indemnification to RACs using Section 119 authority.

Background

Response action contractors have traditionally relied on commercial liability insurance or indemnification to sufficiently offset their potential liability risks from participation in the Superfund program. During the Superfund reauthorization debate, the RAC community identified several factors which, the RACs contended, impaired their ability to adequately offset risk. These factors included:

- Potential subjection to strict, joint and several liability under Superfund and under some state laws; and
- Inability of the commercial liability insurance market to provide liability insurance coverage to RACs involved in the Superfund cleanup program that is both adequate and affordable.

Prior to the reauthorization of CERCLA, EPA provided indemnification to RACs working for EPA through contract authority implementing CERCLA. EPA took this step in order to retain qualified contractors, given the absence of pollution liability insurance coverage. Under this old indemnification agreement, the Federal government indemnified RACs above an initial $1 million for third party liabilities and defense expenses. The indemnification agreement was void in cases of gross negligence or willful misconduct.

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[3] SARA Section 119(e)(2) defines "response action contractor" as:

a. any person who enters into a response action contract (which is defined in part as any written contract or agreement to provide any CERCLA removal or remedial action at a facility listed on the NPL, or to provide any ancillary services related to such response) with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility and is carrying out such a contract; and
b. any person retained or hired by the person who enters into a response action contract, to provide any services related to a response action; and
c. any person, public or nonprofit private entity, conducting a field demonstration pursuant to SARA Section 311(b) (i.e., the "Alternative or Innovative Treatment Technology Research and Demonstration Program").

Section 119 of SARA responds to many of the concerns of the RAC community by:

- Establishing a standard of negligence for actions brought against RACs under Federal law;[4]
- Authorizing EPA to provide to RACs, on a discretionary basis, limited indemnification against pollution liability arising from RAC negligence; and
- Providing express statutory authority for indemnification and a funding mechanism.

The approach taken in Section 119 provisions is based on the following key points:

- A Federal liability standard of negligence, combined with RAC indemnification which is subject to limits and deductibles, provides adequate performance incentives for RACs working in the Superfund program;
- RAC indemnification provides an adequate substitute for insurance;
- Discretionary indemnification is an interim vehicle that will keep the Superfund program operative until the insurance industry returns to the RAC liability insurance market; and
- Discretionary indemnification does not create a Federally intrusive insurance program that interferes with private sector efforts to develop RAC liability insurance coverage.

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[4] The Federal standard of negligence under Section 119 applies only to Federal law. It does not preclude States from applying their own statutory law or common law liability standards, which may in some cases be strict liability. Response action contractors sued in Federal courts are under a "standard of care" defined by Federal law as negligence. However, if an action is brought under state law, a strict liability standard could apply.

EPA Task Force on RAC Indemnification

To avoid program delays, a Task Force was established to determine how EPA will provide indemnification to RACs working in the Superfund program. The Task Force is composed of representatives from EPA's Office of Waste Programs Enforcement (OWPE), Office of Emergency and Remedial Response (OERR), Office of Solid Waste (OSW), Office of General Counsel (OGC), Office of the Comptroller (OC), Office of Administration (OA), and the U.S. Army Corps of Engineers. The primary goals of the Task Force are to:

- Establish an EPA RAC indemnification program;
- Develop Section 119 RAC final indemnification guidelines and regulations;
- Ensure a forum for adequate public comment on RAC indemnification; and
- Promote private sector provision of RAC pollution liability insurance in the future by providing technical assistance to the insurance industry.

The Task Force will attempt to reach these goals by producing several work products that: (1) carefully analyze and estimate the potential pollution liability risk to which RACs are exposed by participating in the Superfund cleanup program; (2) determine what the final EPA indemnification terms and conditions will be; (3) prepare the Agency for implementing an interim RAC indemnification program; and (4) develop the Section 119 regulations.

Interim EPA Indemnification Guidelines

SARA Section 119 now provides EPA's sole authority to extend indemnification to RACs working in the Superfund program. Delegation of authority from the President authorizing EPA to use Section 119 provisions was issued through Executive Order 12580 on January 26, 1987. The delegation authorizes EPA to use Section 119 indemnification authority from the date of enactment (DOE) of SARA. Consequently, EPA must adhere to Section 119 provisions from SARA DOE (October 17, 1986).

Section 119(c)(7) requires that EPA promulgate regulations for carrying out indemnification provisions and, prior to promulgation of the regulations, develop guidelines to carry out use of Section 119 indemnification authority. Because of the complexity of the issues, EPA is proceeding deliberately in establishing these guidelines and is seeking substantial public

comment. Meanwhile, EPA is providing contractors with Section 119 coverage on an interim basis, using procedures outlined in this memorandum. Ultimately, this coverage will be amended to reflect guidance and regulations that will be developed in conformance with Section 119 requirements.

As further described in this memorandum, authorization to provide indemnification will be made by OSWER with concurrence from the Office of the Comptroller (OC). Authorization to indemnify will be made upon receipt of a recommendation from the Task Force. The OC will provide concurrence (or non-concurrence) with recommendations to indemnify within seven calendar days of receipt of a recommendation. Execution of indemnity agreements will be made by appropriate Agency administrative offices.

Section 119(c)(4) mandates that RACs must meet the following requirements before they can receive Federal indemnification for potential pollution liability associated with Superfund response action activities:

- The RAC must make diligent efforts to obtain insurance coverage from non-Federal sources to cover pollution liability; and

- In the case of a RAC contract covering more than one facility, the RAC agrees to continue to make such diligent efforts each time the RAC begins work under the contract at a new facility.

Section 119(c)(4) also requires that the following circumstances must exist before a RAC can receive Federal indemnification for potential pollution liability associated with Superfund response action activities:

- At the time the response action contract is entered into, insurance is not available, at a "fair and reasonable price", in sufficient quantity to offset potential RAC pollution liability risk; and

- Adequate insurance to cover such liability is not generally available at the time the response action contract is entered into.

In future guidance (i.e., the guidance which is to be published for public comment), EPA plans to include guidelines for determining whether insurance is "generally available" or is "fairly and reasonably priced". For the purpose of this interim guidance, EPA has determined, based on information currently available, that Superfund RACs are unable to obtain reasonably priced pollution liability insurance. Therefore, RACs are eligible to receive indemnification under Section 119 from DOE of

SARA. However, EPA will require that RACs seeking Federal indemnification meet the following requirements:

- Within 30 days of signing an indemnification agreement with EPA, RACs must submit to EPA (or to the appropriate State Contracting Officer) written documentation concerning the efforts they have made to date to secure pollution liability insurance coverage (e.g., a RAC could submit a written statement from an insurance broker stating that the RAC has attempted to secure pollution liability coverage from insurance carriers in the past six months).

- If the RAC has secured pollution liability coverage, it must submit to EPA (or to the State Contracting Officer) a copy of the policy and declaration page; and

- Every twelve months (or more frequently, if EPA determines that there has been a significant change in circumstances concerning the availability of pollution liability insurance) the RAC must submit to EPA (or to the State Contracting Officer) written documentation addressing the additional efforts the RAC has made to secure pollution liability insurance coverage including:

  - Copies of applications submitted to three known underwriters of pollution liability insurance;

  - If pollution liability coverage was denied by an underwriter, a summary of the reasons why such coverage was denied;

  - A status report of any pollution liability insurance obtained. The report would include: 1) type of coverage; 2) premium charged; 3) limits of coverage; 4) deductible levels, and any other major terms and conditions of the insurance coverage. A copy of the actual policy and declaration page could be provided in lieu of a written status report;

  - If pollution liability coverage was offered by an underwriter, but not accepted by the RAC, a report on the insurance offered (such as the "status report" required above), and a summary of the reasons why such coverage was not accepted; and

  - A status report concerning the alternative pollution liability risk transfer mechanisms the RAC has pursued other than commercial pollution liability insurance (e.g., risk retention groups, purchasing groups, association captives).

This information should be forwarded to the appropriate EPA official (or State Contracting Officer). This information will be reviewed by the Task Force as needed.

As required under the interim guidelines listed above, EPA expects RACs to demonstrate the extent to which they have attempted to secure pollution liability insurance coverage. EPA also expects that RACs will continue to monitor the market for pollution liability insurance, and continue to seek and secure such insurance coverage (however limited) from commercial insurance carriers or through alternative risk transfer mechanisms (e.g., self-insurance pools).

Indemnification of RACs Working for EPA

Pre-SARA indemnification terms will apply to work performed at a site after the date of enactment (DOE) of SARA if response work at the site was initiated under an EPA contract prior to the DOE of SARA.

EPA will enter into new indemnification agreements (See Attachment A), subject to Section 119 authority, with:

- RACs who are currently working under contract with EPA, for work they will initiate at a new site after DOE of SARA; and
- RACs receiving new contracts (or new cooperative agreements, in the case of Site Demonstration projects) with EPA after DOE of SARA for Superfund response action activities.

RACs currently under contract with EPA have been alerted to the changes that will be forthcoming to their indemnification agreements with EPA. EPA headquarters personnel in the Procurement and Contracts Management Division of the Office of Administration have been trained on the use of Section 119 and, with the assistance of the Task Force, will administer Section 119 indemnification interim procedures for EPA contractors. Requests for indemnification of EPA contractors will be subject to the approval of OSWER and concurrence of OC.

Indemnification of RACs Working for States

Section 119(c)(2) authorizes the indemnification of RACs working for States or political subdivisions of States (pursuant to a Section 104(d)(1) agreement with EPA) for new work initiated at Superfund sites from DOE of SARA. EPA may indemnify RACs performing response action activities for a State at a State-lead Superfund site after DOE of SARA. EPA will offer indemnification to RACs working for a State only if:

- The RAC's response action is part of new site work initiated at a Superfund site after DOE of SARA and it is related directly to cleanup of the site;
- RACs working for a State must meet all of the circumstances and issuance requirements set forth by Section 119(c)(4), as listed above; and
- RACs working for a State must meet all of EPA's interim guideline requirements, as listed previously on pages five and six.

EPA will not offer indemnification to RACs for site work they performed for States prior to DOE of SARA. Any EPA indemnification provided to a RAC(s) working for a State(s) will be subject to limits, deductibles, and other restrictions as required by Section 119(c)(5).

Until EPA issues final guidance and regulations, all requests for EPA indemnification of a RAC working for a State at a Superfund site will be processed via the Task Force. States should submit requests to both the Indemnification Task Force, c/o Director, Office of Emergency and Remedial Response (OERR), and to the Regional Superfund Branch Chief. Requests should identify the Regional Site Coordinator and State contact, and should include pertinent information regarding Section 119(c)(4) requirements as discussed previously. If the Task Force recommends approval of the indemnification request, the Office of the Comptroller will provide concurrence (or non-concurrence) within seven calendar days of receipt of the recommendation. Final approval for EPA indemnification of a State RAC will be made by the Director of the Office of Emergency and Remedial Response. If approval is authorized, then the Grants Administration Division will implement the approval through a special condition to be included in the State/EPA cooperative agreement (See Attachment A).

Indemnification of RACs working for Other Federal Agencies

Section 119(c)(2) authorizes the indemnification of RACs working for other Federal agencies at Superfund sites from DOE of SARA. A delegation of authority from the President authorizing other Federal Agencies to use Section 119 provisions was issued on January 26, 1987. Other Federal agencies follow all EPA guidance and regulations with respect to Section 119. Other Federal agencies that use Section 119 authority must provide their own source of funds (e.g.,their agency appropriation) to pay all indemnification costs (e.g., claims and legal defense costs).

At some Superfund sites, the U.S. Army Corps of Engineers manages response actions pursuant to an interagency agreement with EPA. For Section 119 indemnification purposes, any RAC working as a contractor for the Corps of Engineers at such sites (and where, for remedial actions, the site is listed on the NPL) is considered to be working for EPA rather than for some "other Federal agency". EPA will offer the same indemnification to contractors procured by the Corps of Engineers that it offers to contractors procured by EPA.

Indemnification of RACs Working for PRPs

Under Section 119(c)(2) authority, EPA can, in limited circumstances and subject to strict financial tests, indemnify RACs performing response action activities for PRPs subject to a consent order or decree at Superfund sites after DOE of SARA. EPA will use its authority to indemnify RACs working for PRPs only in extremely limited cases, e.g., where EPA indemnification of the PRP RAC is the solution of last resort. EPA will offer indemnification to RACs working for PRPs <u>only if</u>:

- The PRPs are unable to provide adequate indemnification, and as a result, are unable to obtain the services of a qualified RAC;
- The RAC's response action is part of new site work initiated at a Superfund site after DOE of SARA, and the action is related specifically to the cleanup of the site;
- RACs working for PRPs meet all of the issuance requirements set forth by Section 119(c)(4);
- The circumstances set forth in Section 119(c)(4) exist; and
- RACs working for PRPs meet all of EPA's interim guideline requirements.

EPA will not offer indemnification to RACs for work performed for PRPs prior to DOE of SARA, nor for any PRP RAC response activity that is not related specifically to a remedy at a Superfund site.

Further, Section 119(c)(5)(C) of SARA requires that, before EPA can enter into an indemnification agreement with a RAC performing work under contract with a PRP(s) at a Superfund site(s), EPA must determine the amount which the PRP(s) is able to indemnify the RAC. In making such a determination, EPA shall take into account the total net assets and resources of the PRP(s) with respect to the facility at the time of such determinations. If EPA determines that the amount which the PRP(s) is able to indemnify the RAC is inadequate, then EPA may enter into an indemnification agreement with the RAC to meet the anticipated shortfall. EPA will consider the combined capabilities of all the PRPs at a site to determine whether, as a group, they are capable of providing adequate coverage. In general, the Agency expects to use this provision only in cases where PRPs are small firms with few assets. Therefore, Regions should not make requests for Federal indemnification where PRPs are large corporations with substantial assets or where the PRPs, as a group, have substantial assets. As a result, EPA does not expect requests for Federal indemnification to become an integral part of settlement negotiations.

EPA plans to provide additional guidance in the future concerning the determinations that need to be made as a prerequisite to indemnifying RACs working for PRPs (such as defining "net assets and resources" of the PRPs, and whether the PRPs are "unable to provide adequate indemnification"). Until EPA distributes this guidance, all such determinations will be made by the Task Force.

EPA indemnification of a RAC working for a PRP is a measure of last resort. If EPA does provide indemnification in these cases, the consent decree (or order) should specify terms and conditions, using the model EPA indemnification agreement for RACs working for PRPs shown in Attachment A. If EPA enters into an indemnification agreement with a RAC working for a PRP(s), the RAC must:

- Retain financial responsibility for a deductible amount if commercial pollution liability insurance is unavailable or unreasonably priced; and

- Exhaust all administrative, judicial, and common law claims for indemnification against all PRPs participating in the cleanup of the facility before EPA can pay a claim.

For those RACs receiving indemnification from PRPs only (and where EPA deems the indemnification to be adequate), RACs should be qualified to perform work adequately. This can be ensured through a combination of adequate competition in the contract procurement process, and through a demonstration of financial responsibility. The PRP indemnification is sufficient demonstration of financial responsibility; therefore, performance bonds, letters of credit, etc., are not required. The consent decree should specify the aforementioned as well as the indemnification terms and conditions.

Publicly Owned Treatment Works

Section 119(c)(5)(D) specifically prohibits EPA from indemnifying an owner or operator of a facility regulated under the Solid Waste Disposal Act. Therefore, publicly owned treatment works subject to permit-by-rule provisions cannot be indemnified (nor can any other permit-by-rule facility, such as an underground injection facility). The intent of this provision is to prohibit EPA from offering indemnification to off-site treaters or disposers of Superfund hazardous waste. Therefore, while POTWs not subject to RCRA regulation (i.e., POTWs without a permit-by-rule) are not explicitly prohibited from EPA indemnification authority under Section 119, the Agency has determined that an extension of indemnification authority to any POTW would not be consistent with Congressional intent in Section 119. Therefore, EPA will not provide indemnification to POTWs under Section 119 authority.

Summary

This memorandum describes the current Federal indemnification provisions for response action contractors working in the Superfund program as provided in Section 119 of SARA. The statute gives the Federal government the discretionary authority to indemnify RACs for liability arising out of negligence. Acts of gross negligence and willful misconduct are expressly excluded from the indemnity provision. The Section 119 indemnity provision does not preempt the rights of States to enforce a standard of strict liability.

Federal indemnification is meant to be an interim vehicle which will keep the Superfund program operative until the insurance industry returns to the market. It is not intended to create a Federally intrusive program that will interfere with private sector efforts to develop RAC liability insurance coverage.

If a RAC has received partial indemnification from a PRP(s), EPA may also provide indemnification in cases where the PRP indemnification is deemed insufficient, and in mixed funding cases. EPA may provide indemnification above the PRP indemnification. The consent decree should specify the terms and conditions using the model EPA indemnification agreement shown in Attachment A.

All requests for EPA indemnification of a RAC working for a PRP(s) at a Superfund site should be submitted to both the Indemnification Task Force, c/o Director, Office of Waste Programs Enforcement (OWPE), and to the Regional Superfund Enforcement Branch Chief. Please identify the Regional Site Coordinator and the Regional Counsel's Site Representative. Include pertinent information regarding the number of PRPs, financial profile of the PRPs, type of work to be performed, etc., such that the Task Force can make determinations per Section 119(c)(4) and Section 119(c)(5).

Upon determining that a RAC meets all of the circumstances and requirements set forth in Section 119 and in EPA interim guidelines, the Task Force will evaluate an amount to which the PRP(s) is able to indemnify the RAC and an amount to which EPA will indemnify the RAC in excess of the PRP indemnification amount. Any EPA indemnification provided to a RAC(s) working for PRP(s) will be subject to limits, deductibles, and other limitations as required by Section 119(c)(5). If the Task Force recommends approval of the indemnification request, the Office of the Comptroller will provide concurrence (or non-concurrence) within seven calendar days of receipt of the recommendation. Final approval for EPA indemnification of a PRP RAC will be made by the Director of OWPE.

RACS Working for PRPs Without EPA Indemnification

Those RACs working for PRPs at Superfund sites who do not receive indemnification from EPA may either receive no indemnification at all, or may receive indemnification from PRPs only. For those RACs working with no indemnification, PRPs should demonstrate that the RAC is qualified to perform the work adequately, has sufficient financial capability to complete the projected work, and demonstrates financial responsibility for potential third party liability costs. This can be ensured through a combination of adequate competition in the contract procurement process and a demonstration of financial responsibility. Such a demonstration can consist of purchase of performance bonds, letters of credit, insurance, maintenance of a trust fund, etc. A consent decree should specify the aforementioned.

Please direct all questions and comments to Robert Mason at FTS 382-4015 or Tom Gillis at FTS 382-4524

Attachments
A. Model Indemnification Agreements
B. CERCLA (as amended) Section 119

cc: Administrator
Deputy Administrator
General Counsel
Regional Grants Office, Regions I-X
Regional Financial Management Office, Regions I-X
Regional Superfund Branch Chiefs, Regions I-X

Attachment A

MODEL INDEMNIFICATION AGREEMENTS

This attachment contains model EPA indemnification agreements for use by EPA, States, and PRPs when RACs seek indemnification from EPA. Any deviation from the model language must be approved by the EPA Indemnification Task Force. Four models are attached:

I. Model EPA/RAC Indemnification Agreement
II. Model State Cooperative Agreement Indemnification Special Condition
III. Model EPA/RAC Indemnification Agreement for RACs under Contract with PRPs
IV. Model EPA/ SITES Program Technology Vendor Indemnification Agreement

I

MODEL EPA/RAC INDEMNIFICATION AGREEMENT

H. Insurance -- Liability to Third Persons -- Commercial Organizations (EPAAR 1552.228-70) (APR 1984) (with deviation)

(a) This Clause H_____ will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA).

(b) The Contractor shall procure and maintain such insurance as is required by law or regulation, including that required by FAR Part 28, in effect as of the date of execution of this contract, and any such insurance as the Contracting officer may, from time to time, require with respect to performance of this contract.

(c) At a minimum, the Contractor shall procure and maintain the following types of insurance.

(1) Workmen's compensation and occupational disease insurance in amounts to satisfy State law;

(2) Employer's liability insurance in the minimum amount of $100,000 per occurrence;

(3) Comprehensive general liability insurance for bodily injury, death or loss of or damage to property of third persons in the minimum amount of $1,000,000 per occurrence;

(4) When vessels are used in the performance of the contract, vessel collision liability and indemnity liability insurance in such amounts as the Contracting Officer may require or approve: provided, that the Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program. All insurance required pursuant to the provisions of this paragraph shall be in such form and for such periods of time as the Contracting Officer may, from time to time, require or approve and with insurers approved by the Contracting Officer.

(d) The Contractor further agrees that it will make diligent efforts throughout contract performance in accordance with EPA guidelines to obtain adequate pollution liability insurance.

(e) The Contractor agrees, to the extent and in the manner required by the Contracting Officer, to submit for the approval of the Contracting Officer all insurance maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement hereunder. The

Contractor's submission shall include documentation demonstrating its diligent efforts to obtain pollution liability insurance.

(f) The Contractor shall be reimbursed, for the portion allocable to this contract, the reasonable cost of insurance (including reserves for self-insurance) as required or approved pursuant to the provisions of this contract clause.

(g)(1) Pursuant to Section 119 of CERCLA, the EPA will hold harmless and indemnify the Contractor against any liability (including the expenses of litigation or settlement) for negligence arising out of the Contractor's performance under this contract in carrying out response action activities. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance will not be covered under this contract clause H _____.

(2) For purposes of this clause (g), if the Contracting Officer has determined that the insurance identified in paragraph (d) is not available at a reasonable cost, the Government will hold harmless and indemnify the Contractor for liability to the extent such liability exceeds $100,000.00.

(3) The Contractor shall not be reimbursed for liabilities as defined in (g) (including the expenses of litigation or settlement) that were caused by the conduct of the Contractor (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Contractor shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(h) The Government may discharge its liability under this contract clause by making payments directly to the Contractor or directly to parties to whom the Contractor may be liable.

(i) With prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions in this clause whereby the Contractor shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice, furnishings of evidence or proof, and the like, between the Contractor and the subcontractor as are established by this clause. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this contract clause shall provide for prompt notification to the

Contractor which is covered by this contract clause, and shall entitle the Government, at its election, to control, or assist in the settlement or defense of any such claim or action. The Government will indemnify the Contractor with respect to his obligation to subcontractors under such subcontract provisions. The Government may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(j) If insurance coverage required or approved by the Contracting Officer is reduced without the Contracting Officer's approval, the liability of the Government under this contract clause will not be increased by reason of such reduction.

(k) The Contractor shall:

(1) Promptly notify the Contracting Officer of any claim or action against the Contractor or any subcontractor which reasonably may be expected to involve indemnification under this contract clause;

(2) Furnish evidence or proof of any claim covered by this contract clause in the manner and form required by the Government; and

(3) Immediately furnish the Government copies of all pertinent papers received by the Contractor. The Government may direct, control, or assist the settlement or defense of any such claim or action. The Contractor shall comply with the Government's directions, and execute any authorizations required in regard to such settlement or defense.

(l) Reimbursement for any liabilities under this contract clause will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgments or by settlements approved in writing by the Government.

II

MODEL STATE COOPERATIVE AGREEMENT INDEMNIFICATION SPECIAL CONDITION

Attachment

(1) Pursuant to Section 119 of CERCLA, the EPA will hold harmless and indemnify the Contractor against any third party liability (including the expenses of litigation or settlement) for negligence arising out of the Contractor's performance under this contract in carrying out response action activities. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance required by this contract will not be covered by this clause. This Clause will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 (CERCLA).

(A) The Contractor shall submit to the State Contracting Officer within 30 days of award a written statement from an insurance broker stating that the Contractor has attempted to secure pollution liability coverage from insurance carriers in the past six months;

(B) If the Contractor has secured pollution liability coverage, it must submit a copy of the policy and declaration page to the State Contracting Officer; and

(C) Every twelve months, or as directed by the EPA, the Contractor shall submit to the State Contracting Officer written documentation of the additional efforts made by the contractor to secure pollution liability insurance coverage, including:

- Copies of applications to three known underwriters of pollution liability insurance;
- A status report of any pollution liability insurance obtained, to include type of coverage, premium charged, limits of coverage, deductibles and major terms and conditions of coverage (e.g., a copy of the actual declaration page could be provided in lieu of a status report);
- If pollution liability coverage was offered by an underwriter, but not accepted by the RAC, a report on the insurance offered (such as the "status report" required above), and a summary of the reasons why such coverage was not accepted;
- If pollution liability coverage was rejected by the underwriter, a summary of the reasons why such coverage was denied; and

EPA INDEMNIFICATION

EPA will provide indemnification pursuant to Section 119 of CERCLA, as amended, to contractors carrying out response actions under this agreement provided that the State certifies to EPA that:

1. The contracts awarded under this agreement are defined in section 119(e) of CERCLA, as amended;

2. The contracts awarded under this agreement include the following clause that exclusively governs EPA indemnification:

   (see attached clause)

3. At the end of each calendar year and at the end of each project period, all statements and materials related to pollution liability insurance submitted by the Contractors to the State Contracting Officer will be transferred to EPA.

c A status report on what alternative pollution liability risk transfer mechanisms the contractor has pursued other than commercial pollution liability insurance (e.g., captives, letters of credit, group purchasing of insurance, etc.).

(2) For purposes of this clause, the EPA will hold harmless and indemnify the Contractor for liability described herein to the extent such liability exceeds $100,000.00.

(3) The Contractor shall not be reimbursed for liabilities as defined herein (including the expenses of litigation or settlement) that were caused by the conduct of the Contractor (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Contractor shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(4) The EPA may discharge its liability under this contract clause by making payments directly to the Contractor or directly to parties to whom the Contractor may be liable.

(5) With prior written approval of the State Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions in this clause whereby the Contractor shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice, furnishings of evidence or proof, and the like, between the Contractor and the subcontractor as are established by this clause. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this contract clause shall provide for prompt notification to the Contractor which is covered by this contract clause, and shall entitle the EPA, at its election, to control, or assist in the settlement or defense of any such claim or action. The EPA will indemnify the Contractor with respect to his obligation to subcontractors under such subcontract provisions. The EPA may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(6) If insurance coverage required or approved by the State Contracting Officer is reduced without the State Contracting Officer's approval, the liability of the EPA under this contract clause will not be increased by reason of such reduction.

(7) The Contractor shall:

- Promptly notify the Assistant Administrator, OSWER, EPA of any claim or action against the Contractor or any subcontractor which reasonably may be expected to involve indemnification under this contract clause.

- Furnish evidence or proof of any claim covered by this contract clause in the manner and form required by the EPA.

- Immediately furnish the EPA copies of all pertinent papers received by the Contractor. The EPA may direct, control, or assist the settlement or defense of any such claim or action. The Contractor shall comply with the EPA's directions, and execute any authorizations required in regard to such settlement or defense.

- Submit any disagreements concerning EPA indemnification to the Assistant Administrator, OSWER, EPA for resolution. Decision by the Assistant Administrator will constitute final Agency action.

(8) Reimbursement for any liabilities under this contract clause is available exclusively from the EPA and will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgement or by settlements approved in writing by the EPA.

(9) Nothing in this clause shall be construed as an indemnification agreement between the State and the Contractor.

(10) Nothing in this contract shall be construed to create, either expressly or by implication, any contractual relationship between EPA and the Contractor except as specifically provided in this clause. EPA is not authorized to represent or act on behalf of the State in any manner relating to this contract and has no responsibility with regard to the mutual obligations of the State and the Contractor as provided herein.

III

MODEL EPA/RAC INDEMNIFICATION AGREEMENT FOR RACS UNDER CONTRACT WITH PRPS

MODEL CLAUSES FOR PRP CONTRACTS

Sec. _____ Pollution Liability Insurance and Contractor Indemnification

A. Pollution Liability Insurance

(1) The Contractor shall obtain such pollution liability insurance (hereinafter insurance) as the EPA determines is available at a fair and reasonable price at the time of contract award. The cost of such insurance is an allowable contract cost.

(2) The Contractor shall report to EPA on its efforts to obtain pollution liability insurance.

(A) Within 30 days of signing this agreement, the Contractor shall submit to the EPA a written statement from an insurance broker stating that the Contractor has attempted to secure pollution liability coverage from insurance carriers in the past six months;

(B) If the Contractor has secured pollution liability coverage, it must submit a copy of the policy and declaration page to EPA; and

(C) Every twelve months, or as directed by the EPA, the Contractor shall submit to the EPA written documentation of the additional efforts made by the contractor to secure pollution liability insurance coverage including:

- Copies of applications to three known underwriters of pollution liability insurance;
- A status report of any pollution liability insurance obtained, to include type of coverage, premium charged, limits of coverage, deductibles and major terms and conditions of coverage (e.g., a copy of the actual declaration page could be provided in lieu of a status report);
- If pollution liability coverage was offered by an underwriter, but not accepted by the RAC, a report on the insurance offered (such as the "status report" required above), and a summary of the reasons why such coverage was not accepted;
- If pollution liability coverage was rejected by the underwriter, a summary of the reasons why such coverage was denied; and

- A status report on what alternative pollution liability risk transfer mechanisms the contractor has pursued other than commercial pollution liability insurance (e.g., captives, letters of credit, group purchasing of insurance, etc.).

(3) If, during the period of this contract, EPA determines that insurance or additional insurance is available, the contractor shall obtain such insurance.

B. PRP Indemnification

[The following are minimum clauses. PRPs may include additional, non-conflicting terms.]

(1) The PRPs will hold harmless and indemnify the Contractor against any third party liability (including the expense of litigation or settlement) for negligence arising out of the Contractor's performance of this contract in carrying out response action activities. Such indemnification shall apply only to liability which results from a release of a hazardous substance, pollutant, or contaminant if such release arises out of the response action activities in this contract. Indemnification under this paragraph will apply only to liability not compensated by insurance, not within the deductible amounts of the Contractor's insurance in paragraph A, above, nor within the deductible in paragraph D, below. Indemnification provided under this paragraph shall not exceed $_____ (amount determined by EPA).

(2) Any liability subject to indemnification shall be presented first under this paragraph.

(3) The PRPs are individually and collectively responsible for the indemnification under this paragraph, unless otherwise specifically provided within.

(4) If the PRPs fail to satisfy the indemnification claim within 60 days of its presentation, the Contractor will notify the EPA of such failure.

C. EPA Indemnification

(1) Pursuant to Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), the EPA will hold harmless and indemnify the Contractor against any third party liability (including the expenses of litigation or settlement) for negligence arising out of the Contractor's performance under this contract in carrying

out response action activities. Such indemnification shall apply only to liability not compensated by insurance, indemnification provided in accordance with paragraph B, above, or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance in paragraph A, above, or the deductible in paragraph D, below, will not be covered by this paragraph.

(2) This paragraph will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 of CERCLA.

(3) The Contractor shall not be reimbursed for liabilities as defined herein (including the expenses of litigation or settlement) that were caused by the conduct of the Contractor (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Contractor shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(4) The EPA may discharge its liability under this contract paragraph by making payments directly to the Contractor or directly to parties to whom the Contractor may be liable.

(5) With prior written approval of the EPA, the Contractor may include in any subcontract under this contract the same provisions in this clause whereby the Contractor shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice, furnishings of evidence or proof, and the like, between the Contractor and the subcontractor as are established by this paragraph. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this paragraph shall provide for prompt notification to the Contractor which is covered by this paragraph, and shall entitle the EPA, at its election, to control, or assist in the settlement or defense of any such claim or action. The EPA will indemnify the Contractor with respect to his obligation to subcontractors under such subcontract provisions. The EPA may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(6) If insurance coverage required in paragraph A, above, is reduced without the EPA's approval, the liability of the EPA

under this paragraph will not be increased by reason of such reduction.

(7) The Contractor shall:

- Promptly notify the Assistant Administrator, OSWER, EPA of any claim or action against the Contractor or any subcontractor which reasonably may be expected to involve indemnification under this paragraph.

- Furnish evidence or proof of any claim covered by this paragraph in the manner and form required by the EPA.

- Immediately furnish the EPA copies of all pertinent papers received by the Contractor. The EPA may direct, control, or assist the settlement or defense of any such claim or action. The Contractor shall comply with the EPA's directions, and execute any authorizations required in regard to such settlement or defense.

- Submit any disagreements concerning EPA indemnification to the Assistant Administrator, OSWER, EPA for resolution. Decision by the Assistant Administrator will constitute final Agency action.

(8) The Contractor may present a claim for indemnification under this paragraph only after compliance with the provisions in paragraphs B, above, and C, below.

(9) If the PRPs fail to indemnify the Contractor in the amount provided in paragraph B, above, no indemnification for that amount will be paid under this paragraph until the Contractor demonstrates to EPA's satisfaction that it has exhausted all administrative and judicial claims for indemnification under paragraph B, above, and any common law claims for indemnification that it has against the PRPs. Evidence of exhaustion of claims may include a judicial order dismissing the Contractor's claims, documentation of the Contractor's unsuccessful efforts to enforce a judgement against the PRPs, or documentation of the Contractor's unsuccessful claims in a bankruptcy proceeding involving the PRPs.

(10) Reimbursement for any liabilities under this paragraph will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgement or by settlements approved in writing by the EPA.

(11) Nothing in this contract shall be construed to create, either expressly or by implication, any contractual relationship between EPA and the Contractor except as specifically provided in this section. EPA is not authorized to represent or act on behalf of the (PRPs) in any manner relating to this contract and has no responsibility with regard to the mutual obligations of the (PRPs) and the Contractor as provided herein.

D. Contractor Deductible

The Contractor shall pay the first $100,000.00 of any liability subject to indemnification under this contract before seeking indemnification under paragraphs B and C, above.

IV

MODEL EPA/ SITES PROGRAM TECHNOLOGY VENDOR INDEMNIFICATION AGREEMENT

EPA Indemnification

(1) Pursuant to Section 119 of CERCLA, the EPA will hold harmless and indemnify the Recipient against any liability (including the expenses of litigation or settlement) for negligence arising out of the Recipient's performance under this cooperative agreement in carrying out response action activities through the Superfund Innovative Technology Evaluation program under Section 311(b) of CERCLA. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this cooperative agreement. Further, any liability within the deductible amounts of the Recipient's insurance will not be covered under this clause. If the recipient has secured pollution liability coverage, it must submit a copy of the policy and the declaration page to EPA.

(2) Every twelve months, or as directed by the EPA, the Recipient shall submit to the Contracting Officer written documentation of the additional efforts made by the recipient to secure pollution liability insurance coverage, including:

- Copies of applications to three known underwriters of pollution liability insurance;
- A status report of any pollution liability insurance obtained, to include type of coverage, premium charged, limits of coverage, deductibles and major terms and conditions of coverage (e.g., a copy of the actual declaration page could be provided in lieu of a status report);
- If pollution liability coverage was rejected by the underwriter, a summary of the reasons why such coverage was denied; and

(3) For purposes of this clause, the Government will hold harmless and indemnify the Recipient for liability to the extent such liability exceeds $100,000.00.

(4) The Recipient shall not be reimbursed for liabilities as defined herein (including the expenses of litigation or settlement) that were caused by the conduct of the Recipient (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Recipient shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(5) The Government may discharge its liability under this cooperative agreement clause by making payments directly to the Recipient or directly to parties to whom the Recipient may be liable.

(6) With prior written approval of the Contracting Officer, the Recipient may include in any subcontract under this cooperative agreement the same provisions in this clause whereby the Recipient shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice between the Recipient and the subcontractor as are established by this clause. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this cooperative agreement clause shall provide for prompt notification to the Recipient which is covered by this cooperative agreement clause, and shall entitle the Government, at its election, to control, or assist in the settlement or defense of any such claim or action. The Government will indemnify the Recipient with respect to his obligation to subcontractors under such subcontract provisions. The Government may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(7) If insurance coverage required or approved by the Contracting Officer is reduced without the Contracting Officer's approval, the liability of the Government under this cooperative agreement clause will not be increased by reason of such reduction.

(8) The Recipient shall:

(a) Promptly notify the Assistant Administrator, OSWER, EPA of any claim or action against the Recipient or any subcontractor which reasonably may be expected to involve indemnification under this cooperative agreement clause;

(b) Furnish evidence or proof of any claim covered by this cooperative agreement clause in the manner and form required by the Government;

(c) Immediately furnish the Government copies of all pertinent papers received by the Recipient. The Government may direct, control, or assist the settlement or defense of any such claim or action. The Recipient shall comply with the Government's directions, and execute any authorizations required in regard to such settlement or defense; and

(d) Submit any disagreements concerning EPA indemnification to the Assistant Administrator, OSWER, EPA for resolution.

Decision by the Assistant Administrator will constitute final Agency action.

(9) Reimbursement for any liabilities under this cooperative agreement clause will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgement or by settlements approved in writing by the Government.

(10) This Clause will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA).

high priority to facilities where the release of hazardous substances or pollutants or contaminants has resulted in the closing of drinking water wells or has contaminated a principal drinking water supply.

SEC. 119. RESPONSE ACTION CONTRACTORS.

(a) LIABILITY OF RESPONSE ACTION CONTRACTORS.—

(1) RESPONSE ACTION CONTRACTORS.—A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this title or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release.

(2) NEGLIGENCE, ETC.—Paragraph (1) shall not apply in the case of a release that is caused by conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct.

(3) EFFECT ON WARRANTIES; EMPLOYER LIABILITY.—Nothing in this subsection shall affect the liability of any person under any warranty under Federal, State, or common law. Nothing in this subsection shall affect the liability of an employer who is a response action contractor to any employee of such employer under any provision of law, including any provision of any law relating to worker's compensation.

(4) GOVERNMENTAL EMPLOYEES.—A state employee or an employee of a political subdivision who provides services relating to response action while acting within the scope of his authority as a governmental employee shall have the same exemption from liability (subject to the other provisions of this section) as is provided to the response action contractor under this section.

(b) SAVINGS PROVISIONS.—

(1) LIABILITY OF OTHER PERSONS.—The defense provided by section 107(b)(3) shall not be available to any potentially responsible party with respect to any costs or damages caused by any act or omission of a response action contractor. Except as provided in subsection (a)(4) and the preceding sentence, nothing in this section shall affect the liability under this Act or under any other Federal or State law of any person, other than a response action contractor.

(2) BURDEN OF PLAINTIFF.—Nothing in this section shall affect the plaintiff's burden of establishing liability under this title.

(c) INDEMNIFICATION.—

(1) IN GENERAL.—The President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection against any liability (including the expenses of litigation or settlement) for negligence arising out of the contractor's performance in carrying out response action activities under this title, unless such liability was

caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct.

(2) APPLICABILITY.—This subsection shall apply only with respect to a response action carried out under written agreement with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this title; or

(D) any potentially responsible party carrying out any agreement under section 122 (relating to settlements) or section 106 (relating to abatement).

(3) SOURCE OF FUNDING.—This subsection shall not be subject to section 1301 or 1341 of title 31 of the United States Code or section 3733 of the Revised Statutes (41 U.S.C. 11) or to section 3 of the Superfund Amendments and Reauthorization Act of 1986. For purposes of section 111, amounts expended pursuant to this subsection for indemnification of any response action contractor (except with respect to federally owned or operated facilities) shall be considered governmental response costs incurred pursuant to section 104. If sufficient funds are unavailable in the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 to make payments pursuant to such indemnification or if the Fund is repealed, there are authorized to be appropriated such amounts as may be necessary to make such payments.

(4) REQUIREMENTS.—An indemnification agreement may be provided under this subsection only if the President determines that each of the following requirements are met:

(A) The liability covered by the indemnification agreement exceeds or is not covered by insurance available, at a fair and reasonable price, to the contractor at the time the contractor enters into the contract to provide response action, and adequate insurance to cover such liability is not generally available at the time the response action contract is entered into.

(B) The response action contractor has made diligent efforts to obtain insurance coverage from non-Federal sources to cover such liability.

(C) In the case of a response action contract covering more than one facility, the response action contractor agrees to continue to make such diligent efforts each time the contractor begins work under the contract at a new facility.

(5) LIMITATIONS.—

(A) LIABILITY COVERED.—Indemnification under this subsection shall apply only to response action contractor liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of response action activities.

(B) DEDUCTIBLES AND LIMITS.—An indemnification agreement under this subsection shall include deductibles and shall place limits on the amount of indemnification to be made available.

ATTACHMENT B

CERCLA (AS AMENDED)

SECTION 119

(C) CONTRACTS WITH POTENTIALLY RESPONSIBLE PARTIES.—

(i) DECISION TO INDEMNIFY.—In deciding whether to enter into an indemnification agreement with a response action contractor carrying out a written contract or agreement with any potentially responsible party, the President shall determine an amount which the potentially responsible party is able to indemnify the contractor. The President may enter into such an indemnification agreement only if the President determines that such amount of indemnification is inadequate to cover any reasonable potential liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with such party. The President shall make the determinations in the preceding sentences (with respect to the amount and the adequacy of the amount) taking into account the total net assets and resources of potentially responsible parties with respect to the facility at the time of such determinations.

(ii) CONDITIONS.—The President may pay a claim under an indemnification agreement referred to in clause (i) for the amount determined under clause (i) only if the contractor has exhausted all administrative, judicial, and common law claims for indemnification against all potentially responsible parties participating in the clean-up of the facility with respect to the liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with such party. Such indemnification agreement shall require such contractor to pay any deductible established under subparagraph (B) before the contractor may recover any amount from the potentially responsible party or under the indemnification agreement.

(D) RCRA FACILITIES.—No owner or operator of a facility regulated under the Solid Waste Disposal Act may be indemnified under this subsection with respect to such facility.

(E) PERSONS RETAINED OR HIRED.—A person retained or hired by a person described in subsection (a)(1)(A)(i) shall be eligible for indemnification under this subsection only if the President specifically approves of the retaining or hiring of such person.

(6) COST RECOVERY.—For purposes of section 107, amounts expended pursuant to this subsection for indemnification of any person who is a response action contractor with respect to any release or threatened release shall be considered a cost of response incurred by the United States Government with respect to such release.

(7) REGULATIONS.—The President shall promulgate regulations for carrying out the provisions of this subsection. Before promulgation of the regulations, the President shall develop guidelines to carry out this section. Development of such guidelines shall include reasonable opportunity for public comment.

(8) STUDY.—The Comptroller General shall conduct a study in the fiscal year ending September 30, 1989, on the application of this subsection, including whether indemnification agreements under this subsection are being used, the number of claims that have been filed under such agreements, and the need for this subsection. The Comptroller General shall report the findings of the study to Congress no later than September 30, 1989.

(d) EXCEPTION.—The exemption provided under subsection (a) and the authority of the President to offer indemnification under subsection (c) shall not apply to any person covered by the provisions of paragraph (1), (2), (3), or (4) of section 107(a) with respect to a release or threatened release concerned if such person would be covered by such provisions even if such person had not carried out any actions referred to in subsection (a) of this section.

(e) DEFINITIONS.—For purposes of this section—

(1) RESPONSE ACTION CONTRACT.—The term "response action contract" means any written contract or agreement entered into by a response action contractor (as defined in paragraph (3)(A) of this subsection) with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this Act; or

(D) any potentially responsible party carrying out an agreement under section 106 or 122;

to provide any remedial action under this Act at a facility listed on the National Priorities List, or any removal under this Act, with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from the facility or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such facility.

(2) RESPONSE ACTION CONTRACTOR.—The term "response action contractor" means—

(A) any—

(i) person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility and is carrying out such contract; and

(ii) person, public or nonprofit private entity, conducting a field demonstration pursuant to section 311(b); and

(B) any person who is retained or hired by a person described in subparagraph (A) to provide any services relating to a response action.

(3) INSURANCE.—The term "insurance" means liability insurance which is fair and reasonably priced, as determined by the President, and which is made available at the time the contractor enters into the response action contract to provide response action.

(f) CONSTRUCTION.—Response action contractors and subcontractors for prog[illegible] management, construc[illegible] agement, architectural and engineering [illegible]

be selected in accordance with title IX of the Federal Property and Administrative Services Act of 1949. The Federal selection procedures shall apply to appropriate contracts negotiated by all Federal governmental agencies involved in carrying out this Act. Such procedures shall be followed by response action contractors and subcontractors.

SEC. 120. FEDERAL FACILITIES.

(a) APPLICATION OF ACT TO FEDERAL GOVERNMENT.—

(1) IN GENERAL.—Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.

(2) APPLICATION OF REQUIREMENTS TO FEDERAL FACILITIES.—All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this Act for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this Act.

(3) EXCEPTIONS.—This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods. This subsection shall also not apply to any requirements relating to bonding, insurance, or financial responsibility. Nothing in this Act shall be construed to require a State to comply with section 104(c)(3) in the case of a facility which is owned or operated by any department, agency, or instrumentality of the United States.

(4) STATE LAWS.—State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

(b) NOTICE.—Each department, agency, and instrumentality of the United States shall add to the inventory of Federal agency hazardous waste facilities required to be submitted under section 3016 of the Solid Waste Disposal Act (in addition to the information required under section 3016(a)(3) of such Act) information on contamination from each facility owned or operated by the department, agency, or instrumentality if such contamination affects contiguous or adjacent property owned by the department, agency, or instrumentality or by any other person, including a description of the monitoring data obtained.

(c) FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET.—The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the "docket") which shall contain each of the following:

(1) All information submitted under section 3016 of the Solid Waste Disposal Act and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this Act with respect to the facility.

(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act.

(3) Information submitted by the department, agency, or instrumentality under section 103 of this Act.

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection.

(d) ASSESSMENT AND EVALUATION.—Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator shall take steps to ensure that a preliminary assessment is conducted for each facility on the docket. Following such preliminary assessment, the Administrator shall, where appropriate—

(1) evaluate such facilities in accordance with the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases; and

(2) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria.

Such criteria shall be applied in the same manner as the criteria are applied to facilities which are owned or operated by other persons. Evaluation and listing under this subsection shall be completed not later than 30 months after such date of enactment. Upon the receipt of a petition from the Governor of any State, the Administrator shall make such an evaluation of any facility included in the docket.

(e) REQUIRED ACTION BY DEPARTMENT.—

(1) RIFS.—Not later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency,

OSWER # 9832.12

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

SEP 22 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Federal Superfund Liens

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Directors, Waste Management Division,
Regions I-X

The purpose of this memorandum is to establish guidance on the use of federal liens to enhance Superfund cost recovery. Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), adds a new Section 107(l) to CERCLA, which provides for the establishment of a federal lien in favor of the United States upon property which is the subject of a removal or remedial action.

This guidance provides: (1) analysis of statutory issues regarding the nature and scope of the lien, (2) policy on filing a federal lien to support a cost recovery action, and (3) procedures for filing a notice of lien and taking an in rem action to recover the costs of a lien. Attached to the guidance is an example of a notice of a Superfund lien.

I. STATUTORY BACKGROUND AND ISSUES

A. Property Covered by Lien

Section 107(l) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States upon all real property and rights to such property which (1) belong to such person and (2) are subject to or affected by a removal or remedial action. The lien applies to all property owned by the PRP upon which response action has been taken, not just the portion of the property directly affected by cleanup activities. The House Judiciary Committee Report on the lien

provision in H.R. 2817 (p. 18), which was enacted as part of SARA, states that "the lien should apply to the title to the entire property on which the response action was taken." At the same time, the Report notes that "it is not intended to extend the lien to the title of other property held by the responsible party." Id.

The lien provision is designed to facilitate the United States' recovery of response costs and prevent windfalls. "A statutory lien would allow the Federal Government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from fund cleanup and restoration activities." 131 Cong. Rec. S11580 (Statement of Sen. Stafford) (September 17, 1985). See also House Energy and Commerce Report on H.R. 2817, p. 140, indicating that one of Congress' primary purposes in enacting the lien provision was to prevent unjust enrichment.

B. Duration and Effect of Lien

The federal lien arises "at the later of the following: (A) the time costs are first incurred by the United States with respect to a response action under [SARA, or] (B) the time that the person is provided (by certified or registered mail) written notice of potential liability." (Emphasis added) (§107(l)(2)). EPA may send out two different types of notice letters to PRPs. The first, a general notice letter, will be sent early in the process notifying the recipient that he or she has been identified as a party who may be responsible for cleanup of the site or for the costs of cleanup. In addition, the Agency may send a subsequent "special" notice which will invoke and commence the settlement procedures in Section 122 of SARA. The first of those letters will satisfy the notice of potential liability required for the federal lien to arise, assuming that it does give the PRP notice of potential liability for cleanup of costs, and is forwarded by certified or registered mail.

It is EPA's position that the lien provision applies to costs incurred prior to and after passage of SARA. The lien also applies to all future costs incurred at the site. The lien continues "until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113." (§107(l)(2))

C. Priority of Federal Lien In Relation to Other Property Liens

The federal lien is "subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of

the federal lien has been filed [by EPA]." (§107(l)(3)) Thus, the unfiled federal lien is subordinate to rights that are perfected under applicable State law before EPA files notice of its federal Superfund lien. After EPA files notice of the federal lien, the United States establishes its priority ahead of known and potential purchasers, holders of security interests, and judgment lien creditors whose interests have not been perfected.

During deliberation on the Superfund amendments, Congress considered a provision in H.R. 2005 [S. 51] which provided for constructive notice of an EPA lien. Under that provision, if EPA failed to file its notice of lien in a timely fashion, the EPA lien would nonetheless have had priority over a third party lien which was filed prior in time if the third party had or reasonably should have had actual knowledge that EPA had incurred costs which would have given rise to a lien. See Environment and Public Works Report on S. 51, p. 45. Thus, since this provision was ultimately deleted from the Act, EPA must file its lien in order to achieve priority over any other secured parties, and cannot rely on constructive notice.

D. State Superfund Liens

Most States have passed "Superfund" statutes similar to the federal law. However, a State Superfund lien only applies to response work paid for by a State. Some of the State statutes, such as those in Massachusetts, New Hampshire, New Jersey, Arkansas and Tennessee, contain "superlien" provisions which provide that any expenditures made pursuant to the statute constitute a first priority lien upon the real property of a hazardous waste discharger. Several other States provide that expenditures from the hazardous waste fund will constitute a lien in favor of the State, although not a first-priority lien.

II. POLICY ON FILING FEDERAL LIENS IN COST-RECOVERY ACTIONS

EPA has the authority to file notice of a lien on any real property where Superfund expenditures have been made. Regional offices should carefully evaluate the value of filing notice of a lien whenever the Agency has identified a landowner as a potentially liable party under Section 107. Filing of notice of the federal lien will be particularly beneficial to the government's efforts to recover costs in a subsequent Section 107 action in the following situations:

(1) the property is the chief or the substantial asset of the PRP;

(2) the property has substantial monetary value;

(3) there is a likelihood that the defendant owner may file for bankruptcy. See Revised Hazardous Waste Bankruptcy Guidance, Office of Enforcement and Compliance Monitoring, May 23, 1986;

(4) the value of the property will increase significantly as a result of the removal or remedial work; or

(5) the PRP plans to sell the property.

Regional offices should not file notice where it appears that the defendant satisfies the elements of the innocent landowner defense pursuant to Section 107(b)(3).

Where existing perfected non-Superfund liens on the property equal or exceed the value of the property as enhanced by the Superfund expenditures, it may not be worthwhile to file notice of the federal lien. However, in some cases, a foreclosing party, such as a bank, may take over the property, and EPA may believe that the foreclosing party is liable under Section 107. See United States v. Maryland Bank and Trust Co., 632 F. Supp. 573 (D. Md. 1986). In such cases, EPA should file a lien as to the foreclosing party after foreclosure and after other acts creating liability have taken place.

Pursuant to Section 545(2) of the Bankruptcy Code, a lien unperfected as of the time of filing of the bankruptcy petition will be invalidated by the bankruptcy trustee. Thus, where there is a likelihood of a bankruptcy filing, notice of the Superfund lien should be filed as early as possible. Finally, note that filing notice of the lien is not subject to pre-enforcement review of the liability of the landowner for the response costs.1/

III. PROCEDURES FOR FILING LIENS

Notice of the federal lien should be filed at the time that the owner is provided notice of potential liability. By this time, the lien will have arisen since EPA will have incurred costs, e.g.,

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1/ Courts have rejected claims that owners are entitled to notice and hearing prior to filing of the lien. In Spielman Fond, Inc. v. Hanson's Inc., 379 F. Supp. 997 (D. Ariz.) (3 judge court), summarily aff'd, 417 U.S. 901 (1974), the court held that filing of a mechanic's lien did not amount to a taking of significant property without due process, since it did not prohibit the transfer of title. Subsequent court decisions have followed this holding. See, e.g., B & P Development v. Walker, 420 F. Supp. 704 (W.D. Pa. 1976).

in conducting a PRP search. The government's priority will relate back to the date that the notice of the lien was filed. See Uniform Commercial Code, §9-312(5)(a). Unlike some State Superfund lien provisions, Section 107 does not establish a deadline by which notice must be filed.

A. Preparing the Notice

Regional enforcement personnel should refer to State requirements for filing notice of the lien. We encourage the Regions to work with State Attorney General Offices to assure that the Regions accurately interpret State law, and to consult with OECM and DOJ in determining whether to file notice of the lien.

Notice should generally include: (1) the name of the property owner, (2) a precise legal description of the property on which the lien will arise, (3) an explanation by the Regional official of the basis for the lien, (4) the address of the Regional Administrator or other Regional official delegated authority to sign notices of liens, and (5) a provision that the lien shall remain until all liability is satisfied. The notice should cite CERCLA Section 107(l) and be notarized with the Agency seal.

Notice may also include such information as: (1) the amount of fund expenditures upon which the lien is claimed and (2) a description of labor performed and materials supplied, including dates. However, since the statute does not require specification of costs, the notice should clarify that, where response work is ongoing, the amount of the lien will increase as the costs incurred increase. The property description to be included in the notice of the lien should be the legal description (i.e., metes and bounds, or lot, block and subdivision) rather than a general post office or street address. We have attached an example of a notice of a federal lien.

Under the recent SARA delegation, the Regional Administrator has been delegated authority to sign the notice of filed lien. The Regional Administrator may redelegate this authority at his/her discretion.

B. Where to File

To establish its priority among other secured parties and creditors, EPA must file notice of the lien "in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located." (§107(l)(3))

Where the State has designated an office, such as a County recording office, the lien should be filed in that office. This will likely be the same office where State Superfund liens are filed or where general real property liens, e.g. mechanic's liens, are filed. "If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located." (§107(l)(3))

Where there is any doubt as to the designated State office, the lien should be filed both in the office of the clerk of the United States district court for the district in which the real property is located and in the most appropriate local office for recording property interests. Filing in the appropriate local office is important, since parties with an interest in the property are more likely to review liens in the local office than in federal district court.

IV. IN REM ACTIONS FOR RECOVERING COSTS CONSTITUTING THE LIEN

Under Section 107(l)(4), "[t]he costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred." An in rem action is an action against the property of the PRP. In order to institute a proceeding in rem, the property must "be actually or constructively within the reach of the court." 36 Am. Jur. 2d Forfeitures and Penalties §28 (1968). By contrast, the typical cost recovery action is an in personam action against the PRP.

In rem actions should be considered where the litigation team believes that an action to recover costs covered by the lien will enhance its efforts to recover all costs incurred in a response action. Such actions will be particularly useful where the property constitutes a significant asset of the PRP, and where the government is having difficulty reaching an expeditious cost recovery settlement. The in rem action, which will seek an order directing sale of the property,[2/] should generally be combined with an in personam action for costs. Before bringing an in rem action, the regional office should consider the amount of the claim, the

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2/ An in rem action may be delayed by an automatic stay, obtained in a bankruptcy proceeding, which serves to stay "any act to create, perfect, or enforce any lien against property of the estate." (Emphasis added) 11 U.S.C. §362(a)(4). The automatic stay also prohibits perfection of a lien, through filing notice of the lien, against a bankruptcy debtor.

condition of the site after the response action and the likely marketability of the site. Note that an in rem action will require the same elements of proof as any cost recovery action.

Section 107(l)(4) further states that "[n]othing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section." Thus, where the government seeks to enforce the federal lien, it is not precluded from recovering the balance of its response costs directly from the landowner or any other liable party.3/

DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

Attachment

3/ Moreover, after EPA obtains a judgment, it should consider using state judgment lien provisions, which may cover all real property of the debtor.

NOTICE OF FEDERAL LIEN

NOTICE IS HEREBY GIVEN by the United States of America that it holds a lien on the lands and premises described below situated in the State of Washington, as provided by Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law No. 99-499, amending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq., to secure the payment to the United States of all costs and damages covered by that Section for which Western Processing Company, Inc. and Garret J. Nieuwenhuis (and the marital community composed of himself and his wife) are liable to the United States under Section 107(a) of CERCLA as amended. The lien for which this instrument gives notice exists in favor of the United States upon all real property and rights to such property which belong to said persons and are, have been, or will be, subject to, or affected by, removal and remedial actions as defined by federal law, at or near 7215 South 196th in the City of Kent, County of King, State of Washington, including the following described land:

> That portion of the Southeast Quarter (S.E. 1/4) of the Northwest Quarter (N.W. 1/4) of Section One (1), Township Twenty-Two (22) North, Range Four (4) East, Willamette Meridian, lying Westerly of the Puget Sound Electric right-of-way less than North Thirty (30) feet of Drainage Ditch No. One (1), containing 12.9 acres more or less.

This statutory lien exists and continues until the liability for such costs and damages (or for any decree or judgement against such persons arising out of such liability) is satisfied or becomes unenforceable through the operation of the statute of limitations as provided by Section 113 of Public Law 99-499.

IN WITNESS WHEREOF, the United States has caused this instrument to be executed through the United States Environmental Protection Agency, and its attorney, in his official capacity as Regional Counsel of the United States Environmental Protection Agency, Region 10.

Dated at Seattle, Washington, this 23d day of January, 1987.

UNITED STATES OF AMERICA and
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

By: John T. Hamill, Acting
for James R. Moore
Regional Counsel
U.S. EPA, Region 10

United States of America)
State of Washington)ss
County of King)

On this 23d day of January, 1987, there appeared personally before me, the undersigned Notary, James R. Moore, known to me to be the Regional Counsel of the United States Environmental Protection Agency, Region 10, and he acknowledged that he signed the foregoing NOTICE OF FEDERAL LIEN in a representative capacity as the free and voluntary act and deed of the United States and its said Agency for the uses and purposes therein mentioned. GIVEN under my hand and official seal the day and year first stated above.

NOTARY PUBLIC in and for the State
of Washington residing at Seattle

My Commission Expires: 12/7/90

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

9838.1

JUL 31 1987

MEMORANDUM

SUBJECT: Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)

FROM: Francis S. Blake
General Counsel (LE-130)

TO: J. Winston Porter
Assistant Administrator
for Solid Waste and Emergency Response (WH-562A)

One critical and recurring issue arising in the context of Superfund response activities has been the scope of the petroleum exclusion under CERCLA. Specifically, you have asked whether used oil which is contaminated by hazardous substances is considered "petroleum" under CERCLA and thus excluded from CERCLA response authority and liability unless specifically listed under RCRA or some other statute. For the reasons discussed below, we believe that the contaminants present in used oil or any other petroleum substance are not within the petroleum exclusion. "Contaminants", as discussed below, are substances not normally found in refined petroleum fractions or present at levels which exceed those normally found in such fractions. If these contaminants are CERCLA hazardous substances, they are subject to CERCLA response authority and liability.

Background

Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended (CERCLA), governmental response authority, release notification requirements, and liability are largely tied to a release of a "hazardous substance." Section 104 authorizes government response to releases or threatened releases of hazardous substances, or "pollutants or contaminants." Similarly, liability for response costs and damages under Section 107 attaches to persons who generate, transport or

dispose of hazardous substances at a site from which there is a release or threatened release of such substances. Under Section 103, a release of a reportable quantity of a hazardous substance triggers notification to the National Response Center.

The term "hazardous substance" is defined under CERCLA Section 101(14) to include approximately 714 toxic substances listed under four other environmental statutes, including RCRA. Both the definition of hazardous substance and the definition of "pollutant or contaminant" under Section 104(a)(2) exclude "petroleum, including crude oil or any fraction thereof", unless specifically listed under those statutes. 1/ Accordingly, no petroleum substance, including used oil, can be a "hazardous substance" except to the extent it is listed as a hazardous waste under RCRA or under one of the other statutes. Thus two critical issues in assessing whether a substance is subject to CERCLA is whether or not, and to what extent, a substance is "petroleum." This memorandum discusses the second type of petroleum exclusion issue. The question, therefore, is not whether used oil is "petroleum" and thus exempted from CERCLA jurisdiction, but to what extent substances found in used oil which are not found in crude oil or refined petroleum fractions are also "petroleum". If such substances are not "petroleum" then a release of used oil containing such substances may trigger CERCLA response actions, not to the release of used oil, but to the contaminants present in the oil.

1/ The full texts of these provisions are as follows:

Section 101(14)

. . . .

The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Section 104 (a)(2)

. . . .

The term [pollutant or contaminant] does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as hazardous substances under section 101(14)(A) through (F) of this title, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

Although the term "hazardous substance" is defined by statute, there is no CERCLA definition of "petroleum" and very little direct legislative history explaining the purpose or intended scope of this exclusion. None of the four early Superfund bills originally excluded responses to oil, although the apparent precursor to Section 101(14), found in S. 1480, excluded "petroleum" without explanation in all versions except that introduced. The legislative debates on the final compromise indicate only that Congress intended to enact later, separate superfund-type legislation to cover "oil spills." See generally 126 Cong. Rec. H11793-11802 (December 3, 1980).

Since the enactment of CERCLA, the Agency has provided some interpretations of the nature and scope of the petroleum exclusion. In providing guidance in 1981 on the notification required under Section 103 for non-RCRA hazardous waste sites the Agency stated that petroleum wastes, including waste oil, which are not specifically listed under RCRA are excluded from the definition of "hazardous substance" under 101(14). 46 Fed. Reg. 22145 (April 15, 1981). 2/

In 1982 and in 1983, the General Counsel issued two opinions on the CERCLA petroleum exclusion. In the first opinion, the General Counsel distinguished under the petroleum exclusion between hazardous substances which are inherent in petroleum, such as benzene, and hazardous substances which are added to or mixed with petroleum products. The General Counsel concluded that the petroleum exclusion includes those hazardous substances which are inherent in petroleum but not those added to or mixed with petroleum products. Thus, the exclusion of diesel oil as "petroleum" includes its hazardous substance constituents, such as benzene and toulene, but PCB's mixed with oil would not be excluded. Moreover, if the petroleum product and an added hazardous substance are so commingled that, as a practical matter, they cannot be separated, then the entire oil spill is subject to CERCLA response authority.

In the second opinion, the General Counsel concluded that the petroleum exclusion as applied to crude oil "fractions" includes blended gasoline as well as raw gasoline, even though refined or blended gasoline contains higher levels of hazardous

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2/ In the notice the Agency used the term "waste oil" without stating whether it was intended to include all waste oil or only unadulterated waste oil. The Agency has subsequently interpreted the reference to "waste oil" in this notice to include only unadulterated waste oil. 50 Fed. Reg. 13460 (April 4, 1985).

substances. The increased level of hazardous substances results from the blending of raw gasoline with other petroleum fractions to increase its octane levels. Because virtually all gasoline which leaves the refinery is blended gasoline, the petroleum exclusion would include virtually none of this fraction if the increased concentration of hazardous substances due only to its processing made it subject to CERCLA.

Finally, the Agency has interpreted the petroleum exclusion in two recent Federal Register notices. In the April 4, 1985 final rule adjusting reportable quantities under Section 102, the Agency provided its general interpretation of the exclusion:

> EPA interprets the petroleum exclusion to apply to materials such as crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products. However, EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion. Similarly, pesticides are not within the petroleum exclusion, even though the active ingredients of the pesticide may be contained in a petroleum distillate: when an RQ of a listed pesticide is released, the release must be reported.

50 Fed. Reg. 13460 (April 4, 1985).

In March 10, 1986, the Agency published a notice of data availability and request for comments on the proposed used oil listing under RCRA. 51 Fed. Reg. 8206. In that notice, the Agency responded to commenters who had argued that the RCRA listing would discourage used oil recycling because it would subject generators, transporters, processors, and users to Superfund liability. The Agency stated that used oil which contains hazardous substances at levels which exceed those normally found in petroleum are currently subject to CERCLA. 51 Fed. Reg. 8206 (March 10, 1986). Although the fact that the used oil is contaminated does not remove it from the protection of the petroleum exclusion, the contaminants in the used oil are subject to CERCLA response authority if they are hazardous substances. Accordingly, most used oil, even without a specific listing, would not be fully within the petroleum exclusion, irrespective of the listing.

Discussion

Because there is no definition of "petroleum" in CERCLA or any legislative history which clearly expresses the intended scope of this exclusion, there are several possible interpretations which could be given to this provision. However, we believe that our current interpretation, under which "petroleum" includes hazardous substances normally found in refined petroleum fractions but does not include either hazardous substances found at levels which exceed those normally found in such fractions or substances not normally found in such fractions, is most consistent with the statute and the relevant legislative history. Under this interpretation, the source of the contamination, whether intentional addition of hazardous substances to the petroleum or addition of hazardous substances by use of the petroleum, is not relevant to the applicability of the petroleum exclusion. The remainder of this memorandum explains in greater detail this interpretation and its legal basis, and responds to arguments raised in opposition to this interpretation.

The following is our interpretation of "petroleum" under CERCLA 101(14) and 104(a)(2), which we believe to be consistent with Congressional intent and the position which the Agency has taken on the scope of the petroleum exclusion thus far. First, we interpret this provision to exclude from CERCLA response and liability crude oil and fractions of crude oil, including the hazardous substances, such as benzene, which are indigenous in those petroleum substances. Because these hazardous substances are found naturally in all crude oil and its fractions, they must be included in the term "petroleum," for that provision to have any meaning.

Secondly, "petroleum" under CERCLA also includes hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process. This includes hazardous substances the levels of which are increased during refining. These substances are also part of "petroleum" since their addition is part of the normal oil separation and processing operations at a refinery in order to produce the product commonly understood to be "petroleum."

Finally, hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use are <u>not</u> part of the "petroleum" and thus are not excluded from CERCLA under the

exclusion. 3/ In such cases, EPA may respond to releases of the added hazardous substance, but not the oil itself.

We believe that an interpretation of "petroleum" to include only indigenous, refinery-added hazardous substances is the interpretation of this provision which is most consistent with Congressional intent. The language of the provision, its explanation in the legislative history, and the Congressional debates on the final Superfund bill clearly indicate that Congress had no intention of shielding from Superfund response and liability hazardous substances merely because they are added, intentionally or by use, to petroleum products.

The language of the petroleum exclusion describes "petroleum" principally in terms of crude oil and crude oil fractions. This language is virtually identical to the language used in an earlier Superfund bill to define "oil." 4/ There is no indication in the statute or legislative history that the term "petroleum" was to be given any meaning other than its ordinary, everyday meaning. See Malat v. Riddell, 383 U.S. 569, 571 (1966) (words of a statute should be interpreted where possible in their ordinary, everyday sense). Petroleum is defined in a standard dictionary as

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3/ The mixing of two or more excluded petroleum substances, such as blending of fuels, would not be considered contamination by use, and the mixture would thus also be an excluded substance.

4/ See H.R. 85, 96th Cong., 2d Sess. §101(s) (as passsed by the House, September 1980) (""Oil" means petroleum, including crude oil or any fraction or residue therefrom"). H.R. 85 was designed principally to provide compensation and assess liability for oil tanker spills in navigable waters. As discussed below, the omission of this "oil spill" coverage under the petroleum exclusion was believed to be the most significant omission in terms of response to environmental releases under the final Superfund bill.

Although the bill containing the precursor to Section 101(14), S. 1480, does not have a definition of "petroleum", its accompanying report did explain the term "petroleum oil" in the context of the taxing provisions:

> The term "petroleum oil" as used in subsection 5 means petroleum, including crude petroleum and any of its fractions or residues other than carbon black.

S. Rep. No. 96-848, 96th Cong., 2d Sess. 70 (1980).

> an oily flammable bituminous liquid that may vary from almost colorless to black, occurs in many places in the upper strata of the earth, is a complex mixture of hydrocarbons with small amounts of other substances, and is prepared for use as gasoline, naphtha, or other products by various refining processes.

Webster's Ninth New Collegiate Dictionary 880 (1985). Thus, an interpretation of the phrase "petroleum, including crude oil or any fraction thereof" to include only crude oil, crude oil fractions, and refined petroleum fractions is consistent with the plain language of the statute. 5/

The only legislative history which specifically discusses this provision states that

> petroleum, including crude oil and including fractions of crude oil which are not otherwise specifically listed or designated as hazardous substances under subparagraphs (A) through (F) of the definition, is excluded from the definition of a hazardous substance. The reported bill does not cover spills or other releases strictly of oil.

S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added). Thus, the petroleum exclusion is explained as an exclusion from CERCLA for spills or releases only of oil. The legislative history clearly contemplates that the petroleum

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5/ This distinction under the exclusion in Title I of CERCLA between petroleum as the substance that leaves the refinery and the hazardous substances which are added to it prior to, during or after use was also made by Congress in Title II, the revenue provisions or CERCLA. In Title II, Congress made a distinction between "chemicals", petrochemical feedstocks and inorganic substances, taxed in Subchapter B of Chapter 38 of Internal Revenue Code, and "petroleum", crude oil and petroleum products, taxed in Subchapter A. Section 211 of CERCLA. The list of taxed chemicals includes many of the contaminant hazardous substances typically found in used oil: arsenic, cadmium, chromium, lead oxide, and mercury. The term "petroleum products" was explained in the legislative history as including essentially crude oil and its refined fractions. H. Rep. No. 96-172, Part III, 96th Cong., 2d Sess. 5 (1980) (to accompany H.R. 85).

exclusion will not apply to mixtures of petroleum and other toxic materials since these would not be releases "strictly of oil".

The Congressional debates on the final compromise Superfund legislation provides further clarification of Congressional intent concerning the scope of the petroleum exclusion, both in terms of what this provision deleted from the bill and what it did not. First, the major concern expressed with respect to the final compromise bill was the omission of its oil spill jurisdiction due to the petroleum exclusion. See e.g. 126 Cong. Rec. H11787 (Rep. Florio) (daily ed. December 3, 1980); id. at H11790 (Rep. Broyhill); id. at H11792 (Rep. Madigan); id. at H11793 (Rep. Studds); id. at H11795 (Rep. Biaggi); id. at H11796 (Rep. Snyder). This omission was of concern because it was believed to leave coastal areas and fisheries vunerable to tanker spills of crude and refined oil, such as the wreck of the Argo Merchant, and offshore oil well accidents. 126 Cong. Rec. H11793 (Rep. Studds) (daily ed. December 3, 1980). See also 126 Cong. Rec. S10578 (proposed amendment to S1480 by Sen. Magnuson) (daily ed. August 1, 1980); id. at S10845 (proposed amendment to S1480 by Sen. Gravel) (daily ed. August 5, 1980). The omitted coverage of oil spills was believed to include approximately 500 spills per year, 126 Cong. Rec. H11796 (Rep. Snyder) (daily ed. December 3, 1980), far less than the number of contaminated oil releases each year.

However, it was clear that the omission of oil coverage was intended to include spills of oil only, and there was no intent to exclude from the bill mixtures of oil and hazardous substances. The remarks of Rep. Mikulski are typical of the general understanding of the effect of the petroleum exclusion in the final bill:

> The Senate bill is substantially similar to the House measure, with the exception that there is no oil title.
>
> I realize that it is disappointing to see no oil-related provision in the bill, but we must also realize that this is our only chance to get hazardous waste dump site cleanup legislation enacted. . . .
>
> Moreover, there is already a mechanism in place that is designed to deal with spills in navigable waterways. There is not, however, any provision currently in our law that addresses the potentially ruinous situation of abandoned toxic dump sites.
>
> I, therefore, believe that it is imperative that we pass the Senate bill as a very important beginning in our attempt to defuse the ticking environmental time bomb of abandoned toxic waste sites.

Id. at H11796.

In addition, several speakers specifically identified such mixtures as releases not only covered by the legislation but releases to which the bill was addressed.

> Mr. Edgar ...
>
> In my State, hazardous substances problems have been discovered at an alarming rate in recent years. In the summer of 1979, an oil slick appeared on the Susquehanna River near Pittston, Pa. When EPA officials responded under section 311 of the Clean Water Act, they learned that the slick contained a variety of highly poisonous chemicals in addition to the oil.
>
> Officials estimate that more than 300,000 gallons of acids, cyanide compounds, industrial solvents, waste oil and other chemicals remain at this site where they could be washed to the surface anywhere in a 10-square - mile surface.

Id. at H11798. See also 126 Cong. Rec. S14963 (daily ed. November 24, 1980) (Sen. Randolph) (contaminated oil slick). Other petroleum products containing hazardous substance additives intended to be addressed by the legislation include PCB's in transformer fluid, id. at S14963 (Sen. Randolph) and S14967 (Sen. Stafford), dioxin in motor fuel used as a dust suppressant, id. at S14974 (Sen. Mitchell), PCB's in waste oil, id. (Sen. Mitchell) 6/ and contaminated waste oil, id. at S14980 (Sen. Cohen). Accordingly, Congress understood the petroleum exclusion to remove from CERCLA jurisdiction spills only of oil, not releases of hazardous substances mixed with the oil.

There are two principal arguments which have been raised in opposition to this interpretation. First, the argument has been made that this interpretation narrows the petroleum exclusion to the extent that it has became virtually meaningless. As we have noted in previous opinions on this issue, an interpretation which emasculates a provision of a statute is strongly disfavored. Marsano v. Laird, 412 F.2d 65, 70 (2d Cir. 1969). However, this interpretation leaves a significant number of petroleum spills outside the reach of CERCLA. Spills or releases of gasoline remain excluded from CERCLA under the petroleum exclusion. As indicated by the legislative history for the 1984 underground storage tank

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6/ The illegal disposal of PCB's in North Carolina described by Senator Mitchell was a result of the spraying of 131,000 gallons of PCB-contaminated waste oil along a roadway. See 126 Cong. Rec. H9448 (daily ed. September 23, 1980).

legislation, leakage of gasoline from underground tanks appears to be the greatest source of groundwater contamination in the United States. 130 Cong. Rec. S2027, 2028 (daily ed. February 29, 1984) (Sen. Durenberger). In addition, spills of crude or refined petroleum are not subject to Superfund, as was frequently noted prior to its passage. See generally 126 Cong. Rec. H11786-H11802 (daily ed. December 5, 1980). Moreover, under this interpretation not all releases of used oil will be subject to CERCLA since used oil does not necessarily contain non-indigenous hazardous substances or hazardous substances in elevated levels. 7/ Although used oil is generally "contaminated" by definition, see e.g., RCRA Section 1005 (36), the impurities added by use may not be CERCLA hazardous substances.

A second argument which has been made opposing this interpretation is that Congress intended to include in the term "petroleum" all hazardous substances added through normal use of the petroleum substance. However, even if it were possible to determine in a response situation whether a hazardous substance was added intentionally or only through normal use or to determine what additions are "intentional", the legislative history is contrary to such a distinction. As noted above, the Senate Report explaining this provision states that it excludes releases or spills strictly of oil. This explanation expresses Congressional intent that releases of mixtures of oil and toxic chemicals, i.e. releases which are not strictly of oil, would be subject to CERCLA response authority. Releases of contaminated oil even if contaminated due to "normal use" are not releases strictly of oil.

Furthermore, the Congressional debates prior to passage clearly indicate an intent that contaminated oil would be subject to Superfund as several such releases were discussed as the focus of the legislation. Congress was concerned with the environmental and health effect of abandoned toxic waste sites, not whether the presence of such hazards was intentional or due to normal practices. In fact, one of the petroleum-hazardous substance mixtures most often mentioned during the debates was that of PCB contaminated oil, which is a type of contamination arguably resulting from the "normal use" of the oil in transformers. Accordingly, an interpretation of the petroleum exclusion which includes as "petroleum" hazardous substances added during use of the petroleum would not be consistent with Congressional intent.

7/ Data submitted to EPA by the Utility Solid Waste Activities Group et al. in Appendix C of their comments on the RCRA Used Oil listing, February 11, 1986.

Finally, although the Superfund Amendments and Reauthorization Act of 1986 (SARA) contains several provisions related to oil and oil releases, it did not amend the petroleum exclusion under CERCLA. Moreover, the new provisions concerning oil and oil releases and their legislative history do not indicate a Congressional intent inconsistent with this opinion.

The only discussion of "petroleum" in the Conference Report for SARA is in the context of defining the scope of the new petroleum response fund for leaking underground storage tanks under Subtitle I of the Resource Conservation and Recovery Act (RCRA). Subtitle I defines "petroleum" in a manner nearly identical to CERCLA. The Conference Report specifies that used oil would be subject to the response fund notwithstanding its contamination with hazardous substances. H. Rep. No. 99-962, 99th Cong., 2d Sess. 228 (1986). The Conference Report is not inconsistent with the Agency's position on "petroleum" under CERCLA since it merely specifies that the leaking underground storage tank (UST) response fund is applicable to tanks containing certain mixtures of oil and hazardous substances, as well as to tanks containing uncontaminated petroleum. In fact, the Report further states that the UST response fund must cover releases of used oil from tanks since "releases from tanks containing used oil would not <u>rise to the priority necessary</u>...for CERCLA response", <u>id</u>. (emphasis added), not because such releases would be entirely excluded from CERCLA jurisdiction. <u>See also</u> 132 Cong. Rec. S14928 (daily ed. October 3, 1986) (Senator Chaffee) (Nothing in Section 114, pertaining to liability for releases of recycled oil, "shall affect or impair the authority of the President to take a response action pursuant to Section 104 or 106 of CERCLA with respect to any release...of used oil or recycled oil"); 132 Cong. Rec. H9611 (daily ed. October 8, 1986) (Rep. Schneider) ("...the oil companies are rightfully assessed a significant share of the Superfund tax...Waste oils laced with contaminants have been identified at at least 153 Superfund sites in 32 States.").

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAY 27 1988

OSWER Directive #9834.9a

MEMORANDUM

SUBJECT: Interim Policy on Mixed Funding Settlements Involving the Preauthorization of States or Political Subdivisions

FROM: J. Winston Porter
Assistant Administrator
Office of Solid Waste and Emergency Response

Thomas L. Adams, Jr.
Assistant Administrator
Office of Enforcement and Compliance Monitoring

TO: Regional Administrators, Regions I - X

I. INTRODUCTION

The purpose of this memorandum is to establish the Agency's interim policy on the use of mixed funding settlements that involve the preauthorization of States or political subdivisions when such parties are potentially responsible parties (PRPs) at Superfund sites. [1] This memorandum addresses one specific question that arose during negotiations at a municipal landfill. The question was whether the Agency could approve a request for preauthorization submitted by a political subdivision seeking to file a claim against the Fund for reimbursement of a portion of response costs at a Superfund site. The question of whether a political subdivision is eligible to request preauthorization in the context of a mixed funding settlement was resolved during a November 1987 Assistant Administrator Review Team (AART) meeting. This policy formalizes that decision and is expanded to include States as well.

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[1] This policy supplements the guidance on "Evaluating Mixed Funding Agreements Under CERCLA." The Mixed Funding guidance presents a method for determining whether it may be appropriate to settle for less than 100% of response costs and provides examples of the types of sites that are good and poor candidates for mixed funding. This guidance was signed on October 20, 1987 and was issued under OSWER Directive #9834.9.

II. ISSUE

Mixed Funding (Section 122(b)(1))

Section 122(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA) authorizes EPA to enter into mixed funding settlements with PRPs. Section 122(b)(1) authorizes one type of mixed funding where PRPs agree to perform the response activity and the Agency agrees to reimburse the PRPs for a portion of their response costs. The Agency implements this type of mixed funding by approving the PRP's request for preauthorization to undertake the response and by awarding monies from the Fund once the response action is completed.

The term preauthorization refers to the approval that PRPs must obtain from EPA prior to the conduct of cleanup actions and before a claim for reimbursement of response costs is presented to the Fund. If preauthorization is granted, it serves as an Agency commitment that, if the response is conducted pursuant to the settlement agreement and the costs are reasonable and necessary, reimbursement will be available from the Fund as specified by the agreement. EPA will grant preauthorization to PRPs only in the context of settlement agreements. [2]

Although section 122(b)(1) provides authority for mixed funding, it does not specify a mechanism for permitting the Fund to be used for this purpose. CERCLA's principal claims mechanism is section 111(a) and the Agency uses this mechanism for reimbursing PRPs for a portion of their response costs pursuant to a mixed funding agreement.

Reimbursement of Claims (Section 111(a))

Section 111(a) provides that the President shall use the money in the Fund for:

(1) payment for governmental response costs incurred pursuant to section 104 ...

(2) payment of any claim for necessary response costs incurred by any other person ... (emphasis added).

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[2] For a more detailed discussion about preauthorization see the guidance on "Evaluating Mixed Funding Settlements Under CERCLA" cited earlier.

A question arose on the precise meaning of "any other person" under section 111(a)(2). Specifically, the question was whether, when read in conjunction with section 111(a)(1), "any other person" means any person other than a governmental entity. The Agency believes that "any other person" can include governmental entities when they are PRPs and when they are acting pursuant to a settlement agreement as discussed below. Note that any person who plans to file a claim against the Fund under the section 111(a)(2) response claims process must first obtain preauthorization (i.e., prior EPA approval).

III. PREAUTHORIZATION OF STATES OR POLITICAL SUBDIVISIONS

In considering mixed funding at a site that involves a State or political subdivision as a PRP, the Region must first determine whether the offer is an acceptable candidate for mixed funding. This determination must be made at all sites where mixed funding is being considered and must be made by applying the criteria established in the "Interim CERCLA Settlement Policy" and the guidance on "Evaluating Mixed Funding Agreements Under CERCLA." [3]

The Settlement Policy establishes ten criteria that must be applied to a settlement offer to determine whether it is appropriate to settle for less than 100% of response costs. The Mixed Funding guidance provides a more detailed discussion about how to apply the ten settlement criteria to mixed funding settlement offers, including a discussion about which factors generally make an offer an acceptable candidate for mixed funding.

The Region must also consider the following additional criteria. States or political subdivisions are eligible to file claims against the Fund only when:

(1) the State or political subdivision is a PRP under section 107 at the site; and

(2) the State or political subdivision will carry out the response pursuant to a settlement agreement under section 122.

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[3] The "Interim CERCLA Settlement Policy" was issued under OSWER Directive #9835.0 on February 5, 1985. The Mixed Funding guidance was cited earlier.

If you have any questions or comments regarding this interim policy, please contact Kathleen MacKinnon in the Office of Waste Programs Enforcement at FTS-475-9812.

cc: Jon Cannon, OWPE
Lisa Friedman, OGC
Edward Reich, OECM
Henry Longest, OERR
David Buente, DOJ
Waste Management Division Directors, Regions I - X
Regional Counsels, Regions I - X
Municipal Settlement Workgroup Members

Appendix A

INTERIM GUIDANCE ON PRP PARTICIPATION IN THE RI/FS PROCESS*

I. INTRODUCTION

This memorandum sets forth the policy and procedures governing the participation of potentially responsible parties (PRPs) in the development of remedial investigations (RI) and feasibility studies (FS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986. This memorandum discusses:

- The initiation of enforcement activities including PRP searches and PRP notification;
- The circumstances in which PRPs may conduct the RI/FS;
- The development of enforceable agreements governing PRP RI/FS activities;
- Initiation of PRP RI/FS activities and oversight of the RI/FS by EPA;
- EPA control over PRP RI/FS activities; and
- PRP participation in Agency-financed RI/FS activities.

More detailed information regarding each of the above topics is included in Attachments 1-4 of this appendix.

This document is consistent with CERCLA and EPA guidance in effect as of October 1988, and is intended to supersede the March 20, 1984 memorandum from Assistant Administrators Lee M. Thomas and Courtney M. Price entitled "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies Under CERCLA" (OSWER Directive No. 9835.1). Users of this guidance should consult the RI/FS Guidance or any relevant guidance or policies issued after distribution of this document before establishing EPA/PRP responsibilities for conducting RI/FS activities. Additional guidance regarding procedures for EPA oversight activities will be available in the Office of Waste Program Enforcement's (OWPE) forthcoming "Guidance Manual on

*This memorandum was signed by the AA OSWER and released for distribution on May 16, 1988. Technical clarifications/updates have been made to this guidance for insertion into Appendix A of the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies" (October 1988-OSWER Directive No. 9355.3-01) (Referred to herein as the RI/FS Guidance).

Oversight of Potentially Responsible Party Remedial Investigation and Feasibility Studies".

II. BACKGROUND

Sections 104/122 of CERCLA provide PRPs with the opportunity to conduct the RI/FS when EPA determines (1) that the PRPs are qualified to conduct such activities and (2) they will carry out the activities in accordance with CERCLA requirements and EPA procedures.[1] The Agency will continue its policy of early and timely PRP searches as well as early PRP notification and negotiation for RI/FS activities.

It is also the policy of EPA to encourage the early and active participation of PRPs in conducting RI/FS activities. EPA believes that early participation of PRPs in the remedial process will encourage PRP implementation of the selected remedy. PRP participation in RI/FS activities will ensure that they have a better and more complete understanding of the selected remedy, and thus will be more likely to agree on implementation of the remedy. Remedial activities performed by PRPs will also conserve Fund monies, thus making additional resources available to address other sites.

As part of the Agency's effort to encourage PRP participation in remedial activities, EPA will consider the PRPs' role in conducting RI/FS activities when assessing an overall settlement proposal for the remedial design and remedial action. For example, when the Agency performs a non-binding allocation of responsibility (NBAR), the Agency may consider previous PRP efforts and cooperation. This will provide an additional incentive for PRPs to be cooperative in conducting RI/FS activities.

Although EPA encourages PRP participation in conducting the RI/FS, the Agency and CERCLA impose certain conditions governing their participation. These conditions are intended to assure that the RI/FS performed by the PRPs is consistent with Federal requirements and that there is adequate oversight of those activities. These conditions are discussed both in Section III and Attachment I of this memorandum.

At the discretion of EPA, a PRP (or group of PRPs) may assume full responsibility for undertaking RI/FS activities pursuant to Sections 104/122 of CERCLA. The terms and conditions governing the RI/FS activities should be specified in an Administrative Order. The use of Administrative Orders is authorized in CERCLA Section 122(d)(3); they are the preferred type of agreement for RI/FS activities since they are authorized internally and therefore, may be negotiated more quickly

[1] The legal authority to enter into agreements with PRPs is found in CERCLA Section 122(a). This section then refers to response actions conducted pursuant to Section 104(b). For the purposes of this guidance, Sections 104/122 will be cited when referring to such authority.

than Consent Decrees. Before SARA, Administrative Orders were signed using the authorities of Section 106 of CERCLA. New provisions in SARA allow for Orders to be signed using the authorities of Sections 104/122; Section 104/122 Orders do not require EPA to make a finding of imminent and substantial endangerment.

RI/FS activities developed subsequent to the Administrative Order are set forth in a Statement of Work, which is then embodied or incorporated by reference into the Order. A Work Plan describing detailed procedures and criteria by which the RI/FS will be performed is developed by the PRPs and, after approval by EPA, should also be incorporated by reference into the Administrative Order.

It is the responsibility of the lead agency to ensure the quality of the effort if the PRPs assume responsibility for conducting the RI/FS. Therefore, EPA will establish oversight procedures and project controls to ensure that the response actions are consistent with CERCLA and the National Contingency Plan (NCP). Section 104(a)(1) of CERCLA mandates that no PRP be allowed to undertake an RI/FS unless EPA determines that the party(ies) conducting the RI/FS is qualified to do so. In addition, Section 104(a)(1) requires that a qualified party be contracted with or arranged for to assist in overseeing and reviewing the conduct of the RI/FS and, that the PRPs agree to reimburse EPA for the costs associated with the oversight contract or arrangement.

III. INITIATION OF ENFORCEMENT ACTIVITIES

As part of effective management of enforcement activities, timely settlements for RI/FS activities are to be pursued. This includes conducting PRP searches early in the site discovery process and subsequent notification to all PRPs of their potential liability and of their opportunity to perform response activities. Guidance on conducting timely and effective PRP searches is contained in the guidance manual, "Potentially Responsible Party Search Manual" (August 17, 1987 - OSWER Directive No. 9834.6).

EPA policy has been to notify PRPs of their potential liability for the planned response activities, to exchange information about the site, and to provide PRPs with an opportunity to undertake or finance the response activities themselves. In the past this has been accomplished by issuing a "general notice" letter to the PRPs. In addition to the use of the general notice letter, Section 122(e) of CERCLA now authorizes EPA to use "special notice" procedures, which for an RI/FS, establish a 60 to 90 day moratorium and formal negotiation period. The purpose of the moratorium is to provide time for formal negotiation between EPA and the PRPs for conduct of RI/FS activities. In particular, use of the special notice procedures triggers a 60 day moratorium on EPA conduct of the RI/FS. During the 60 day moratorium, if the PRPs provide EPA with a "good faith offer" to conduct or finance the RI/FS, the negotiation period can be extended to a total of 90 days. EPA considers a good faith offer to be a written proposal where the PRPs make a showing of their qualifications and willingness to conduct or finance the RI/FS. Minor deficiencies in the PRPs' initial submittals should not be grounds for a

determination that the offer is not a good faith offer or that the PRPs are unable to perform the RI/FS.

To facilitate, among other things, PRP participation in the RI/FS process, Section 122(e)(1) requires the special notice letter to provide the names and addresses of other PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of substances at the site, to the extent this information is available at the time of special notice. Regions are encouraged to release this information to PRPs when the notice letters are issued. To expedite settlements, Regions are also encouraged to give PRPs as much guidance as possible concerning the RI/FS process. It is appropriate to transmit to PRPs copies of important guidance documents such as the RI/FS Guidance, as well as model Administrative Orders and Statements of Work. A model Administrative Order can be found in the memorandum from Gene Lucero entitled, "Model CERCLA Section 106 Consent Order for an RI/FS" (January 31, 1985 - OSWER Directive No. 9835.5). This model order is currently being revised to reflect SARA requirements and will be forthcoming. A model Statement of Work has been included as Appendix C to the RI/FS Guidance, while a model Statement of Work for PRP-lead RI/FSs is currently being developed by OWPE. Other Regional and Headquarters guidance relating to technical issues may be given to PRPs, as well as examples of project plans (plans that must be developed prior to the conduct of the RI/FS) that are of high quality. A description of the required project plans is included in Attachment II.

Although use of the special notice procedures is discretionary, Regions are encouraged to use these procedures in the majority of cases. If EPA decides not to employ the special notice procedures described in Section 122(e), the Agency will notify the PRPs in writing of such a decision, including an explanation as to why EPA believes the use of the special notice procedures is inappropriate. Additional information on the content of special notice letters, including the use of these notice provisions, can be found in the memorandum entitled "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987 - OSWER Directive No. 9834.10).

Section 121(f)(1) requires that the State be notified of PRP negotiations and that an opportunity for State participation in such negotiations be provided. In addition, Section 122(j)(1) requires that if a release or threat of release at the site in question may have resulted in damages to natural resources, EPA must notify the appropriate Federal or State Trustee and provide an opportunity for the Trustee to participate in the negotiations. To simplify the notification of Federal Trustees, the Agency intends to provide a list of projects in the Superfund Comprehensive Accomplishments Plan (SCAP) to the Trustees as notice to participate in the negotiations. In those cases where there is reason to believe that a significant natural resource will be affected, direct coordination with the Federal and/or State Trustee will be required.

IV. CONDITIONS FOR EPA INVOLVEMENT IN, AND PRP INITIATION OF, RI/FS ACTIVITIES

Under Section 104(a)(1) EPA may authorize PRPs to conduct RI/FS activities at any site, provided the PRPs can do so promptly and properly and can meet the conditions specified by EPA for conducting the RI/FS. These conditions are discussed in Attachment I of this appendix and involve the scope of activities, the organization of the PRPs, and the PRPs' (and their contractors') demonstrated expertise. EPA encourages PRPs to conduct the RI/FS provided that the PRPs commit in an Order (or Consent Decree) under CERCLA Sections 104/122 (or Sections 106/122 for a Decree) to conduct a complete RI/FS to the satisfaction of EPA, under EPA oversight.[2] Oversight of RI/FS activities by the lead agency is required by Section 104(a)(1) and is intended to assure that the RI/FS is adequate for lead agency identification of an appropriate remedy, and that it will otherwise meet the Agency requirements of CERCLA, the NCP, and relevant Agency guidance. EPA will allow PRPs to conduct RI/FS activities and will provide review and oversight under the following general circumstances.

EPA's priority is to address those NPL sites that have been identified on the SCAP. The SCAP is an EPA management plan which identifies site- and activity-specific Superfund financial allocations for each quarter of the current fiscal year. When employing Section 122(e) notice procedures, EPA will notify PRPs of its intention to conduct RI/FS activities at NPL sites in a manner that allows at least 90 days notice before obligating the funds necessary to complete the RI/FS (see Section III of this guidance). During this time frame PRPs may elect to conduct the RI/FS, under the review and oversight of EPA. If the PRPs agree to conduct the RI/FS they must meet the conditions discussed in Attachment I. The scope and terms for conducting the studies are embodied in an Agreement; as mentioned in Section II, Administrative Orders are the preferred type of Agreement for RI/FS activities.

EPA will not engage in lengthy discussions with PRPs over whether the PRPs will conduct the RI/FS; rather, EPA will adhere to the time frames established by the Section 122 special notice provisions. In most instances, once Fund resources have been obligated to conduct the RI/FS, the PRPs will no longer be eligible to conduct the RI/FS activities at the site.

The actions described below are typically taken to initiate RI/FS activities:

- EPA develops a site-specific Statement of Work (SOW) in advance of the scheduled RI/FS start. This SOW is then provided to the PRPs along with a draft of the Administrative Order (or

[2] For a State-lead enforcement site the State is responsible for oversight unless otherwise specified in the agreement between the State and EPA. EPA should maintain communication with the State to ensure that the State is providing oversight of the remedial activities.

Consent Decree) at the initiation of negotiations. (PRPs may, with EPA approval, submit a single site plan that incorporates the elements of an SOW and a detailed Work Plan as a first deliverable once the Agreement has been signed. This combined site plan must clearly set forth the scope of the proposed RI/FS and would be incorporated into the Agreement in place of the SOW.)

- Final provisions of the SOW are negotiated with the Order.

- EPA determines whether the PRPs possess the necessary capabilities to conduct an RI/FS in a timely and effective manner (conducted simultaneously with other negotiations).

- EPA develops a Community Relations Plan specifying any activities that may be required of the PRPs. (Community relations activities are discussed in Attachment II.)

- EPA determines contractor and staff resources required for oversight and initiates planning the necessary oversight requirements. This process may include preparing a Statement of Work, if a contractor is to develop an "oversight plan."

- EPA and PRPs identify and procure any necessary assistance.

- PRPs submit a Work Plan to EPA for Agency review and approval. The Work Plan must present the methodology and rationale for conducting the RI/FS as well as detailed procedures and requirements, if such procedures have not been set forth in the Agreement. This Work Plan, which in most instances is one of the first deliverables under the Order, is commonly incorporated into the Agreement following EPA approval.

- PRPs are responsible for obtaining access to the site; however, if access cannot be obtained, EPA, with the assistance of DOJ, will secure access subject to PRP reimbursement for the costs incurred in securing such access.

These standardized actions ensure that the scope of the RI/FS activities to be conducted by the PRPs, and the procedures by which the RI/FS is performed, are consistent with EPA policy and guidance. Additional actions may be required either for a technically complex site or for a site where a number of PRPs are involved. Regardless of the circumstances, the actions listed in this section should be negotiated as expeditiously as possible. Specific elements of these actions are discussed in Attachment II.

V. DEVELOPMENT OF THE RI/FS ADMINISTRATIVE ORDER OR CONSENT DECREE

The PRPs must respond to EPA's notice letter by either declining, within the time specified, to participate in the RI/FS, or by offering a good faith proposal to EPA for performing the RI/FS. Declining to participate in the RI/FS may be implied if the PRPs do not negotiate during

the moratorium established by the notice letter. If the PRPs have declined to participate, or the time specified has lapsed, EPA will obligate funds for performing the RI/FS. If a good faith proposal is submitted, EPA will negotiate with the PRPs on the scope and terms for conducting the RI/FS.

The results of successful negotiations will, in most cases, be contained in an Administrative Order, or where the site is in litigation, in a Judicial Consent Decree entered into pursuant to Section 122(d) of CERCLA. Guidance for the development of an Administrative Order is provided in OWPE's document "Administrative Order: Workshop and Guidance Materials" (September 1984), and in the memorandum from Gene Lucero entitled "Model CERCLA Section 106 Consent Order for an RI/FS" (January 31, 1985). (The latter guidance is currently being revised since the provisions in SARA allow for Orders to be signed using the authorities of Sections 104/122.)

An Administrative Order (or Consent Decree) will generally contain the scope of activities to be performed (either as a Statement of Work or Work Plan), the oversight roles and responsibilities, and enforcement options that may be exercised in the event of noncompliance (such as stipulated penalties). In addition to the above, the Agreement will typically include the following elements, as agreed upon by EPA, the PRPs, and other signatories to the Agreement.

- <u>Jurisdiction</u> - Describes EPA's authority to enter into Administrative Orders or Consent Decrees.

- <u>Parties bound</u> - Describes to whom the Agreement applies and is binding upon.

- <u>Purpose</u> - Describes the purpose of the Agreement in terms of mutual objectives and public benefit.

- <u>Findings of fact, determination, and conclusions of law</u> - Provides an outline of facts upon which the Agreement is based, including the fact that PRPs are not subject to a lesser standard of liability and will not receive preferential treatment from the Agency in conducting the RI/FS.

- <u>Notice to the State</u> - Verifies that the State has been notified of pending site activities.

- <u>Work to be performed</u> - Provides that PRPs submit project plans to the lead-agency for review and approval before commencing RI/FS activities. Project plans are those plans developed in order to effectively conduct the RI/FS project and include: a Work Plan, describing the methodology, rationale, and schedule of all tasks to be performed during the RI/FS; a Sampling and Analysis Plan, describing the field sampling procedures to be performed as well as the quality assurance procedures which will be followed for sampling and analysis (including a description of how the data gathered during the RI/FS will be

managed) and the analytical procedures to be employed; and a Health and Safety Plan describing health and safety precautions to be exercised while onsite. (More information on the contents of these project plans can be found in Attachment II of this appendix.)

- Compliance with CERCLA, the NCP, and Relevant Agency Guidance - Specifies that the actions at a site will comply with the requirements of CERCLA, the NCP, and relevant Agency guidance determined to be appropriate for site remediation.

- Reimbursement of costs - Specifies that PRPs will assume all costs of performing the work required by the Agreement. In addition, this section commits PRPs to reimbursement of costs associated with oversight activities. This includes reimbursement for qualified party assistance in oversight, as required by Section 104(a)(1). This section should also specify the nature and kind of cost documentation to be provided and the process for billing and receiving payment.

- Reporting - Specifies the type and frequency of reporting that PRPs must provide to EPA. Normally the reporting requirements will, at a minimum, include the required project plans as well as those deliverables required by the RI/FS Guidance. Additional reporting requirements are left to the discretion of the Regions. That is, Regions may require additional deliverables such as interim reports on particular RI or FS activities.

- Designated EPA, State, and PRP project coordinators - Specifies that EPA, the State, and PRPs shall each designate a project coordinator.

- Site access and data availability - Stipulates that PRPs shall allow access to the site by EPA, the State, and oversight personnel. Access will be provided for inspection and monitoring purposes that in any way pertain to the work undertaken pursuant to the Order. In addition, access will be provided in the event of project takeover. This section also stipulates that EPA will be provided with all currently available data.

- Record preservation - Specifies that all records must be maintained by both parties for a minimum of 6 years after termination of the Agreement, followed by a provision requiring PRPs to offer the site records to EPA before destruction.

- Administrative record requirements - Provides that all information upon which the selection of remedy is based must be submitted to EPA in fulfillment of the administrative record requirements pursuant to Section 113 of CERCLA. (Additional information on administrative record requirements is contained in Attachment III.)

- Dispute resolution - Specifies steps to be taken if a dispute occurs. The Administrative Order states that with respect to all submittals and work performed, EPA will be the final arbiter, while the court is the final arbiter for a Consent Decree. (More information on dispute resolution can be found in Attachment IV of this appendix.)

- Delay in performance/stipulated penalties - Specifies EPA's authority to invoke stipulated penalties for noncompliance with Order or Decree provisions. Section 121 of CERCLA requires that Consent Decrees contain provisions for penalties in an amount not to exceed $25,000 per day. In addition to stipulated penalties, Section 122(l) provides that Section 109 civil penalties apply for violations of Administrative Orders and Consent Decrees. Delays that endanger public health and/or the environment may result in termination of the Agreement and EPA takeover of the RI/FS. (More information on stipulated penalties can be found in the Office of Enforcement and Compliance Monitoring's (OECM) "Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees" (September 21, 1987) and in Attachment IV of this appendix.)

- Financial assurance - Specifies that PRPs should have adequate financial resources or insurance coverage to address liabilities resulting from their RI/FS activities. When using contractors, PRPs should certify that the contractors have adequate insurance coverage or that contractor liabilities are indemnified.

- Reservation of rights - States that PRPs are not released from all CERCLA liability through compliance with the Agreement, or completion of the RI/FS. PRPs may be released from liability relating directly to RI/FS requirements, if PRPs complete the RI/FS activities to the satisfaction of EPA.

- Other claims - Provides that nothing in the Agreement shall constitute a release from any claim or liability other than, perhaps, for the cost of the RI/FS, if completed to EPA satisfaction. Also provides that nothing in the Agreement shall constitute preauthorization of a claim against the Fund under CERCLA. This section should also specify the conditions for indemnification of the U.S. Government.

- Subsequent modifications/additional work - Specifies that the PRPs are committed to perform any additional work or subsequent modifications which are not explicitly stated in the Work Plan, if EPA determines that such work is needed to enable the selection of an appropriate response action. (Attachment IV contains additional information on this clause.)

VI. STATEMENT OF WORK AND WORK PLAN

Based upon available models and guidance, the Region should present to the PRPs at the initiation of negotiations a Statement of Work (SOW) and draft Administrative Order. The SOW describes the broad objectives and general activities to be undertaken in the RI/FS. (The PRPs may develop the SOW if it is determined to be appropriate for a particular case.) Once the PRPs receive the SOW they develop a more detailed Work Plan, which should be incorporated by reference into the Order following EPA approval. The Work Plan expands the tasks described in the SOW and presents the rational and methodology (including detailed procedures and schedules) for conducting the RI/FS. It should be noted that EPA, rather than the PRPs, may develop the work plan in the event of unusual circumstances.

VII. REVIEW AND OVERSIGHT OF THE RI/FS

To ensure that the RI/FS conforms to the NCP and the requirements of CERCLA, including Sections 104(a)(1) and 121, EPA will review and oversee PRP activities. Oversight is also required to ensure that the RI/FS will result in sufficient information to allow for remedy selection by the lead agency.

The oversight activities that EPA, the State, and other oversight personnel will be performing should be determined prior to the initiation of the RI/FS. Different mechanisms will be used for the review and oversight of different PRP products and activities. These mechanisms, and corresponding PRP activities, should be determined and if possible incorporated in the Order. Generally, the following oversight activities should be specified:

- Review of plans, reports, and records;
- Oversight of field activities (including maintenance of records and documentation);
- Meetings; and
- Special studies.

Section 104(a)(1) requires that the President contract with or arrange for a "qualified person" to assist in the oversight and review of the conduct of the RI/FS. EPA believes that qualified persons, for the purposes of overseeing RI/FS activities, are those firms or individuals with the professional qualifications, expertise, and experience necessary to provide assurance that the Agency is conducting meaningful and effective oversight of PRP activities. In this context, the qualified person generally will be either an ARCs, TES, or REM contractor. EPA employees, employees of other Federal agencies, State employees, or any other qualified person EPA determines to be appropriate however, may be asked to perform the necessary oversight functions.

As part of the Section 104 requirements, PRPs are required to reimburse EPA for qualified party oversight costs. It is Agency policy to recover all response costs at a site including all costs associated with oversight. Additional guidance on oversight and project control activities is presented in Attachments III and IV, respectively.

VIII. CONTROL OF ACTIVITIES

EPA will usually not intervene in a PRP RI/FS if activities are conducted in conformance with the conditions and terms specified by the Order. When deficiencies are detected, EPA will take immediate steps to correct the PRP activities. Deficiencies will be corrected through the use of the following activities: (1) identification of the deficiency; (2) demand for corrective measures; (3) use of dispute resolution mechanisms, where appropriate; (4) imposition of penalties; and if necessary, (5) PRP RI/FS termination and project takeover or judicial enforcement. These activities are described in detail in Attachment IV of this appendix.

IX. PRP PARTICIPATION IN AGENCY-FINANCED RI/FS ACTIVITIES

PRPs that elect not to perform the RI/FS should be allowed an opportunity for involvement in a Fund-financed RI/FS. Private parties may possess technical expertise or knowledge about a site which would be useful in developing a sound RI/FS. Involvement by PRPs in the development of a Fund-financed RI/FS may also expedite remediation by identifying and satisfactorily resolving differences between the Agency and private parties.

Section 113(k)(2)(B) requires that interested persons, including PRPs, be provided an opportunity for participation in the development of the administrative record. PRP participation may include the submittal of information, relevant to the selection of remedy, for inclusion in the record and/or the review of record contents and submittal of comments on such contents.

The extent of additional PRP involvement will be left to the discretion of the Region and may include activities such as:

- Access to the site to observe sampling and analysis activities;
- Access to validated data and draft reports.

With respect to PRP access to a site, it is within the Regions' discretion to impose conditions based on safety and other relevant considerations. To the extent that the Region determines that access is appropriate under the circumstances, PRPs must reimburse EPA for all identifiable costs incurred with the connection of the accesses afforded the PRPs, and must execute appropriate releases in favor of the EPA and its contractors. With respect to providing data, it should be noted that the Region is required to allow private citizens access to the same

information that is provided to the PRPs. The Regions must therefore take this into consideration when determining the extent of the PRP's involvement in a Fund-financed RI/FS.

Aside from participation in the administrative record, which is a statutory requirement, the final decision whether to permit PRPs to participate in other aspects of the Fund-financed RI/FS (as well as the scope of any participation) rests with the Regions. This decision should be based on the ability of PRPs to organize themselves so that they can participate as a single entity, and the ability of PRPs to participate without undue interference with or delay in completion of the RI/FS, and other factors that the Regions determine are relevant. The Region may terminate PRP participation in RI/FS development if unnecessary expenses or delays occur.

X. CONTACT

For further information on the subject matter discussed in this interim guidance, please contact Susan Cange (FTS 475-9805) of the Guidance and Oversight Branch, Office of Waste Program Enforcement.

ATTACHMENT I

CONDITIONS FOR PRP CONDUCT OF THE RI/FS

Organization and Management

When several potentially responsible parties are involved at a site they must be able to organize themselves quickly into a single representative body to negotiate with EPA. To facilitate this negotiation process, EPA will make available the names and addresses of other PRPs, in accordance with the settlement provisions of CERCLA Section 122(e). Either a single PRP or an organized group of PRPs may assume responsibility for development of the RI/FS.

Scope of Activities

As part of the negotiation process PRPs must agree to follow the site-specific Statement of Work (SOW) as the basis for conducting an RI/FS. PRPs are required to submit an RI/FS Work Plan setting forth detailed procedures and tasks necessary to accomplish the RI/FS activities described in the SOW. EPA may approve reasonable modifications to the SOW and will reject any requests for modifications that are not consistent with CERCLA (as amended by SARA), the NCP, the requirements set forth in this guidance document, the RI/FS Guidance, or other relevant CERCLA guidance documents.

Demonstrated Capabilities

PRPs must demonstrate to EPA that they possess, or are able to obtain, the technical expertise necessary to perform all relevant activities identified in the SOW, and any amendments that may be reasonably anticipated to that document. In addition, PRPs must demonstrate that they possess the managerial expertise and have developed a management plan sufficient to ensure that the proposed activities will be properly controlled and efficiently implemented. PRPs must also demonstrate that they possess the financial capability to conduct and complete the RI/FS in a timely and effective manner. These capabilities are discussed briefly below.

- Demonstrated Technical Capability

PRPs should be required to demonstrate the technical capabilities of key personnel involved in executing the project. Personnel qualifications may be demonstrated by submitting resumes and references. PRPs may demonstrate the capabilities of the firm that will perform the work by outlining their past areas of business, relevant projects and experience, and overall familiarity with the types of activities to be performed as part of the remedial investigation and feasibility study.

It is important that qualified firms be retained for performing RI/FS activities. Firms that do not have the necessary expertise for performing RI/FS studies may create unnecessary delays in the project

and may create situations which further endanger public health or the environment. These situations may be created when PRP contractors submit insufficient project plans, submit deficient reports, or perform inadequate field work. Furthermore, excessive Agency oversight may be required in the event that an unqualified contractor performs the RI/FS; the Agency may have to significantly increase its workload by providing repeated reviews of project plans, reports, and oversight of field activities.

The PRPs must also demonstrate the technical capabilities of the laboratory chosen to do the analysis of samples collected during the RI/FS. If a non-CLP laboratory is selected, EPA may require a submission from the laboratory which provides a comprehensive statement of the laboratories' personnel qualifications, equipment specifications, security measures, and any other material necessary to prove the laboratory is qualified to conduct the work.

o Demonstrated Management Capability

PRPs must demonstrate that they have the administrative capabilities necessary for conducting the RI/FS in a responsible and timely manner. A management plan should be submitted to EPA either during negotiations or as a part of the Work Plan which includes a discussion of roles and responsibilities of key personnel. This management plan should include an RI/FS team organization chart describing responsibilities and lines of authority. Positions and responsibilities should be clearly related to technical and managerial qualifications. The PRPs should also demonstrate an understanding of effective communications, information management, quality assurance, and quality control systems. PRPs usually procure the services of consultants to conduct the required RI/FS activities. The consultants must demonstrate, in addition to those requirements stated above, effective contract management capabilities.

o Demonstrated Financial Capability

The PRPs should develop a comprehensive and reasonable estimate of the total cost of anticipated RI/FS activities. EPA will decide on a case-by-case basis if the PRPs will be required to demonstrate that they have the necessary financial resources available and committed to conduct the RI/FS activities. The resources estimated should be adequate to cover the anticipated costs for the RI/FS as well as the costs for oversight, plus a margin for unexpected expenses. If, during the conduct of the RI/FS the net worth of the financial mechanism providing funding for the RI/FS is reduced to less than that required to complete the remaining activities, the PRPs should immediately notify EPA. Under conditions specified in the Order, PRPs are required to complete the RI/FS regardless of initial cost estimates or financial mechanisms.

- Assistance for PRP Activities

If PRPs propose to use consultants for conducting or assisting in the RI/FS, the PRPs should specify the tasks to be conducted by the consultants and submit personnel and corporate qualifications of the proposed firms to the EPA for review. Verification should be made that the PRPs' consultants have no conflict of interest with respect to the project. Any consultants having current EPA assignments as prime contractors or as subcontractors must obtain approval from their EPA Contract Officers before performing work for PRPs. Lack of clarification on possible conflicts of interest may delay the PRP RI/FS. EPA will reserve the right to review the PRPs' proposed selection of consultants and will disapprove their selection if, in EPA's opinion, they either do not possess adequate technical capabilities or there exists a conflict of interest. It should be noted that the responsibility for selection of consultants rests with the PRPs.

ATTACHMENT II

INITIATION OF PRP RI/FS ACTIVITIES

Development of the Statement of Work

After the PRPs have been identified in the PRP Search Report they are sent either a general notice letter followed by a special notice letter or a general notice letter followed by an explanation pursuant to Section 122(a) why special notice procedures are not being used. EPA will engage in negotiations with those PRPs who have submitted a good faith offer in response to the notice letter and therefore have volunteered to perform the RI/FS. While the PRPs are demonstrating their capabilities for conducting the RI/FS, EPA will negotiate the terms of the Administrative Order. Either an acceptable Statement of Work or Work Plan must be incorporated by reference into the Agreement.

The Statement of Work (SOW) is typically developed by EPA and describes, in a comprehensive manner, all RI/FS activities to be performed, as reasonably anticipated, prior to the onset of the project. The SOW focuses on broad objectives and describes general activities that will be undertaken to achieve these objectives. Detailed procedures by which the work will be accomplished are not presented in the SOW, but are described in the subsequent Work Plan that is developed by the PRPs. In certain instances, with the approval of EPA, PRPs may prepare a single site plan incorporating the elements of an SOW and a Work Plan. In such instances, the site plan will be incorporated into the Order in place of the broader SOW.

- Use of the EPA Model SOW

EPA has developed a model SOW defining a comprehensive RI/FS effort which is contained in the RI/FS Guidance. Additionally, a model SOW for a PRP-lead RI/FS is being developed by OWPE and will be forthcoming. The Regions should develop a site-specific SOW based upon the model(s). RI/FS projects managed by PRPs will involve, at a minimum, all relevant activities set forth in the EPA model SOW. Further, all plans and reports identified as deliverables in the EPA model SOW must be identified as deliverables in the site-specific SOW and/or the Work Plan developed by the PRPs. Additional deliverables may be required by the Regions and should be added to the Administrative Order.

- Modification of the EPA Draft SOW Requirements

The activities set forth in the model SOW are considered by EPA to be the critical RI/FS activities that are required by the NCP. PRPs should present detailed justifications for any proposed modifications and amendments to the activities set forth in the SOW. EPA will review all proposed modifications and approve or disapprove their inclusion in the SOW based on available information, EPA policy and guidance, overall program objectives, and the requirements of the NCP and CERCLA. EPA

will not allow modifications that, in the judgment of the Agency, will lead to an unsatisfactory RI/FS or inconsistencies with the NCP.

Review of the RI/FS Project Plans

RI/FS project plans include those plans developed for the RI/FS. At a minimum the project plans should include a Work Plan, a Sampling and Analysis Plan, a Health and Safety Plan, and a Community Relations Plan. The Community Relations Plan is developed by EPA and should include a description of the PRPs' role in community relations activities, if any. EPA review and approval of the work plan and sampling and analysis plan will usually be required before PRPs can begin site activities. An example when limited project activities may be initiated prior to approval of the project plans would be if additional information is required to complete the Sampling and Analysis Plan. Additionally, conditional approvals to the Work Plan and Sampling and Analysis Plan may be provided in order to initiate field activities in a more timely manner. It should be noted that EPA does not "approve" the PRPs' Health and Safety Plan but rather, it is reviewed to ensure the protection of public health and the environment. The PRPs may be required to amend the plan if EPA determines that it does not adequately provide for such protection.

o Contents of the Work Plan

The Work Plan expands the tasks of the SOW, and the responsibilities specified in the Agreement, by presenting the rationale and methodology (including detailed procedures) for conducting the RI/FS. Typically the Work Plan is developed after the draft Order and then incorporated into the Agreement. In some cases however, it may be appropriate for EPA to develop the Work Plan prior to actual negotiation with the PRPs and attach the plan to the draft Agreement. The PRP RI/FS Work Plan must be consistent with current EPA guidance. Guidance on developing acceptable Work Plans is available in the RI/FS Guidance. Additional guidance will be forthcoming in the proposed NCP. Once the Work Plan is approved by EPA, it becomes a public document and by the terms of the Agreement, should be incorporated by reference into that document. The Work Plan should, at a minimum, contain the following elements.

Introduction/Background Statement - PRPs should provide an introductory or background statement describing their understanding of the work to be performed at the site. This should include historical site information and should highlight present site conditions.

Objectives - A statement of what is to be accomplished and how the information will be utilized.

Scope - A detailed description of the work to be performed including a definition of work limits.

Management Plan - A description of the project management showing personnel with authority and responsibility for the appropriate aspects of the project and specific tasks to be performed. A

single person should be identified as having overall responsibility for the project and specific tasks to be performed.

Work Schedule - A statement outlining the schedule for each of the required activities. This could be presented in the form of a Gantt or milestone chart. The schedule in the work plan must match that in the draft order.

Deliverables - A description of the work products that will be submitted and their schedule for delivery. The schedule should include specific dates, if possible. Overwise, the schedule should be in terms of the number of days/week after approval of the work plan.

o Contents of the Sampling and Analysis Plan.

A Sampling and Analysis Plan (SAP) must be submitted by the PRPs before initiation of relevant field activities. This plan contains two separate elements: a Field Sampling Plan and a Quality Assurance Project Plan. These documents were previously submitted as separate deliverables, but are now combined into one document. Though the SAP is typically implemented by PRP contractors, it is the responsibility of the PRPs to ensure that the goals and standards of the plan are met. (Verification that the goal and standards of the SAP are met will also be part of EPA's oversight responsibilities.) The SAP should contain the following elements:

Field Sampling Plan - The Field Sampling Plan includes a detailed description of all RI/FS sampling and analytical activities that will be performed. These activities should be consistent with the NCP and relevant CERCLA guidance. Further guidance on developing Field Sampling Plans is presented in the RI/FS Guidance.

Quality Assurance Project Plan - The SAP must include a detailed description of quality assurance/quality control (QA/QC) procedures to be employed during the RI/FS. This section is intended to ensure that the RI/FS is based on the correct level or extent of sampling and analysis required to produce sufficient data for evaluating remedial alternatives for a specific site. A second objective is to ensure the quality of the data collected during the RI/FS. Guidance on appropriate QA/QC procedures may be found in the RI/FS Guidance as well as "Data Quality Objectives for the RI/FS Process" (March 1987 - OSWER Directive No. 9355.0-7B).

If the SAP modifies any procedures established in relevant guidance, it must provide an explanation and justification for the change.

o Other Project Plans

Other project plans that are likely to be required in the RI/FS process include the Health and Safety Plan and the Community Relations Plan.

Health and Safety Plan - PRPs should include a Health and Safety Plan either as part of the Work Plan or as a separate document. The Health and Safety Plan should address the measures taken by the PRPs to ensure that all activities will be conducted in an environmentally safe manner for the workers and the surrounding community. EPA reviews the Health and Safety Plan to ensure protection of public health and the environment. EPA does not, however, "approve" this plan. Guidance on the appropriate contents of a Health and Safety Plan may be found in the RI/FS Guidance. In addition, Health and Safety requirements are found in "OSHA Safety and Health Standards: Hazardous Waste Operations and Emergency Response" (40 CFR Part 1910.120).

Community Relations Plan - EPA must prepare a Community Relations Plan for each NPL site. The extent of PRP involvement in community relations activities should be detailed in this plan. Additional information on Community Relations activities is contained below.

o Review and Approval

PRPs must submit all of the required RI/FS project plans (with the exception of the Community Relations Plan which is developed by EPA) to EPA for review, and in the case of the Work Plan and SAP, approval. EPA will review the plans for their technical validity and consistency with the NCP and relevant EPA guidance. Typically, the Agency must review and approve these plans before PRPs can begin any site activities. Any disagreements that arise between EPA and PRPs over the contents of the plans should be resolved according to the procedures set forth in the dispute resolution section of the relevant EPA/PRP Agreement.

Community Relations

EPA is responsible for developing and implementing an effective community relations program, regardless of whether RI/FS activities are Fund-financed or conducted by PRPs. At State-lead enforcement sites, funded by EPA under Superfund Memoranda of Agreement (see the "Draft Guidance on Preparation of a Superfund Memorandum of Agreement (October 5, 1987 - OSWER Directive No. 9375.0-01)), the State has the responsibility for development and implementation of a community relations program. PRPs may, under certain circumstances, assist EPA or the State in implementing the community relations activities. For example, PRPs may wish to participate in community meetings and in preparing fact sheets. PRP participation in community relations activities would, however, be at the discretion of the Regional Office, or the State, and would require oversight by the lead-agency. EPA will not under any circumstances negotiate press releases with PRPs.

EPA designs and implements community relations activities according to CERCLA and the NCP. A Community Relations Plan must be developed by EPA for all NPL sites as described by the EPA guidance, "Community Relations in Superfund: A Handbook" (U.S. EPA, 1988 - OSWER Directive No. 9230.0-03). The Community Relations Plan must be independent of negotiations with PRPs. Guidance for conducting community relations activities at Superfund enforcement sites is

specifically addressed by Chapter VI of the Handbook and the EPA memo entitled "Community Relations Activities at Superfund Enforcement Sites--Interim Guidance" (November 1988 - OSWER Directive No. 9230.0-3B). In some instances the decision regarding PRP participation in community relations activities will be made after the Community Relations Plan has been developed. As a result, the plan will need to be modified by EPA to reflect Agency and PRP roles and responsibilities.

EPA, or the State, will provide the Community Relations Plan to all interested parties at the same time. In general, if the case has not been referred to the Department of Justice (DOJ) for litigation, community relations activities during the RI/FS should be the same for Fund- and PRP-lead sites. If the case has been (or may potentially be) referred to DOJ for litigation, constraints will probably be placed on the scope of activities. The EPA Community Relations Plan may be modified after consultation with the technical enforcement staff, the Regional Counsel and other negotiation team members, including, if the case is referred, the lead DOJ or Assistant United States Attorneys (i.e., the litigation team). This technical and legal staff must be consulted prior to any public meetings or dissemination of fact sheets or other information; approval must be obtained prior to releases of information and discussions of technical information in advance. PRP participation in implementing community relations activities will be subject to EPA (or State) approval in administrative settlements and EPA/DOJ in civil actions. Key activities specific to community relations programs for enforcement sites include the following:

- Public Review of Work Plans for Administrative Orders

The PRP Work Plan, as approved by EPA, is incorporated into the Administrative Order (or Consent Decree). Once the Agreement is signed, it becomes a public document. Although there is no requirement for public comment on an Administrative Order, Regional staff are encouraged to announce, after the Order is final, that the PRP is conducting the RI/FS. Publication of notice and a corresponding 30-day comment period is required however, for Consent Decrees.

- Availability of RI/FS Information from the PRPs

PRPs, in agreeing to conduct the RI/FS, must also agree to provide all information necessary for EPA to implement a Community Relations Plan. The Agreement should identify the types of information that PRPs will provide, and contain conditions concerning the provision of this information. EPA should provide the PRPs with the content of the plan so that the PRPs can fully anticipate the type of information that will be made public. All information submitted by PRPs will be subject to public inspection (i.e., available through Freedom of Information Act requests, public dockets, or the administrative record) unless the information meets an exemption. An example would be if the information is deemed either as enforcement sensitive by EPA, or business confidential by EPA (based on the PRPs' representations), in conformance with 40 CFR Part 2.

Development of the ATSDR Health Assessment

Section 104(j)(6) of CERCLA requires the Agency for Toxic Substances and Disease Registry (ATSDR) to perform health assessments at all NPL facilities according to a specified schedule. The purpose of the health assessment is to assist in determining whether any current or potential threat to human health exists and to determine whether additional information on human exposure and associated health risks is needed.

The EPA remedial project manager (RPM) should coordinate with the appropriate ATSDR Regional representative for initiation of the health assessment. In general, the health assessment should be initiated at the start of the RI/FS. The ATSDR Regional representative will provide information on data needs specific to performing a health assessment to ensure that all necessary data will be collected during the RI.

The RPM and the ATSDR Regional representative should also coordinate the transmission and review of pertinent documents dealing with the extent and nature of site contamination (i.e., applicable technical memoranda and the draft RI). As ATSDR has no provisions for withholding documents, if requested by the public, the RPM must discuss enforcement sensitive documents and drafts with the ATSDR Regional representative rather than providing copies to them. This will ensure EPA's enforcement confidentiality. Further guidance on coordination of RI/FS activities with ATSDR can be found in the document entitled "Guidance for Coordinating ATSDR Health Assessment Activities with the Superfund Remedial Process" (March 1987 - OSWER Directive No. 9285.4-02).

Identification of Oversight Activities

EPA will review RI/FS plans and reports as well as provide field oversight of PRP activities during the RI/FS. To ensure that adequate resources are committed and that appropriate activities are performed, EPA should develop an oversight plan that defines the oversight activities that must be performed including EPA responsibilities, RI/FS products to be reviewed, and site activities that EPA will oversee. In planning for oversight, EPA should consider such factors as who will be performing oversight and the schedule of activities that will be monitored. A tracking system for recording PRP milestones should be developed. This system should also track activities performed by oversight personnel and other appropriate cost items such as travel expenses.

Identification and Procurement of EPA Assistance

In accordance with Section 104(a)(1) EPA must arrange for a qualified party to assist in oversight of the RI/FS. The following section provides guidance for identifying and procuring such assistance for EPA activities.

o Assistance for EPA Activities

As specified in Section 104(a)(1), EPA is required to contract with or arrange for a qualified person to assist in oversight of the RI/FS. Qualified individuals are those groups with the professional qualifications, expertise, and experience necessary to provide assurance that the Agency is conducting appropriate oversight of PRP RI/FS activities.

Normally, EPA will obtain oversight assistance either through the Technical Enforcement Support (TES) contract, the Alternative Remedial Contracts Strategy Contract (ARCS), or occasionally through the Remedial Action (REM) contracts. In some cases oversight assistance may be provided by States through the use of Cooperative Agreements. Oversight assistance may also be obtained through the U.S. Army Corps of Engineers or other governmental agencies; interagency Agreements should be utilized to obtain such assistance.

ATTACHMENT III

REVIEW AND OVERSIGHT OF THE RI/FS

Review of Plans, Reports, and Records

EPA will review all RI/FS products which are submitted to the Agency as specified in the Work Plan or Administrative Order. PRPs should ensure that all plans, reports, and records are comprehensive, accurate, and consistent in content and format with the NCP and relevant EPA guidance. After this review process, EPA will either approve or disapprove the product. If the product is found to be unsatisfactory, EPA will notify the PRPs of the discrepancies or deficiencies and will require corrections within a specified time period.

o Project Plans

EPA will review all project plans that are submitted as deliverables in fulfillment of the Agreement. These plans include the Work Plan, the Sampling and Analysis Plan (including both the Field Sampling Plan and the Quality Assurance Project Plan), and the Health and Safety Plan. If the initial submittals are not sufficient in content or scope, the RPM will request that the PRPs submit revised document(s) for review. EPA does not "approve" the PRP's Health and Safety Plan but rather, it is reviewed to ensure the protection of public health and the environment. The PRP's Work Plan and Sampling and Analysis Plan, on the other hand, must be reviewed and approved prior to the initiation of field activities. Conditional approval to these plans may be provided in order to initiate field activities in a more timely manner.

The PRPs may be required to develop additional Work Plans or modify the initial Work Plan contained in or created pursuant to the Agreement. These changes may result from the need to: (1) re-evaluate the RI/FS activities due either to changes in or unexpected site conditions; (2) expand the initial Work Plan when additional detail is necessary; or (3) modify or add products to the Work Plan based on new information (e.g., a new population at risk). EPA will review and approve all Work Plans and/or modifications to Work Plans once they are submitted for review.

o Reports

PRPs will, at a minimum, submit monthly progress reports, technical memorandums or reports, and the draft and final RI/FS reports as required in the Agreement. To assist in the development of the RI/FS and review of documents, additional deliverables may be specified by the Region and included in the Agreement. These reports and deliverables will be reviewed by EPA to ensure that the activities specified in the Order and approved Work Plan are being properly implemented. These reports will generally be submitted according to the conditions and schedule set forth in the Agreement. Elements of the PRP reports are discussed below.

Monthly Progress Reports - The review of monthly progress reports is an important activity performed during oversight. These reports should provide sufficient detail to allow EPA to evaluate the past and projected progress of the RI/FS. PRPs should submit these written progress reports to the RPM. The report should describe the actions and decisions taken during the previous month and activities scheduled during the upcoming reporting period. In addition, technical data generated during the month (i.e., analytical results) should be appended to the report. Progress reports should also include a detailed statement of the manner and extent to which the procedures and dates set forth in the Agreement/Work Plan are being met. Generally, EPA will determine the adequacy of the performance of the RI/FS by reviewing the following subjects discussed in progress reports:

- Technical Summary of Work

  The monthly report will describe the activities and accomplishments performed to date. This will generally include a description of all field work completed, such as sampling events and installation of wells; a discussion of analytical results received; a discussion of data review activities; and a discussion of the development, screening, and detailed analysis of alternatives. The report will also describe the activities to be performed during the upcoming month.

- Schedule

  EPA will oversee PRP compliance with respect to those schedules specified in the Order. Delays, with the exception of those specified under the Force Majeure clause of the Agreement, may result in penalties, if warranted. The RPM should be immediately notified if PRPs cannot perform required activities or cannot provide the required deliverables in accordance with the schedule specified in the Work Plan. In addition, PRPs should notify the RPM when circumstances may delay the completion of any phase of the work or when circumstances may delay access to the site. PRPs should also provide to the RPM, in writing, the reasons for, and the anticipated duration of, such delays. Any measures taken or to be taken by the PRPs to prevent or minimize the delay should be described including the timetables for implementing such measures.

- Budget

  The relationship of budgets to expenditures should be tracked where the RI/FS is funded with a financial mechanism established by the PRPs. If site activities require more funds than originally estimated, EPA must be assured that the PRPs are financially able to undertake additional expenditures. While EPA does not have the authority to review or approve a PRP budget, evaluating costs during the course of the RI/FS allows EPA to effectively monitor activity to ensure timely

completion of RI/FS activities. If the PRPs run over budget, EPA must be assured that they can continue the RI/FS activities as scheduled. Therefore, if specified in the Agreement, PRPs should submit budget expenditures and cost overrun information to EPA. Budget reports need not present dollar amounts, but should indicate the relationship between remaining available funds and the estimate of the costs of remaining activities.

o Problems

Any problems that the PRPs encounter which could affect the satisfactory performance of the RI/FS should be brought to the immediate attention of EPA. Such problems may or may not be a force majeure event, or caused by a force majeure event. EPA will review problems and advise the PRPs accordingly. Problems which may arise include, but are not limited to:

- Delays in mobilization or access to necessary equipment;
- Unanticipated laboratory/analytical time requirements;
- Unsatisfactory QA/QC performance;
- Requirements for additional or more complex sampling;
- Prolonged unsatisfactory weather conditions;
- Unanticipated site conditions; and
- Unexpected, complex community relations activities.

Other Reports - All other reports, such as technical reports and draft and final RI/FS reports, should be submitted to EPA according to the schedule contained in the Order or the approved Work Plan. EPA will review and approve these reports as they are submitted. Suggested formats for the RI/FS reports are presented in the RI/FS Guidance.

o Records

PRPs should preserve all records, documents, and information of any kind relating to the performance of work at the site for a minimum of 6 years after completion of the work and termination of the Administrative Order. After the 6-year period, the PRPs should offer the records to EPA before their destruction.

Document control should be a key element of all recordkeeping. The following activities require careful recordkeeping and will be subject to EPA oversight:

Administration - PRP administrative activities should be accurately documented and recorded. Necessary precautions to prevent errors

or the loss or misinterpretation of data should be taken. At a minimum, the following administrative actions should be documented and recorded:

- Contractor work plans, contracts, and change orders;
- Personnel changes;
- Communications between and among PRPs, the State, and EPA officials regarding technical aspects of the RI/FS;
- Permit application and award (if applicable); and
- Cost overruns.

Technical Analysis - Samples and data should be handled according to procedures set forth in the Sampling and Analysis Plan. Documentation establishing adherence to these procedures should include:

- Sample labels;
- Shipping forms;
- Chain-of-custody forms; and
- Field log books.

All analytical data in the RI/FS process should be managed as set forth in the Sampling and Analysis Plan. Such analytical data may be the product of:

- Contractor laboratories;
- Environmental and public health studies; and
- Reliability, performance, and implementability studies of remedial alternatives.

Decision Making - Actions or communications among PRPs that involve decisions affecting technical aspects of the RI/FS should be documented. Such actions and communications include those of the project manager (or other PRP management entity), steering committees, or contractors.

o Administrative Record Requirements

Section 113(k) of CERCLA requires that the Agency establish an administrative record upon which the selection of a response action is based. A suggested list of documents which are most likely to be included in any adequate administrative record is provided in the memorandum entitled "Draft Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (June 23, 1988 - OSWER Directive No. 9833.3A). More detailed guidance will be forthcoming, including guidance provided in

the revisions to the NCP. There are, however, certain details associated with compiling and maintaining an administrative record that are unique to PRP RI/FS activities.

EPA is responsible for compiling and maintaining the administrative record, and generating and updating an index. If EPA and the PRPs mutually agree, the PRPs may be allowed to house and maintain the administrative record file at or near the site; they may not, however, be responsible for the actual compilation of the record. Housing and maintaining the administrative record would include setting up a publicly accessible area at or near the site and ensuring that documents remain and are updated as necessary. EPA must always be responsible for deciding whether documents are included in the administrative record; transmitting records to the PRPs; and maintaining the index to the repository.

The information which may comprise the administrative record must be available to the public from the time an RI/FS Work Plan is approved by EPA. Once the Work Plan has been approved the PRPs must transmit to EPA, at reasonable, regular intervals, all of the information that is generated during the RI/FS that is related to selection of the remedy. The required documentation should be specified in the Administrative Order. The Agreement should also specify those documents generated prior to the RI/FS that must be obtained from the PRPs for inclusion in the record file. This may include any previous studies conducted under State or local authorities, management documents held by the PRPs such as hazardous waste shipping manifests, and other information about site characteristics or conditions not contained in any of the above documents.

Field Activities

o Field Inspections

Field inspections are an important oversight mechanism for determining the adequacy of the work performed. EPA will therefore conduct field inspections as part of its oversight responsibilities. The oversight inspections should be performed in a way that minimizes interference with PRP site activities or undue complication of field activities. EPA will take corrective steps, as described in Section VII and Attachment IV of this appendix, if unsatisfactory performance or other deficiencies are identified.

Several field-related tasks may be performed during oversight inspections. These tasks include:

On-site presence/inspection - As specified in Section 104(e)(3), EPA reserves the right to conduct on-site inspections at any reasonable time. EPA will therefore establish an on-site presence to assure itself of the quality of work being conducted by PRPs. At a minimum, field oversight will be conducted during critical times, such as the installation of monitoring wells and during sampling events. EPA will focus on whether the PRPs adhere to procedures specified in the SOW and Work Plan(s), especially those concerning QA/QC procedures. Further guidance regarding site characterization

activities is presented in the RI/FS Guidance, the "Compendium of Superfund Field Operations Methods" (August 1987 - OSWER Directive No. 9355.0-141), the "RCRA Ground Water Technical Enforcement Guidance Document" (September 1986 - OSWER Directive No. 9950.1), the NEIC Manual for Groundwater/Subsurface Investigations at Hazardous Waste Sites (U.S. EPA, 1981c), and OWPE's forthcoming "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies."

Collection and analysis of samples - EPA may collect a number of QA/QC samples including blank, duplicate, and split samples. The results of these sample analyses will be compared to the results of PRP analyses. This comparison will enable EPA to identify potential quality control problems and therefore help to evaluate the quality of the PRP investigation.

Environmental Monitoring - EPA may supplement any PRP environmental monitoring activity. Such supplemental monitoring may include air or water studies to determine additional migration of sudden releases that may have occurred as a result of site activities.

o QA/QC Audits

EPA may either conduct, or require the PRPs to conduct (if specified in the Agreement), laboratory audits to ensure compliance with proper QA/QC and analytical procedures, as specified in the Sampling and Analysis Plan. These audits will involve on-site inspections of laboratories used by PRPs and analyses of selected QA/QC samples. All procedures must be in accordance with those outlined in The User's Guide to the Contract Laboratory Program, (U.S. EPA, 1986) or otherwise specified in the Sampling and Analysis Plan.

o Chain-of-Custody

Chain-of-custody procedures will be evaluated by EPA. This evaluation will focus on determining if the PRPs and their contractors adhere to the procedures set forth in the Sampling and Analysis Plan. Proper chain-of-custody procedures are described in the National Enforcement Investigation Center (NEIC) Policies and Procedures Manual, (U.S. EPA, 1981b). Evaluation of chain-of-custody procedures will occur during laboratory audits as well as during on-site inspections of sampling activities.

Meetings

Meetings between EPA, the State, and PRPs should be held on a regular basis (as specified in the Agreement) and at critical times during the RI/FS. Such critical times may at a minimum include when the SOW and the Work Plan are reviewed, the RI is in progress and completed, remedial alternatives are developed and screened, detailed analysis of the alternatives is performed, and the draft and final RI/FS reports are

submitted. These meetings will discuss overall progress, discrepancies in the work performed, problems encountered in the performance of RI/FS activities and their resolution, community relations, and other related issues and concerns. While meetings may be initiated by either the PRPs or EPA at any time, they will generally be conducted at the stages of the RI/FS listed below.

o Initiation of Activities

EPA, the State, and the PRPs may meet at various times before field activities begin to discuss the initial planning of the RI/FS. Meetings may be arranged to discuss, review, and approve the SOW; to develop the EPA/PRP Agreement; and to develop, review, and approve the Work Plan.

o Progress

EPA may request meetings to discuss the progress of the RI/FS. These meetings should be held at least quarterly and will focus on the items submitted in the monthly progress reports and the findings from EPA oversight activities. Any problems or deficiencies in the work will be identified and corrective measures will be requested (see Section VIII and Attachment IV) of this appendix.

o Closeout

EPA may request a closeout meeting upon completion of the RI/FS. This meeting will focus on the review and approval of the final RI/FS report, termination of the RI/FS Agreement, and any final on-site activities which the PRPs may be required to perform. These activities may include maintaining the site and ensuring that fences and warning signs are properly installed. The transition to remedial design and remedial action will also be discussed during this meeting.

Special Studies

EPA may determine that special studies related to the PRP RI/FS are required. These studies can be conducted to verify the progress and results of RI/FS activities or to address a specific complex or controversial issue. Normally, special studies are performed by the PRPs; however, there may be cases in which EPA will want to conduct the independent studies. The PRPs should be informed of any such studies and given adequate time to provide necessary coordination of site personnel and resources. If not provided for in the Agreement, modifications to the Work Plan may be required.

ATTACHMENT IV

CONTROL OF ACTIVITIES

Identification of Deficiencies

Oversight activities may identify unsatisfactory or deficient PRP performance. The determination of such performance may be based upon findings such as:

- o Work products are inconsistent with the SOW or Work Plan;
- o Technical deficiencies exist in submittals or other RI/FS products;
- o Unreasonable delays occur while performing RI/FS activities; and
- o Procedures are inconsistent with the NCP.

Corrective Measures

The need to perform corrective measures may arise in the event of deficiencies in reports or other work products, or unsatisfactory performance of field or laboratory activities. When deficiencies are identified corrective measures may be sought by: (1) notifying the PRPs; (2) describing the nature of the deficiency; and (3) either requesting the PRPs to take whatever actions they regard as appropriate or setting forth appropriate corrective measures. The following subsections describe this process for each of the two general types of activities that may require corrective measures.

- o Corrective Measures Regarding Work Products

Agency review and approval procedures for work products generally allow three types of responses: (1) approval; (2) approval with modifications; and (3) non-approval. Non-approval of a work product (including project plans) immediately constitutes a notice of deficiency. EPA will immediately notify the PRPs if any work product is not approved and will explain the reason for such a finding.

Approval with modifications will not lead to a notice of deficiency if the modifications are made by the PRPs without delay. If the PRPs significantly delay in responding to the modifications, the RPM would issue a notice of deficiency to the PRP project manager detailing the following elements:

- A description of the deficiency or a statement describing in what manner the work product was found to be deficient or unsatisfactory;

- Modifications that the PRPs should make in the work product to obtain approval;

- A request that the PRPs prepare a plan, if necessary, or otherwise identify actions that will lead to an acceptable work product;

- A schedule for submission of the corrected work product;

- An invitation to the PRPs to discuss the matter in a conference; and

- A statement of the possibility of EPA takeover at the PRPs' expense, EPA enforcement, or penalties (as appropriate).

o Corrective Measures Regarding Field Activities

When the lead agency discovers that the PRPs (or their contractors) are performing the RI/FS field work in a manner that is inconsistent with the Work Plan, the PRPs should be notified of the finding and asked to voluntarily take appropriate corrective measures. The request is generally made at a progress meeting, or, if immediate action is required, at a special meeting held specifically to discuss the problem. If corrective measures are not voluntarily taken, the RPM should, in conjunction with appropriate Regional Counsel, issue a notice of deficiency containing the following elements:

- A description of the deficiency;

- A request for an explanation of the failure to perform satisfactorily and a plan for addressing the necessary corrective measures;

- A statement that failure to present an explanation may be taken as an admission that there is no valid explanation;

- An invitation to discuss the matter in a conference (where appropriate);

- A statement that stipulates penalties may accrue or are accruing, project termination may occur, and/or civil action may be initiated if appropriate actions are not taken to correct the deficiency; and

- A description of the potential liabilities incurred in the event that appropriate actions are not taken.

Modifications to the Work Plan/Additional Work

Under the Administrative Order (or Consent Decree), PRPs agree to complete the RI/FS, including the tasks required under either the original Work Plan or a subsequent or modified Work Plan. This may

include determinations and evaluations of conditions that are unknown at the time of execution of the Agreement. Modifications to the original RI/FS Work Plan are frequently required as field work progresses. Work not explicitly covered in the Work Plan is often required and therefore provided for in the Order. This work is usually identified during the RI and is driven by the need for further information in a specific area. In general, the Agreement should provide for fine-tuning of the RI, or the investigation of an area previously unidentified. As it becomes clear what additional work is necessary, EPA will notify the PRPs of the work to be performed and determine a schedule for completion of the work.

EPA must ensure that clauses for modifications to the Work Plan are included in the Agreement so that the PRPs will carry out the modifications as the need for them is identified. To facilitate negotiation on these points, EPA may consider one or more of the following provisions in the Agreement for addressing such situations:

- Defining the limits of additional work requirements;
- Specifying the dispute resolution process for modified Work Plans and additional work requirements;
- Defining the applicability of stipulated penalties to any additional work which the PRPs agree to undertake.

Dispute Resolution

As discussed elsewhere in this guidance, the RI/FS Order developed between EPA and the PRPs sets forth the terms and conditions for conducting the RI/FS. An element of this Agreement is a statement of the specific steps to be taken if a dispute arises between EPA (or its representatives) and the PRPs. These steps should be well defined and agreed upon by all signatories to the Agreement.

A dispute with respect to the Order is followed by a specific period of discussion with the PRPs. After the discussion period, EPA issues a final decision which becomes incorporated into the Agreement. Administrative Orders should clarify that with respect to all submittals and work performed, EPA will be the final arbiter. The court, on the other hand, is the final arbiter for Consent Decrees.

Penalties

As an incentive for PRPs to properly conduct the RI/FS and correct any deficiencies discovered during the conduct of the Agreement, EPA should include stipulated penalties. Section 121 provides up to $25,000 per day in stipulated penalties for violations of a Consent Decree while Section 122 allows EPA to seek or impose civil penalties for violations of Administrative Orders.[3] Penalties should begin to accrue on the first

[3] In order to provide for stipulated penalties in an Administrative Order the parties must voluntarily include them in the terms of the Agreement.

day of the deficiency and continue to be assessed until the deficiency is corrected. The type of violation (i.e., reporting requirements vs. implementation of construction requirements), as well as the amounts, should be specified as stipulated penalties in the Agreement to avoid negotiations on this point which may delay the correction. The amounts should be set pursuant to the criteria of Section 109 and as such must take into account the nature, circumstances, extent, and gravity of the violations as well as the PRPs' ability to pay, prior history of violations, degree of culpability, and the economic benefit resulting from noncompliance. Additional information on stipulated penalties can be found in OECM's "Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees" (September 27, 1987).

Project Takeover

Generally, EPA will consult with PRPs to discuss deficiencies and corrective measures. If these discussions fail, EPA has two options: (1) pursue legal action to force the PRPs to continue the work; or (2) take over the RI/FS. If taking legal action will not significantly delay implementation of necessary remedial or removal actions, EPA may commence civil action against the noncomplying PRP to enforce the Administrative Order. Under a Consent Decree, the matter would be presented to the court in which the Decree was filed to enforce the provisions of the Decree.

If a delay in RI/FS activities endangers public health and/or the environment or will significantly delay implementation of necessary remedial actions, EPA should move to replace the PRP activities with Fund-financed actions. The RPM will take the appropriate steps to assume responsibility for the RI/FS, including issuing a stop-work order to the PRPs and notifying the EPA remedial contractors. In issuing stop work orders, RPMs should be aware that Fund resources may not be automatically available. But, in the case of PRP actions which threaten human health or the environment, there may be no other course of action. Once this stop work order is issued, a fund-financed RI/FS will be undertaken consistent with EPA funding procedures.

WDR378/029

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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

JUN 7 1988

MEMORANDUM

SUBJECT: Transmittal of Guidance on Documenting Decisions not to Take Cost Recovery Actions

FROM: Jonathan Z. Cannon, Acting Director
Office of Waste Programs Enforcement (OWPE)

TO: Addressees

Attached is the "Guidance on Documenting Decisions not to Take Cost Recovery Actions". This document was previously circulated for comment with the Draft Superfund Cost Recovery Strategy. The guidance discusses the importance of documenting decisions not to pursue cost recovery actions and provides procedures for drafting memoranda to document such decisions. The procedures should be followed for every site where a decision is made not to pursue an action for the recovery of unreimbursed Fund expenditures.

In addition to implementing the procedures for new cases as they arise, each Region should review the backlog of sites where a decision, express or implicit, was made not to pursue cost recovery. A cost recovery close-out memorandum should be written for every site in this backlog. To conserve resources and yet address this backlog, Regions should initially draft close-out memoranda for only those sites that will not be pursued further and the total unreimbursed response costs exceed two hundred thousand dollars. Among those cases, the Regions should concentrate first on close-out memoranda for those sites with larger amounts of unrecovered costs. Once that backlog has been addressed, the less than two hundred thousand dollar cases should be revisited and closed out, if appropriate.

Attachment

Addressees: Directors, Waste Management Divisions
Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division
Region II
Directors, Hazardous Waste Management Divisions
Regions III, VI
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X
Directors, Environmental Services Divisions
Regions I, VI, VII

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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE
OSWER Directive No. 9832.11

JUN 7 1990

MEMORANDUM

SUBJECT: Guidance on Documenting Decisions not to Take Cost Recovery Actions

FROM: Jonathan Z. Cannon, Acting Director
Office of Waste Programs Enforcement (OWPE)

TO: Addressees

PURPOSE

This document is intended to provide information on the content of close-out memoranda which should be written for each site where the Agency does not intend, on the basis of certain information, to pursue an action for recovery of unreimbursed Hazardous Substances Superfund (Fund) monies.

BACKGROUND

Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA), the Agency is charged with management of the Fund. Fund monies expended in response to releases or threatened releases of hazardous substances are fully recoverable pursuant to §107 of CERCLA as long as response actions conducted were not inconsistent with the national contingency plan (NCP).

Because of the Agency's accountability for management of the Fund, an affirmative decision whether or not to pursue a cost recovery action must be made for each removal action and remedial action in which CERCLA funds are expended. Decisions to pursue

cost recovery are reflected in referrals and settlements. Decisions not to proceed with cost recovery efforts are to be documented in close-out memoranda. Determinations not to pursue cost recovery are important for satisfying EPA management's accountability for cost recovery on a site by site basis. Additionally, by documenting which cases will not be pursued, the close-out memoranda will aid in planning referrals and projecting revenues to the Fund in future years.

PRE-DECISIONAL ACTIVITIES

In removal actions where time permits and in remedial actions, the Regions generally will conduct a PRP search and seek to have the PRPs undertake the clean-up prior to funding a response action. PRP searches that are not essentially complete when the response starts are completed during or after the federally-funded action. While the primary purposes of a PRP search are to identify PRPs who may be induced to perform work and to provide evidence for cost recovery lawsuits, PRP searches also form a basis for determining not to pursue a cost recovery action. For example, it may form a basis for not filing where PRPs cannot be identified, where the evidence linking possible PRPs to a site is very tenuous, or where PRPs are not viable.

TIMING OF THE MEMORANDUM

CERCLA §113 establishes the statute of limitations for recovery of post-SARA response costs.[1] The statute of limitations provision, which was added by SARA, applies only to those response actions initiated after the effective date of SARA. To minimize opportunities for challenges in litigation, however, the Regions should operate as though the SARA statute of limitations applies to all removal and remedial actions, and plan the referral of viable cases consistent with that assumption.

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[1]/ CERCLA §113 states "An initial action for recovery of costs referred to in section 107 must be commenced--(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) for continued response action: and (B) for a remedial action , within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph."

When to prepare a cost recovery close-out memorandum will depend upon the specifics of the case. Normally, the decision not to pursue cost recovery should be made some time after the case would be "ripe" for referral of a judicial action for cost recovery.[2] The close-out memorandum may be prepared and signed as soon as the Region is reasonably sure that information developed later will have no bearing on viability of a cost recovery action. For example, if a thorough PRP search is conducted prior to the commencement of a federally funded remedial design but no viable PRPs are found, a cost recovery close-out memorandum may be prepared while the remedial design is underway. If there is a settlement for less than all costs and the Region does not intend to recover the remaining costs (e.g., where there are no viable PRPs), this must be addressed in the ten point settlement analysis (if known at that time) or a separate close-out memorandum. Of course, signing of a close-out memorandum does not extinguish or compromise any cost recovery rights of EPA and does not foreclose the Agency from re-opening the case in the event additional parties are discovered, new evidence is developed, or any other reason. Moreover, to facilitate planning of referrals and projections of revenues, it is advantageous to close out cases as soon as possible. In any event, the memorandum must be prepared prior to the relevant real or potential statute of limitations date.

CONTENT OF THE MEMORANDUM DOCUMENTING A DECISION NOT TO PURSUE COST RECOVERY

If all available enforcement information on a site points to a recommendation not to pursue cost recovery, a close-out memorandum should be written by the staff program person assigned to the case and, where legal issues are involved, in consultation with the Office of Regional Counsel. The memorandum must be signed by the program division director (in most regions this is the Waste Management Division Director). The Memorandum and its supporting documents (e.g., the PRP Search Report, the Action Memorandum) should be placed in the permanent site file but should remain confidential since enforcement discretion is involved. As an enforcement confidential document, the memorandum is not available under the Freedom of Information Act. The memorandum should not be included in the administrative record.

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[2]/ As noted in the June 12, 1987 guidance "Cost Recovery Actions/Statute of Limitations", OSWER Directive No. 9832.3-1A, removal actions are ripe for referral of a judicial action immediately following completion of the action. Remedial sites become ripe for referral of a judicial action concurrent with the start of the remedial action.

The memorandum should include four sections: A. Site Description; B. Work Conducted and Associated Costs; C. Discussion of Basis not to Pursue Cost Recovery; and D. Conclusion.

A. Site Description. This section should briefly identify the site and its location, and the EPA identification number (12-digit EPA ID #). It should very briefly describe the environmental condition of the site. References to an Action Memorandum or Remedial Investigation/ Feasibility Study Report should be utilized to keep the memo brief.

B. Work Authorized and Conducted and Associated Costs. This section should briefly describe the action(s) taken by EPA (or a state under a cooperative agreement or a contractor) on the site and the initiation and completion date of the response action(s) taken. In addition, this section should provide an estimate of the amount of money spent or expected to be spent for all past and future response actions.

This section should also note any previous settlement(s) (whether for work or cost recovery) and the dollar value of the settlement(s).

C. Discussion of Basis not to Pursue Cost Recovery. This section should include the information that leads the Division Director to the conclusion that further cost recovery efforts should not occur. The memorandum must clearly state the reason that the decision was made not to pursue cost recovery at the site. Possible reasons include:

1) No PRPs were identified for the site. The potentially responsible party search report or other documentation of the completed PRP search effort should be referenced.

2) The PRPs identified in the PRP search are not financially viable. A written evaluation of the ability of any identified PRPs to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement should be conducted during the PRP search.[3] The close-out memorandum should reference the results of the evaluation.

3) The available evidence does not support one or more essential elements of a prospective case and there is no reason to believe that such evidence can be discovered or developed in the future.

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[3]/ The Potentially Responsible Search Manual, (OSWER Directive No. 9834.6) provides information on how to go about collecting information on the financial status of companies and individuals.

See the August 26, 1983 guidance document on Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (OSWER Directive No. 9832.1) for a further discussion of the essential elements of a cost recovery action.

4) The legal case is so questionable that cost recovery should not be pursued. The close-out memorandum should identify what legal issues (e.g., statute of limitations) would impair successful cost recovery efforts.

5) The Agency lacks resources to pursue the case. This reason may only be used for those sites where total costs of response at the site do not exceed two hundred thousand dollars and settlement efforts have been exhausted. Some actions will be filed where expenditures are less than $200,000. While such small cases should not automatically be closed out for this reason, some may have to be. For example, resources for very small cases for cost recovery efforts beyond the issuance of demand letters may not be available prior to the expiration of the statute of limitations. Sites closed out solely on this basis should not be closed out until it has been determined that there will not be resources to pursue an action prior to the expiration of the statute of limitations.

6) Other reasons. There may be reasons, not identified above, that form the basis for making a decision not to pursue cost recovery (or further cost recovery) at a particular site. One example is the existence of an agreement by the PRP(s) (in the form of a consent order or decree) to conduct the response action(s) approved by EPA. While the Agency may not have waived explicitly in the settlement some or all of oversight costs incurred, the Agency may decide later not to pursue those costs because the PRP(s) has been cooperative in agreeing to conduct work.[4] In this example, if there are non-settlors, the close-out memorandum must analyze the case against them based upon the factors delineated above. A low dollar threshold does not necessarily apply to a case where there are recalcitrant non-settlors.

Each close-out memorandum prepared must contain at least one of the above reasons but should contain all the reasons that exist.

D. Conclusion. The conclusion should restate the amount of the total response costs expended or projected for the site not

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4/ See the Interim CERCLA Settlement Policy, December 5, 1984, OSWER Directive No. 9835.0.

previously recovered. It should also restate the basis for not pursuing cost recovery at the site.

NEW INFORMATION In the event that a Cost Recovery Close-Out Memorandum has been signed and new relevant information comes to light, the case should be re-examined to determine whether the decision not to proceed with cost recovery efforts is still valid. Factors to be reviewed included the total dollar amount of funds expended or to be expended; the relevant statute of limitations date; and the changes to the strength of the case resulting from the new information.

REPORTING REQUIREMENTS

OWPE is incorporating reporting requirements for cost recovery close-out memoranda into the CERCLIS system. Guidance on using the system to report the information contained in the close-out memoranda will be issued in the future.

CONCLUSION

Close-out memoranda are necessary for EPA to effectively manage the Hazardous Substance Superfund. In order to effectively budget future Fund actions, EPA must know which sites have unrecoverable costs associated with them. The close-out memorandum discussed in this guidance will provide the Agency with a means of tracking those sites with no potential for return and allow them to be removed from consideration for further cost recovery action. If you have any questions concerning this guidance please contact Carolyn Mc Avoy of the Guidance and Oversight Branch, OWPE, at FTS 475-8723.

Addressees: Directors, Waste Management Divisions
Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division
Region II
Directors, Hazardous Waste Management Divisions
Regions III, VI
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X
Directors, Environmental Services Divisions
Regions I, VI, VII

cc: Regional Counsel, Regions I-X
Regional Counsel Waste Branch Chiefs, Regions I-X
Superfund (Enforcement) Branch Chiefs, Regions I-X
Superfund (Enforcement) Section Chiefs, Regions I-X

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

JUN 21 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

9831.7

MEMORANDUM

SUBJECT: Supporting State Attorneys General CERCLA Remedial and Enforcement Response Activities at NPL Sites

FROM: Henry L. Longest, Director
Office of Emergency and Remedial Response

Jonathan Z. Cannon, Acting Director
Office of Waste Programs Enforcement

TO: Waste Management Division Directors
Regions I - X

PURPOSE

The Agency has received several inquiries over the last few months about the eligibility of State Attorneys General (AG) to receive funds to support their CERCLA response activities at NPL sites, and the specific funding mechanisms for awarding these funds. Administrator Lee M. Thomas has also asked that we clarify the Agency's position on funding State AGs.

This memorandum reaffirms that it is the Agency's policy to enter into cooperative agreements with a single designated State lead agency. However, it also reaffirms that CERCLA funds may be available to State AGs, and describes three types of cooperative agreements by which funds may be passed through the State lead agency to the State AG.

BACKGROUND

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), authorizes EPA to enter into cooperative agreements with States to conduct response actions at hazardous waste sites. A Superfund cooperative agreement award is the assistance vehicle that transfers funds for response to the States and documents both EPA and State responsibilities for a site. EPA will only enter into cooperative agreements with the State lead agency (usually the State's pollution control agency) as designated by the State's Governor.

To involve other essential State agencies, such as the State AG's office, the State lead agency typically enters into an intergovernmental agreement with these other agencies. Therefore, the mechanism for providing funds to other State agencies is:

- A cooperative agreement <u>with</u> the State lead agency; along with
- A <u>pass-through</u> by the State lead agency to another agency by way of a two-party intergovernmental agreement prior to costs being incurred.

PROCEDURES FOR STATES AND EPA REGIONAL OFFICES

<u>The State</u>

The State AG may require Fund money to conduct their responsibilities for the State's CERCLA program, or the State lead agency may require State AG support to conduct their responsibilities. In either case, any request for funding from EPA must come from the State lead agency.

Therefore, in developing a cooperative agreement application, the State lead agency must:

- Indicate which portion of the funds requested are for the State AG's efforts; and
- Identify the specific tasks the State AG will conduct with the funds.

<u>The EPA Regional Office</u>

When reviewing cooperative agreement applications, Regional offices must consider how CERCLA funds will be allocated among State agencies, such as the State AG, whose participation may be necessary or required to achieve cleanup of the site. This step is essential, in order to determine that the State lead agency will have the necessary technical and legal support for completing all remedial and enforcement response activities at the site.

Knowledge of each State agency's roles and responsibilities will also enhance communication between those offices and between the State lead agency and Regional office in developing and implementing State projects.

Therefore, in reviewing a cooperative agreement application, the Region must determine:

- Whether the funding requirements and tasks of the State AG are addressed; and if not reflected in the application,

- Whether the State AG has been notified and consulted with by the State lead agency prior to awarding the agreement.

This will ensure that the State AG is fully informed of the project, and will have the necessary or required resources and staff to uphold its project responsibilities.

TYPES OF COOPERATIVE AGREEMENTS AVAILABLE FOR AG FUNDING

Generally, the three existing types of cooperative agreements will continue to be used to fund State AG efforts. These are (1) a Core Program Cooperative Agreement; (2) a Cooperative Agreement for Support Agencies at Federal-lead sites; and (3) a Site-specific Cooperative Agreement.

Core Program Cooperative Agreements (CPCAs)

CPCAs were created by EPA to ensure that each State has the funds it needs to develop and manage a program to carry out its CERCLA activities at NPL sites. Under a CPCA, a State may receive up to $250,000 to cover administrative, management and coordination costs associated with building, strengthening and maintaining a State's CERCLA program.

Under a CPCA, the State lead agency requests funds for developing, managing and/or supporting the State's CERCLA response program. Of the several functions that are eligible for CPCA funding some portion of the $250,000 may be provided to the State AG for its assistance in these areas, including such things as:

- Development and refinement of a State CERCLA enforcement program and procedures for implementation;

- Development of legal authorities;

- Protocols for document review for legal sufficiency and enforceability;

- Legal assistance, such as for coordinating the identification of ARARs and development of administrative records; and

- Other general legal assistance as appropriate.

With specific regard to the above tasks, if the State lead agency needs to identify a portion of the State's CPCA funds for the State AG, it must do so both in the cooperative agreement application and statement of work. If the State AG agrees to provide such assistance, a copy of the intergovernmental agreement to this effect must be attached to the application.

Please refer to the "Final Guidance on State Core Program Funding Cooperative Agreements," dated December 18, 1987, (OSWER Directive Number 9375.2-01) for more information on CPCAs.

Cooperative Agreements for Support Agencies at Federal-lead Sites

EPA coordinates all site-specific Federal-lead response activities with States. To monitor progress and meaningfully consult with EPA at these sites, States may review significant documents produced during a project, attend important meetings about site progress, and make site visits. Such site-specific activities performed by the State are known as management assistance.

Management assistance applies to Federal-lead enforcement sites as well as Federal-lead Fund-financed sites. With specific reference to Federal-lead enforcement sites, States may request management assistance funds so that they may be involved or participate in programmatic discussions and review activities with EPA and potentially responsible parties (PRPs). One example of this programmatic responsibility may be making a legal determination of applicable State requirements for an NPL site as part of the ARAR identification process. Management assistance funds are available to the State lead agency for these tasks. Assistance for such tasks may be provided by the State AG. However, even where the State AG is directly responsible for various tasks, the State lead agency must still request the funds from EPA for the State AG.

Cooperative Agreements for Site-specific Response at State-lead Sites (Single or Multi-Site Agreements)

EPA and the State will typically negotiate annually to determine who will have the lead for response activities at NPL sites. This holds true for both Fund-lead and enforcement-lead sites. Again, with specific reference to enforcement sites, EPA and the State may agree to designate a site as State-lead enforcement. If so, the State may receive funding for various enforcement activities, including (1) PRP searches; (2) issuance of notice letters to PRPs; (3) negotiations with PRPs to secure their commitment for site cleanup; (4) administrative or judicial enforcement actions to compel PRP cleanup; and (5) oversight of PRP response activities. The State lead agency may either have

the legal capability or responsibility to perform these tasks itself, or it may request or require that the State AG perform these tasks. In the latter case, the State lead agency must request the funds in its cooperative agreement application for State AG performance of these tasks. Under a multi-site cooperative agreement, the State lead agency may request funds for the State AG allocated to the sites at which the State AG may have a role.

Please see OERR's manual on "State Participation in the Superfund Program" and OWPE's "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites," dated April 7, 1987, (OSWER Directive Number 9831.6) for additional information on management assistance and site-specific cooperative agreements.

STATUS OF FUNDING TO SUPPORT STATE AG EFFORTS

For your information, we have attached a list of States which have identified funds for their State AG in either a CPCA or site-specific cooperative agreement with EPA. The site-specific cooperative agreements which have funds for pass-through to the State AG are currently all related to management assistance at enforcement sites.

Should you have any questions on this matter, please contact Tony Diecidue at FTS-382-4841 (enforcement-lead) or John Banks (Fund-lead) at FTS-382-2450.

Attachment

cc: Superfund Branch Chiefs, Region I - X
Superfund Section Chiefs, Region I - X
Regional Counsels, I - X
Grants Administration Contacts, Region I - X
National Association of Attorneys General

ATTACHMENT

STATUS OF FUNDING TO SUPPORT STATE AG EFFORTS*

REGION	SITE-SPECIFIC COOPERATIVE AGREEMENTS	CORE PROGRAM COOPERATIVE AGREEMENTS
1	None	None
2	None	Regional discussions with Puerto Rico indicate they may fund AG.
3	None	Virginia and Maryland
4	None	Regional discussions with South Carolina indicate they may fund AG.
5	None	None
6	Management assistance CA at an enforcement site (Combustion Inc., LA).	None. All State lead agencies have own legal support.
7	None	None
8	Colorado	Colorado
9	None	None
10	Oregon and Idaho	None

*Information gathered from phone survey of Regions I-X.

United States
Environmental Protection
Agency

Office of Emergency and
Remedial Response
Washington DC 20460

OSWER Directive 9200.7-01
July 1988

Superfund

EPA

Catalog of Superfund Program Directives

Interim Edition

FOREWORD

This Interim Catalog is designed to supplement the Office of Solid Waste and Emergency Response (OSWER) Directives System publications by providing a quick reference to the most current policy, procedural and technical directives governing the Office of Emergency and Remedial Response's (OERR) Superfund Program.

The Catalog is divided into four sections. The first contains a listing of documents by program and key word. Section II is organized numerically and abstracts all final documents. Section III contains a list of draft documents, with projected date for final release and an abstract, if available. Finally, an index lists all documents numerically.

This interim version covers all documents through July 31, 1988. Regular supplements will encompass certain planned changes for managing guidance, as well as a complete update of new issuances.

Copies of the Catalog may be obtained from the Superfund Docket at 202-382-6940. Questions or information about the Catalog may be directed to the Policy and Analysis Staff, Office of Program Management, OERR, Attention: Betti VanEpps, FTS or 202-475-8864.

TABLE OF CONTENTS

	Page
Key Word Cross-Reference	
Section 1 - Catalog of Superfund Program Directives By Program Responsibility And Key Word	1
Section 2 - Document Abstracts	16
Section 3 - Documents In Final Draft Development	42
Numerical Index To Superfund Program Directives	

KEY WORD CROSS-REFERENCE

		Page
Alternative Water Supplies	Remedial	6-13
Analytical, Laboratory Support and Sampling Instructions	Pre-Remedial	4-5
Bibliographies	Policy/Admin.	1-3
Claims	Remedial Removal	 14-15
Clean Water Act Interface	Remedial	6-13
Compliance with Other Laws (ARARs)	Policy/Admin.	1-3
Community Relations	Remedial	6-13
Contracts	Policy/Admin. Remedial Removal	1-3 6-13 14-15
Costs and Cost Sharing	Remedial Removal	6-13 14-15
Data Management	Policy/Admin. Remedial	1-3 6-13
Delegations	Policy/Admin.	1-3
Documents Management	Policy/Admin.	1-3
Drinking Water	Removal	14-15
Emergency and Expedited Response Actions .	Removal	14-15
Federal Facilities	Policy/Admin. Remedial	1-3 6-13
Field Operating Guides (Health, Safety) .	Remedial	6-13
Financial Management	Remedial Removal	6-13 14-15
Flood Plains and Wetlands	Policy/Admin.	1-3
Fund-Lead Projects	Remedial	6-13

Key Word Cross-Reference, continued

		Page
Groundwater	Policy/Admin. Remedial	1-3 6-13
Hazardous Site Ranking System (HRS)	Pre-Remedial	4-5
Interagency Agreements	Policy/Admin.	1-3
Mining Waste	Policy/Admin.	1-3
Methane Sites	Policy/Admin.	1-3
Modeling	Remedial	6-13
National Contingency Plan (NCP)	Policy/Admin.	1-3
National Priority List (NPL)	Pre-Remedial	4-5
Off-Site	Remedial	6-13
Preliminary Assessments & Site Investigations (PA/SI)	Remedial	6-13
Program Implementation	Policy/Admin. Removal	1-3 14-15
Public Health	Pre-Remedial	4-5
Quality Assurance	Policy/Admin.	1-3
RCRA/CERCLA Interface	Remedial Removal	6-13 14-15
Records of Decision	Remedial	6-13
Records Management	Removal	14-15
Risk and Exposure Assessment	Pre-Remedial	14-15
Recycling	Remedial	6-13
Regional Project Management	Remedial	6-13
Remedial Response, Initiation of	Remedial	6-13
Remedial Action Start Mandate	Remedial	6-13

Key Word Cross-Reference, continued

		Page
Remedial Investigation/Feasibility Studies (RI/FS)	Remedial	6-13
Remedial Design/Remedial Action (RD/RA) .	Remedial	6-13
SARA Implementation	Pre-Remedial	4-5
Selection of Remedy	Remedial	6-13
SITE Program	Remedial	6-13
Site Operations Planning	Remedial	6-13
State Program Management	Remedial	6-13
Statutory Issues	Removal	14-15
Technical Assistance Grants Program . . .	Remedial	6-13
Technologies	Remedial	6-13

SECTION 1 - CATALOG OF SUPERFUND PROGRAM DIRECTIVES BY PROGRAM RESPONSIBILITY AND KEY WORD

POLICY AND ADMINISTRATION

Bibliographies

9200.7-01 Catalog Of Superfund Directives (8/88), page 17

9380.1-02 Hazardous Waste Bibliography (10/9/86), page 41

Compliance With Other Laws (ARARs)

9234.0-05 Interim Guidance On Compliance With Applicable Or Relevant And Appropriate Requirements (7/9/87), page 20

9234.1-01 CERCLA Compliance With Other Laws Manual (Volumes 1 and 2) (Draft), page 42

9234.1-03 CERCLA Compliance With Other Laws Manual (Volume 3) (Draft), page 42

Contracts

9242.3-05 REM II Contract Award Fee Performance Evaluation Plan (7/25/84), page 21

Data Management

9221.0-02 CERCLIS Data Handling Support Policy Statement (3/31/86), page 17

Delegations

9012.10 Redelegations Of Authority Under CERCLA And SARA (5/25/88), page 16

9260.1-09 Delegations Of Remedy Selection To Regions (Under Delegation #14-5) (3/24/86), page 23

9260.3-00 Delegations Of Authority Under The Federal Water Pollution Control Act (FWPCA) Applicable To The Superfund Program (4/16/84), page 23

Policy and Administration, continued

Documents Management

9200.4-01 Guidelines For Producing Superfund Documents (2/9/87), page 17

Federal Facilities

9272.0-01 Implementation Of CERCLA Strategy At Federal Facilities (4/2/84), page 23

9272.0-03 Responsibilities For Federal Facilities (8/19/85), page 24

9272.0-04 Federal Facilities (8/19/85), page 24

9272.0-05 Responsibilities For Federal Facilities (8/26/85), page 24

Floodplains and Wetlands

9280.0-02 Policy On Flood Plains And Wetlands Assessments (8/85), page 25

Interagency Agreements

9295.1-01 Memorandum Of Understanding Between ASTDR And EPA (4/25/85), page 27

9295.2-02 Joint CORPS/EPA Guidance (6/24/83), page 27

9295.2-03 Interagency Agreement Between Corps Of Engineers And EPA In Executing P.L. 96-510 (CERCLA) (12/3/84), page 27

9295.5-01 Memorandum Of Understanding (MOU) Between FEMA And EPA For The Implementation Of CERCLA Relocation Activities Under PL 96-510 (4/5/85), page 28

9295.5-02 Implementation Of EPA/FEMA Memorandum Of Understanding (MOU) On CERCLA Relocations (6/14/85), page 28

Mining Waste

9234.0-04 Applicability Of RCRA Requirements To CERCLA Mining Waste Sites (8/19/86), page 20

National Contingency Plan (NCP)

9360.0-06A Relationship Of The Removal And Remedial Program Under The Revised NCP (3/10/86), page 37

Program Implementation

9200.3-01A Superfund Comprehensive Accomplishments Plan Manual (SCAP) (FY-88) (10/1/87), page 16

9200.3-02 Implementation Strategy For Reauthorized Superfund: Short Term Priorities For Action (10/24/86), page 16

9200.3-05 Flexibility In The FY-88 Superfund Regional Extramural Operating Plan (6/7/88), page 16

Quality Assurance

9200.1-05 Quality Assurance Plan For Superfund (Draft), page 42

PRE-REMEDIAL PROGRAM

Analytical, Laboratory Support, and Sampling Inspections

9240.0-01	User's Guide To The Contract Laboratory Program (8/1/84), page 20
9240.0-02	Analytical Support For Superfund (3/20/86), page 21

Hazardous Site Ranking System (HRS)

9355.0-03	Uncontrolled Hazardous Waste Site Ranking (3/31/88), page 33

National Priorities List (NPL)

9320.1-02	Guidance For Establishing The NPL (6/28/82), page 28
9320.1-05	RCRA/NPL Listing Policy (9/10/86), page 28
9320.1-06	RCRA Special Study Waste Definitions: Sites Requiring Additional Consideration Prior To NPL Proposal Under SARA (3/10/87), page 29
9320.1-07	Interim Guidance For Consideration Of Sections 105(g) And 125 Of SARA Prior To NPL Proposal Of Special Study Waste Sites (8/21/87), page 29
9320.1-08	Listing Of Municipal Landfills On NPL (10/24/86), page 29
9320.1-09	Listing Of Municipal Landfills On NPL (8/21/87), page 29
9320.3-01	Guidance For Updating The NPL (5/12/83), page 29
9320.3-02	Instructions For Promulgating NPL Update (1/18/84), page 30
9320.3-03	Procedures For Updating The NPL (5/23/84), page 30
9320.3-04	Guidance For Proposed NPL Update #3 (2/10/84), page 30
9200.6-02	NPL Docket Guidance (Draft), page 42
9320.3-05	NPL Information Update #4 (4/38/85), page 30
9320.3-06	Updating The NPL: Update #6 Proposal (9/17/85), page 30
9320.4-01	Interim Information Release Policy Systems - A Users Manual (4/18/85), page 30

Pre-Remedial Program, continued

Preliminary Analysis and Site Investigations (PA/SI)

9345.0-01	Preliminary Assessment (PA) Guidance FY-1988 (2/12/88), page 32
9345.1-02	Expanded Site Inspection (SI) Transitional Guidance For FY-88 (10/1/87), page 32

Public Health

9285.4-01	Superfund Public Health Evaluation Manual (10/1/86), page 26
9285.4-02	Guidance For Coordinating ASTDR Health Assessment Activities With The Superfund Remedial Process (5/14/87), page 27
9285.4-03	Health Assessments By ASTDR IN FY-88 (4/7/88), page 27

Risk and Exposure Assessment

9285.5-01	Superfund Exposure Assessment Manual (Draft), page 43
9285.6-01	Superfund Risk Assessment Information Directory (12/17/86), page 27

SARA Implementation

9345.2-01	Pre-Remedial Strategy For Implementing SARA (2/12/88), page 32

REMEDIAL PROGRAM

Alternative Water Supplies

9355.3-02 Guidance For Providing Alternative Water Supplies (3/1/88), page 33

Claims

9225.0-02 Forwarding Claims To Headquarters (4/25/84), page 17

Clean Water Act Interface

9330.2-04 Discharge Of Wastewater From CERCLA Sites Into POTWS (4/15/86), page 31

Community Relations

9230.0-02 Superfund Community Relations Policy (5/9/83), page 18

9230.0-03 Community Relations Handbook (Final) (2/86), page 18

9230.0-03A Community Relations Activities At Superfund Enforcement Sites - Interim Guidance (3/22/85), page 18

9230.0-03B Community Relations In Superfund - A Handbook (Interim Guidance) (6/88), page 18

9230.04 Community Relations Guidance For Evaluating Citizen Concerns At Superfund Sites (10/17/83), page 19

9230.05 Community Relations Requirements For Operable Units (10/2/83), page 19

9242.5-01 Procedures Manual For Superfund Community Relations Contractor Support (Draft), page 42

Remedial Program, continued

Contracts

9242.3-07	Implementation Of The Decentralized Contractor Performance Evaluation And Award Fee Process For Remedial Program Contracts (3/9/87), page 22
9250.1-01	Policy On Cost-Sharing At Publicly-Owned Sites (3/30/83), page 22
9250.3-01	Waiver Of 10% Cost Share For Remedial Planning Activities At Privately-Owned Sites (5/13/83), page 22
9250.3-02	Guidance On Implementing Waiver Of 10% Cost Sharing For Remedial Planning (6/3/83), page 22
9345.0-02	Guidance For Low and Medium Cost Site Discovery Activities (Draft), page 43
9355.0-10	Remedial Action Costing Procedures Manual (9/1/85), page 34

Data Management

9355.07B	Data Quality Objectives Development Guidance On Remedial Response Actions (Two Volumes) (3/1/87), page 34

Federal Facilities

9272.0-02	Initial Guidance On Federal Facilities ERCLA Sites (12/3/84), page 23
9318.0-04	Coordination Between Regional Superfund Staffs And Office Of Federal Activities (OFA) Regional Counterparts On CERCLA Actions (10/29/84), page 28

Field Operating Guides: Health, Safety & Technical

9285.1-01	Standard Operating Safety Guide Manual (11/19/84), page 25
9285.2-01	Field Standard Operating Procedures Manual #4 Site Entry (1/1/85), page 25
9285.2-02	Field Standard Operating Procedures Manual #7 - Decontamination Of Response Personnel (1/1/85), page 25
9285.2-04	Field Standard Operating Procedures Manual #8 - Air Surveillance (1/1/85), page 26
9285.2-05	Field Standard Operating Procedures Manual #6 - Work Zones (4/1/85), page 26
9285.3-01	Field Standard Operating Procedures Manual #9 - Site Safety Plan (4/1/85), page 26
9285.3-02	Occupational Health Technical Assistance And Enforcement Guidelines For Superfund, page 26
9285.3-02	Employee Occupational Health & Safety (7/7/87), page 26
9355.0-14	A Compendium Of Superfund Field Operations (12/1/87), page 35

Financial Management

9275.2-01	Remedial Financial Management Instructions (9/21/84), page 24
9355.1-01	Federal Lead Remedial Project Management Manual (12/1/86), page 36
9355.2-01	State Lead Remedial Project Manual (9/30/87), page 36
9355.1-03	Terminating Contracts For Superfund Fund-Lead Remedial Action Projects (Draft), page 44

Remedial Program, continued

Groundwater

9355.0-23 Interim Guidance On Funding For Ground Water And Surface Water Restoration Actions (10/26/87), page 35

9283.1-01 Recommendations For Groundwater Remediation At The Millcreek, Pennsylvania Site (3/24/86), page 25

9283.1-02 Guidance On Remedial Actions For Contaminated Groundwater At Superfund Sites (Draft), page 43

Modeling

9355.0-08 Modeling Remedial Actions At Uncontrolled Hazardous Waste Sites (4/1/88), page 34

Off-Site

9330.1-01 Requirements For Selecting An Off-Site Option In A Superfund (1/28/83), page 30

9330.2-05 CERCLA Off Site Policy: Providing Notice To Facilities (5/12/86), page 31

9330.2-06 CERCLA Off Site Policy: Eligibility Of Facilities in Assessment Monitoring (7/28/86), page 31

RCRA/CERCLA Interface

9330.1-02 Evaluation Of Program And Enforcement-Lead Records Of Decision (RODS) For Consistency With RCRA Land Disposal Restrictions (12/3/86), page 31

9347.0-0.1 Interim RCRA/CERCLA Guidance On Non-Contiguous Sites And On-Site Management Of Waste Residue (3/3/86), page 33

9347.0-02 Implementation Guidance For Solvent Dioxin, And California List Wastes Subject To RCRA/HSWA Land Disposal Restrictions (Draft), page 44

Records of Decision and Other Decision Documents

9340.2-01 Preparation Of Decision Documents For Approving Fund-Financed And PRP Remedial Actions Under CERCLA (2/27/85), page 32

9335.3-02 Guidance On Preparing Superfund Decision Documents: The Proposed Plan And ROD (Draft), page 43

9355.0-21 Additional Interim Guidance For FY-87 Records Of Decision (7/24/87), page 35

Recycling Superfund Wastes

9380.2-04 Decision Criteria For Recycling Wastes From CERCLA Sites (Draft), page 44

Regional Project Management

9355.1-02 RPM Primer (9/30/87), page 36

Remedial Response, Initiation Of

9242.3-03 Procedures For Initiating Remedial Response Services (7/6/84), page 21

Remedial Action Start Mandate

9355.0-24 OSWER Strategy For Management Oversight Of The RCRA/CERCLA Remedial Action Start Mandate (12/28/87), page 35

Remedial Design/Remedial Action (RD/RA)

9355.0-04A Superfund Remedial Design And Remedial Action (RD/RA) Guidance (6/1/86), page 33

Remedial Investigation/Feasibility Studies (RI/FS)

9340.1-01	Participation Of Potentially Responsible Parties (PRPS) In Development Of Remedial Investigations and Feasibilities Studies (RI's and FS's) (3/20/84), page 31
9355.0-05C	Guidance On Feasibility Studies (FS) Under CERCLA (6/1/85), page 33
9355.0-06B	Guidance On Remedial Investigations (RI's) Under CERCLA (6/1/85), page 34
9355.0-20	RI/FS Improvements (7/22/87), page 36
9355.3-01	Guidance For Conducting Remedial Investigations (RI) And Feasibility Studies (FS) Under CERCLA (Draft), page 44
9355.3-05	RI/FS Improvements Follow-Up (4/25/88), page 36

Selection of Remedy

9355.0-19	Interim Guidance On Superfund Selection Of Remedy (2/1/86), page 35

SITE Program

9380.2-03	Superfund Innovative Technology Evaluation (SITE) Program Strategy And Program Plan (12/1/86), page 41

Site Operations Planning

9380.2-02	Site Operations Plan (Draft), page 44

Remedial Program, continued

State Program Management

9375.0-01	Guidance In Preparation Of A Superfund Memorandum Of Agreement (SMOA) (Draft), page 44
9375.1-06	Award Of Cooperative Agreements To Political Subdivisions (2/12/87), page 39
9375.1-09	Interim Guidance On State Participation In Pre-Remedial And Remedial Response (7/21/87), page 40
9375.1-10	Involvement Of Indian Tribal Governments In The Superfund Pre-Remedial And Remedial Program (Draft), page 44
9375.1-11	State Procurement Under Superfund Remedial Cooperative Agreements (7/88), page 40
9375.1-12	State Access To EPA Contractors During Remedial Process (4/27/88), page 40
9375.2-01	State CORE Program Funding Cooperative Agreements (12/18/87), page 40

Technical Assistance Grants (TAG) Program

9200.3-04	Resource Distribution for TAG Grant Program (Draft), page 42
9230.1-01	Interim Guidance On Technical Assistance Grants For Public Participation (3/26/86), page 19
9230.1-02	Technical Assistance Grants Program Activities Prior To Issuance Of Interim Final Rule (1/11/88), page 19
9230.1-03	Citizens Guidance Manual For The Technical Assistance Grant Program (6/88), page 20
9230.1-04	Regional Guidance Manual For The Technical Assistance (7/88), page 20
9345.0-03	Guidance For Special Study Activities (Draft), page 43

Technologies

9380.0-02	Slurry Trench Construction For Pollution Migration Controls (2/1/84), page 40
9380.0-03	Guidance For Cleanup Of Surface Tank And Drum Sites (5/28/85), page 40
9380.0-04	Remedial Action At Waste Disposal Sites Handbook (Revised) (10/1/85), page 40
9380.0-05	Leachate Plume Management (11/1/85), page 41
9380.0-06	Guidance Document For Cleanup Of Surface Impoundment Sites (7/17/86), page 41
9380.2-05	Guidance on Differentiating Alternative Technologies, page 44

REMOVAL PROGRAM

Claims

9225.0-03 Notification Of Restrictions On Reimbursement Of Private Party Costs (11/25/85), page 18

Contracts

9242.2-01B Emergency Response Cleanup Services (ERCS) Users' Manual (10/20/87), page 21

9242.4-01A Technical Assistance Team (TAT) Contract Users' Manual (9/1/87), page 22

Cost and Cost Sharing

9250.2-01 Policy On Cost-Sharing Of Immediate Removals At Publicly Owned Sites (3/30/83), page 22

Drinking Water

9360.1-01 Interim Final Guidance On Removal Action Levels At Contaminated Drinking Water Sites (10/6/87), page 39

Emergency and Expedited Response Actions

9360.0-10 Expedited Response Actions (7/8/86), page 38

9360.0-15 Role Of Expedited Response Action (ERAs) Under SARA (4/21/87), page 39

9380.2-01 Draft Alternative Treatment/Disposal Technology Guidance For Removal And Expedited Removal Actions, page 44

Financial Management

9275.1-01 Removal Financial Management Instructions (7/31/84), page 24

Methane Sites

9360.0-08 Removal Actions At Methane Release Sites (1/23/86), page 38

Removal Program, continued

Program Implementation

9360.0-03B Superfund Removal Procedures, Revision #3 (2/88), page 37

9360.0-14 Use Of Expanded Removal Authority To Address NPI And Proposed NPL Sites (2/7/87), page 39

9360.0-18 Removal Program Priorities, 3/31/88, page 39

Records Management

9360.2-01 Model Program For Removal Site File Management (7/18/88), page 39

Statutory Issues

9360.0-12 Guidance On Implementation Of The Revised Statutory Limits On Removal Actions (4/6/87), page 38

9360.0-13 Guidance On Implementation Of The "Contribute To The Efficient Remedial Performance" Provision (4/6/87), page 38

SECTION II

DOCUMENT ABSTRACTS

Redelegation Of Authority Under CERCLA and SARA
9012.10 5/25/88 - OPM/PAS 41 pages

Complete set of new and revised redelegations of authority regarding activities under CERCLA and SARA. Published under the signature of the AA/OSWER, it is the current and definitive delegations document for these authorities. Attachment A contains redelegations of authority to take specific actions. Attachment B designates responsibilities to exercise concurrence, consult or receive notice.

Superfund Internal Delegations Of Authority
(No. to be added) 9/13/87 - OPM/PAS 68 pages

This document, signed by the Administrator and transmitted under the signature of the Director, OERR on 9/24/87, contains the complete set of final new and revised internal delegations of authority implementing the provisions of SARA. It may be requested with the Redelegations, listed above.

Superfund Comprehensive Accomplishments Plan Manual (SCAP) (FY-88)
9200.3-01A 10/1/87 - OPM 240 pages

Provides guidance to the agency and its program managers for the projected accomplishments for the current fiscal year. It is used for budgeting, resource allocation, and program monitoring throughout the fiscal year. Prepared annually.

Implementation Strategy For Reauthorized Superfund: Short Term Priorities for Action
9200.3-02 10/24/86 - OPM 24 pages

First in a series of memoranda providing direction for implementing the Superfund program under SARA. Provides basic instruction on initial priorities for program implementation and considerations that must be taken into account under SARA. Addresses the management of on-going remedial and removal response actions, both Fund and Enforcement, as affected by SARA.

Flexibility In The FY-88 Superfund Regional Extramural Operating Plan
9200.3-05 6/7/88 - OPM 6 pages

Intended to assist program managers in effective utilization of their FY-88 extramural operating funds.

Guidelines For Producing Superfund Documents
9200.4-01 2/9/87 - OPM/PAS 12 pages

First in a series of planned guidances designed to organize and institutionalize the composition techniques, publication and distribution procedures to be followed in developing documents that are usable, readable and available. Emphasis is on concise, well-referenced documents. This specific guideline addresses issues of availability, cross referencing, indexing, and follow-up contacts. Writing techniques are suggested that can result in streamlined documents written in clear English that provide an appropriate level of detail. Formatting suggestions are made to facilitate condensation for use in field manuals or electronic indexing or filing.

Catalog Of Superfund Program Directives (Interim Version)
9200.7-01 8/88 - OPM/PAS 56 pages

Bibliography in its interim format that will serve as an index and abstract catalog to assist the user in selecting the most current Superfund documents best suited for a particular need. Final directives are separated from draft documents. All are indexed by program responsibility, key word, OSWER number and title, and contain brief abstracts of content. This issue covers all documents through 7/31/88. The final version, expected early in FY-89, will encompass planned changes for managing guidance. The catalog is designed for loose-leaf maintenance with quarterly updates.

CERCLIS Data Handling Support Policy Statement
9221.0-02 3/31/86 - OPM/MES 2 pages

Statement of present policy regarding management of the data handling support contract for CERCLIS provided under contract by Computer Sciences Corporation (CSC).

Forwarding Claims To Headquarters
9225.0-02 4/25/84 - HSCD 1 page

Sets a specific time frame within which claims, inquiries regarding claims, and requests for pre-authorization must be forwarded to Headquarters.

Notification Of Restrictions On Reimbursement Of Private Party Costs
9225.0-03 11/25/85 - ERD 3 pages

Directs Regions to ensure that affected communities are informed of restrictive provisions of CERCLA regarding private party reimbursements for removal costs. When a removal action that affects private residents is approved, the OSC shall attempt to notify them that the expenses they incur are incurred at their risk and expense, and are not reimbursable by the Federal government. OSC's are cautioned not to make statements that can be construed by community members as promises by EPA to reimburse for c_ean-up costs.

Superfund Community Relations Policy
9230.0-02 5/9/83 - HSCD 5 pages

Articulates the agency policy for community relations activities that must be an integral part of every Superfund financed remedial or removal action. Serves as an introduction to the more detailed handbooks that provide specific, detailed direction for conducting viable community relations activities at Superfund sites.

Community Relations Handbook (Final) Manual
9230.0-03 1986 - HSCD 146 pages

Represents the agency's policy and program guidance for developing and implementing community relations programs at Superfund sites. The handbook is intended for use by States, EPA staff, and other Federal agencies. Offers step-by-step procedures for developing and managing an effective, site-specific community relations program. Chapters include community relations during removals and remedial response during enforcement action. Examples of community relations techniques and sample plans are provided. There are also instructions for administering a community relations program and various reporting formats.

Community Relations Activities At Superfund Enforcement Sites - Interim Guidance
9230.03a 3/22/85 - HSCD 15 pages

Describes how to conduct community relations programs in the course of enforcement actions while reserving the integrity of the enforcement process.

Community Relations In Superfund - A Handbook (Interim Guidance)
9230.03B 6/88 - HSCD Manual

Applicable to all response actions conducted under CERCLA, whether performed by EPA, other Federal agencies, or State governments. Provides policy requirements for coordinating activities at Superfund sites and additional techniques and guidance that can be used to supplement and enhance a basic community relations program. This is a complete revision of the 9/83 version. Contains new material and revisions to reflect SARA amendments and EPA policies issued since 1983.

Community Relations Guidance For Evaluating Citizen Concerns At Superfund Sites
9230.03 10/17/83 - HSCD 13 pages

Guides Regions and State Community Relations staffs in conducting and evaluating on-site discussions with citizens and local authorities prior to non-emergency Superfund response actions.

Community Relations Requirements For Operable Units
9230.05 10/2/83 - HSCD 4 pages

Discusses the impact on community relations efforts of the concept of dividing remedial activities at a site into operable units as defined in the amended NCP (50 FR 47911, 11/20/85). No major changes are required in the planning and implementation of Superfund community relations.

Interim Guidance On Technical Assistance Grants (TAG) For Public Participation
9230.2-02 3/26/86 - HSCD 10 pages

Supplies preliminary assistance for persons involved in early stages of managing TAG grants for public participation. Will be updated as the program evolves.

Technical Assistance Grants (TAG) Program Activities Prior To Issuance Of Interim Final Rule
9230.1-02 1/11/88 - HSCD 8 pages

Supplies additional interim information for managing the TAG program prior to promulgation of final rulemaking.

Citizens Guidance Manual For The Technical Assistance (TAG) Grant Program
9230.1-03 6/88 - HSCD 129 pages plus appendices

Provides a complete set of instructions for citizens interested in Technical Assistance Grants. Includes a step-by-step guide to applying for and managing the grant and all forms required by EPA with samples of completed forms. The manual will be current for the TAG Program during its operation under the Interim Final Rule for section 117(3) of CERCLA and will be revised upon publication of the Final Rule (expected in 1989.)

Regional Guidance Manual For The Technical Assistance (TAG) Grant Program
9234.1-04 7/88 - HSCD 84 pages

Provides guidance to Regional staff who are managing the Technical Assistance Grant Program and other Regional staff for use as a reference about the program. Explains the program, responsibilities of key staff, the role that States play in the program, and all administrative procedural requirements for the application and award, procurement, and fiscal management processes.

Applicability Of RCRA Requirements To CERCLA Mining Waste Sites
9234.0-04 8/19/86 - OPM/PAS 11 pages

Clarifies use of Subtitle D and/or C of RCRA for developing remedial alternatives at CERCLA mining waste sites in light of a July 3, 1986 final determination on regulation of mining waste.

Interim Guidance On Compliance With Applicable Or Relevant And Appropriate (ARAR) Requirements
9234.0-05 7/9/87 - OPM/PAS 12 pages

Addresses the requirement in CERCLA, as amended by SARA, that remedial actions comply with applicable or relevant and appropriate requirements (ARARs) of Federal laws and more stringent, promulgated State laws. Describes how requirements are generally to be identified and applied and specifically discusses compliance with State requirements and certain surface water and groundwater standards.

User's Guide To The Contract Laboratory Program
9240.0-1 12/86 - HSED 250 pages

Organic and inorganic analytical program description that outlines the requirements and analytical procedures of new CLP protocols developed from technical caucus recommendations. Reflects the status of the program as of December 1986.

Analytical Support For Superfund
9240.0-02 3/20/86 - HSED 7 pages

Memorandum that reviews alternative Superfund sample analysis resources available to the Regions, provides general guidance in the use of these resources, and requests that each Region manage and monitor its analytical support services. Describes the two principal sources of Superfund program analytical support as the Regional laboratories and the Contract Laboratory Program (CLP). Additional contractor sources available include Remedial (REM), Field Investigation (FIT), and the Environmental Services Assistance Team (ESAT). Generally, CLPs are to be used for analysis requiring consistent methodology, 30-40 day turnaround, and data of known and documented quality. CLP's Special Analytical Services can be used to analyze unusual matrices. Remedial and Removal contract analytical resources include fixed and mobile laboratory support. Choice of analytical support should be driven by data requirements. Users should be sensitive to costs, definition of work, enforcement needs, and quality assurance requirements. Describes how Regions should develop their own integrated management and tracking systems to monitor these resources.

Emergency Response Cleanup Services (ERCS) Users' Manual
9242.2-01B 10/20/87 - ERD 240 pages

Provides a comprehensive guide to using emergency response cleanup services contractors at Superfund sites.

Procedures For Initiating Remedial Response Services
9242.3-03 7/6/84 - HSCD 21 pages

Streamlines work plan development process. Develops a more comprehensive site specific work plan and reduces dead time during work plan reviews. Provides latitude to Regional site managers to identify approved initial tasks on a site-by-site basis.

REM II Contract Award Fee Performance Evaluation Plan
9242.3-05 7/25/84 - OPM 50 pages

Defines procedures for the REM II Contract Award Fee Performance Plan. Describes fee structure and evaluation process and includes copies of the forms needed to manage this contract. Procedures are essentially the same as the revised REM/FIT procedures, except that each region must assess the contractor's regional management activities.

Implementation Of The Decentralized Contractor Performance Evaluation And Award Fee Process For Remedial Program Contracts
9242.3-07 3/9/87 - HSCD 16 pages

Delegates site-specific award fee decisions to the Regional Division Directors. Distributes standard operating procedures identifying the roles and responsibilities of Regional and Headquarters staff in implementing the contractor award fee process. Procedure will be field tested for one evaluation cycle, then made final.

Technical Assistance Team (TAT) Contract Users' Manual
9242.4-01A 9/1/87 - ERD 225 pages

Explains the nature of Technical Assistant Team (TAT) contract resources, responsibilities, and procedures for operating under this contract and a means to evaluate and compensate contractor performance.

Policy On Cost Sharing At Publicly Owned Sites
9250.2-02 3/30/83 - HSCD 2 pages

Describes CERCLA Section 104(c)(e)(ii) Requirement that States pay 50% or more of the response costs associated with facilities owned by States or their political subdivisions ("publicly-owned") at the time of disposal of any hazardous substance. (Supplemented by 9250.2-01.)

Policy On Cost Sharing Of Immediate Removals At Publicly Owned Sites
9250.2-01 3/30/83 - ERD 5 pages

Specifically addresses cost sharing for immediate removal actions at publicly owned sites. (Supplements 9250.1-01.) Note: Changes in SARA will require revision of this document, which will be scheduled in conjunction with promulgation of NCP revisions.

Waiver Of 10% Cost Share For Remedial Planning Activities At Privately Owned Sites
9250.3-01 5/13/83 - HSCD 1 page

Reverses March 11, 1982 policy (see 9246.0-01) to allow the funding of remedial investigation, feasibility study, and remedial design at privately owned sites without a State cost share. (See also 9250.3-02)

Guidance On Implementing Waiver Of 10% Cost Sharing For Remedial Planning
9250.3-02 6/3/83 - HSCD 4 pages

Establishes procedures for implementing cost sharing policy as reflected in 9250.3-01.

Delegations Of Remedy Selection To Regions (Under Delegation #14-5)
9260.1-09 3/24/86 - OPM/PAS 25 pages

Delegates remedy selection decisions to RAs. Outlines options for division of decision authority between the AA/OSWER and RAs.

Delegations Of Authority Under The Federal Water Pollution Control Act (FWPCA) Applicable To The Superfund Program
9260.3-00 4/16/84 - OPM/PAS 3 pages

(1) Identifies and delegates the applicable authorities under FWPCA for imminent and substantial threat to the public health or welfare of the United States because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility. (FWPCA 311; E.O. 11735, 8/3/73; 40 CFR 300.52 (NCP)

(2) Delegates to AA/OSWER and RAs authority to issue letters of notification of placement of chemical and biological agents on the National Oil and Hazardous Substances Contingency Plan (NCP) product schedule in accordance with Subpart H "Use of Dispersants and Other Chemicals" of the NCP. (FWPCA311(c)(2)(G); 40 CFR 300.81, the NCP)

(3) Delegates to AA/OSWER and RAs authority to perform the EPA functions and responsibilities relative to the Spill Prevention Control and Countermeasures Plan (SPCC Plan) regulations. (FWPCA 311(j)(1)(C); 40 CFR parts 110, 112, 114. (4-1-84)

Implementation Of CERCLA Strategy At Federal Facilities
9272.0-01 4/2/84 - Office of External Affairs 1 page

Memorandum dated April 2, 1984 from the Assistant Administrator for External Affairs to the Assistant Administrator, OSWER, discussing the implementation phase of Federal Facility CERCLA strategy.

Initial Guidance On Federal Facilities At CERCLA Sites
9272.0-02 12/3/84 - HSCD 3 pages

Discusses status and direction of OSWER efforts to implement hazardous site cleanup at Federal Facilities. Divides primary responsibility for national management of Superfund Federal Facility programs between the Office of Waste Programs Enforcement and the Office of Emergency and Remedial Response.

Responsibilities For Federal Facilities
9272.0-03 8/19/85 - OWPE/OERR 1 page

Memorandum from Director OWPE to Director OERR clarifying responsibilities of OWPE and OERR on Federal Facilities.

Federal Facilities
9272.0-04 8/19/85 - OWPE/OERR 2 pages

Clarifies responsibilities and direction of effort within OWPE for Federal facility activities.

Responsibilities For Federal Facilities
9272.0-05 8/26/85 - OERR/OWPE 1 page

Memorandum from Director OERR to Director OWPE that provides direction for the OERR Facilities Program Manual development responsibilities that OWPE assumed and clarifies responsibilities between OERR and OWPE for Federal facilities.

Removal Financial Management Instructions
9275.1-01 7/31/84 - ERD 34 pages

Describes the process necessary to implement the April 16, 1984 Superfund delegation (9260.2). Provides a planning structure for Regional Administrator to identify and assign Regional financial responsibility for activities. (Memo signed by Administrator) (Update planned for late FY-88)

Remedial Financial Management Instructions
9275.2-01 9/21/84 - HSCD 28 pages

Describes the process necessary to implement the April 16, 1984, Superfund delegations (9260.2). Provides a planning structure for Regional Administrators to identify and assign Regional financial responsibility for activities.

Policy On Flood Plains And Wetlands Assessments
9280.0-02 8/85 - OPM/PAS 12 pages

Discusses specific situations that require preparation of a flood plains or wetlands assessment and the factors to be considered in preparing such an assessment. For removal actions, the OSC must consider the effect of response actions; and for remedial actions, a floodplains/wetlands assessment must be incorporated in the planning and analysis of the action. In responding to releases of hazardous substances in floodplains and wetlands, Superfund actions must meet substantive requirements of the Floodplain Management Executive Order (EO 11988); the Protection of Wetlands Executive Order (EO 11990), and Appendix A of 40 CFR Part 6, "Statement of Procedures on Floodplain Management and Wetland Protection."

Recommendations For Groundwater Remediation At The Millcreek, Pennsylvania Site
9283.1-01 3/24/86 - HSCD 7 pages

Memorandum presents an initial overall approach to decision making with respect to groundwater cleanup at Superfund sites under development by OERR. The strategy will be further refined in a Groundwater Evaluation Manual currently under development.

Standard Operating Safety Guide Manual
9285.1-01B 11/19/84 - HSCD 182 pages

Manual provides guidance on health and safety practices and procedures. Intended to complement professional judgement and experience and supplement existing Regional Safety Criteria. Updates previous guidance to reflect additional agency experience in responding to environmental incidents involving hazardous substances. Not intended to be a comprehensive safety manual for incident response.

Field Standard Operating Procedures Manual #4 Site Entry
9285.2-01 1/1/85 - HSCD 38 pages

Provides site entry operating procedures for field response personnel to minimize the risk of exposure to hazardous substances on Superfund sites.

Field Standard Operating Procedures Manual #7 - Decontamination Of Response Personnel
9285.2-02 1/1/85 - HSCD 38 pages

Describes approved operating procedures for decontamination of response personnel and equipment at hazardous substance release sites.

Field Standard Operating Procedures Manual #8 - Air Surveillance
9285.2-03 1/1/85 - HSCD 33 pages

Describes air monitoring procedures for use by field personnel to obtain air monitoring data required to minimize the risk of exposure to personnel at hazardous substance release sites.

Field Standard Operating Procedures Manual #6 - Work Zones
8285.2-04 4/1/85 - HSCD 30 pages

Describes procedures to be used by field personnel to establish work zones for control of hazardous materials to minimize the risk of exposure to workers at hazardous release sites.

Field Standard Operating Procedures Manual #9 - Site Safety Plan
9285.2-05 4/1/85 - HSCD 34 pages

Establishes requirements for protecting health and safety of field personnel during all activities conducted at the site of an incident. Contains safety information, instructions, and procedures to cover a variety of situations commonly encountered in this type of field work.

Occupational Health Technical Assistance And Enforcement Guidelines For Superfund
9285.3-01 3/15/84 - HSCD 10 pages

Gives direction for OSHA field staff who may be asked to provide assistance or conduct enforcement activities at hazardous release sites.

Employee Occupational Health & Safety
9285.3-02 7/7/87 - HSCD 4 pages

Provides procedures for managing employee occupational health and safety considerations at Superfund sites.

Superfund Public Health Evaluation Manual
9285.4-01 10/1/86 - HSED Manual

Establishes a framework to be used at Superfund sites to analyze public health risks and develop design goals for remedial alternatives based on Applicable or Relevant and Appropriate Requirements (ARARs) of other laws, where available; or risk analysis where those requirements are not available. Procedures are designed to conform with EPA's proposed risk assessment guidelines. Supplements Chapter 5 of the Guidance on Feasibility Studies Under CERCLA, which describes the public health evaluation process and provides detailed guidance on conducting the evaluation.

Guidance For Coordinating ASTDR Health Assessment Activities With The Superfund Remedial Process
9285.4-02 5/14/87 - HSED 32 pages

Provides guidance for coordinating health assessment activities at Superfund sites between the ASTDR and EPA when conducting Superfund remedial activities.

Health Assessments By ASTDR in FY-88
9285.4-03 1/7/88 - HSED 6 pages

Clarifies operating procedures for dealing with ATSDR. Presents schedule for health assessments being conducted by ATSDR in FY-88.

Superfund Risk Assessment Information Directory
9285.6-01 12/17/86 - HSED Manual

Provides information on resources for conducting risk assessment activities at Superfund sites.

Memorandum Of Understanding Between ASTDR And EPA
9295.1-01 4/2/85 - OPM 11 pages

Establishes policies and procedures for conducting response and non-response health activities related to releases of hazardous substances.

Joint CORPS/EPA Guidance
9295.2-02 6/24/83 - OPM 41 pages

Provides joint guidance for conducting activities and coordination necessary for a smooth interface between EPA and the U.S. Army Corps of Engineers. Provides further guidance regarding responsibility and information necessary for coordination of billing and reporting.

Interagency Agreement Between Corps Of Engineers And EPA In Executing P.L. 96-510 (CERCLA)
9295.2-03 12/3/84 - OPM 3 pages

Defines the assistance the U.S. Army Corps of Engineers will provide to EPA in implementing the Superfund program, EPA Fund-lead or State Fund-lead for EPA Enforcement-lead projects.

Memorandum Of Understanding (MOU) Between FEMA And EPA For The Implementation Of Cercla Relocation Activities Under PL 96-510
9295.5-01 4/5/85 - OPM 21 pages

Describes major responsibilities and outlines areas of mutual support and cooperation with respect to relocation activities associated with response actions pursuant to CERCLA, Executive Order 12316, and the NCP, 40 CFR Part 300. Effective until April 1989.

Implementation Of EPA/FEMA Memorandum Of Understanding (MOU) On CERCLA Relocations
9295.5-02 6/14/85 - OPM 27 pages

Forwards EPA/FEMA MOU on CERCLA Relocation (9295.5-01) to Regional Administrators. Provides guidance in establishing Regional/Headquarters/-FEMA relocation contacts and following standards established in the MOU.

Coordination Between Regional Superfund Staffs And Office Of Federal Activities (OFA) Regional Counterparts On CERCLA Actions
9318.0-04 10/29/84 - HSCD 4 pages

Encourages coordination between the Regional Superfund staffs and OFA Regional counterparts in carrying out CERCLA actions. (Signed W. Hedeman and A. Hirsch).

Guidance For Establishing The NPL
9320.1-02 6/28/82 - HSED 14 pages

Establishes procedures for implementing the NPL, which was mandated by section 105 (8)(B) of CERCLA. Addresses the overall strategy for developing and presenting the list, including selection of candidate sites, data collection, application of the Hazard Ranking System (HRS), procedures for submitting candidate sites, and the verification of quality assurance (control procedures). (Signed by Hedeman, supplemented by NPL 9320.3-01 and 3-03)

RCRA/NPL Listing Policy
9320.1-05 9/10/86 - HSED 11 pages

Describes RCRA/NPL listing policy as promulgated in the Federal Register (51 FR 21054, June 10, 1986)

RCRA Special Study Waste Definitions: Sites Requiring Additional Consideration Prior To NPL Proposal Under SARA
9320.1-06 3/10/87 - HSED 22 pages

Policy memorandum signed by Director OERR, which discusses Section 105(g) and 125 of SARA and its relationship to RCRA, as amended by HSWA with respect to the special study wastes such as drilling fluids, cement kiln dust wastes, mining wastes, ash wastes, etc.

Interim Guidance For Consideration Of Sections 105(g) And 125 Of SARA Prior To NPL Proposal Of Special Study Waste Sites
9320.1-07 8/21/87 - HSED 17 page

Memorandum describes OERR policy for identifying municipal waste landfills that have received hazardous wastes. Criteria described for considering their possible inclusion on the NPL. Signed by Director OERR.

Listing Of Municipal Landfills On NPL
9320.1-08 10/24/86 - HSED 2 pages

Memorandum discusses procedures for determining which solid waste landfills qualify for listing on the NPL. Describes the type of documentation required from the Regions to establish this eligibility.

Listing Of Municipal Landfills On NPL
9320.1-09 8/21/87 - HSED 2 pages

Memorandum continues the discussion of procedures for listing municipal landfills which qualify as Superfund sites on the NPL.

Guidance For Updating The NPL
9320.3-01 5/12/83 - HSED 7 pages

Provides guidance for the first and future updates of the NPL (Supplements 9320.1-2 and 9320.1-3. Supplemented by 9320.3-2 and 9320.3-3)

Instructions For Promulgating NPL Update
9320.3-02 1/18/84 - HSED 7 pages

Defines procedures and Regional responsibilities for the final rulemaking of the NPL update.

Procedures For Updating The NPL
9320.3-03 5/23/84 - HSED 8 pages

Sets for the process for developing updates to the NPL and presents the schedule for proposing the second update. (Supplements NPL 9320.1-2, 9320.1-3, and 9320.3-1)

Guidance For Proposed NPL Update #3
9320.3-04 12/10/84 - HSED 3 pages

Memorandum establishes schedule and scope of Update #3 to allow Regions to submit sites not completed in time for previous update and limited to classic industrial sites which clearly fit existing policy guidelines.

NPL Information Update #4
9320.3-05 4/30/85 - HSED 6 pages

Provides background information on NPL Response Categories/ Status Codes.

Updating The NPL: Update #6 Proposal
9320.3-06 9/17/85 - HSED 4 pages

Memorandum provides specific information on the scope, scheduling, and procedures for preparing sites for proposal on Update #6 of the NPL. Describes the future implications for a proposed delisting policy on adding sites to the NPL.

Interim Information Release Policy
9320.4-01 4/18/85 - HSED 6 pages

Provides interim policy for release of information regarding the NPL. Should be used by Regions to prepare coordinated responses to information requests from the public, from citizens, and those submitted under the Freedom of Information Act (FOIA).

Requirements For Selecting An Off-Site Option In A Superfund Response Action
9330.1-01 1/28/83 - HSCD 4 pages

Addresses the interface between RCRA and CERCLA for the off-site treatment, storage or disposal of hazardous substances. Establishes general Agency policy for removal and remedial actions. Establishes specific criteria for remedial actions in determining when hazardous substances may be transported off-site for treatment, storage or disposal when selecting an appropriate off-site hazardous waste management facility.

Evaluation Of Program And Enforcement-Lead Records Of Decision (RODS) For Consistency With RCRA Land Disposal Restrictions
9330.1-02 12/3/86 - HSCD 15 pages

Regional survey to determine impact of RCRA land disposal restrictions on RODS.

Discharge Of Wastewater From CERCLA Sites Into POTWS
9330.2-04 4/15/86 - HSCD 6 pages

Joint memo from OERR and OWPE to Regional Division Directors for Waste and Water Management addressing the concerns and issues unique to POTWS that must be evaluated before the discharge of CERCLA wastewater to a POTW.

CERCLA Off Site Policy: Providing Notice To Facilities
9330.2-05 5/12/86 - HSCD 6 pages

Guidance on providing notice to commercial treatment, storage, and disposal (TSDs) facilities deemed ineligible to receive CERCLA response wastes. Facilities may submit written comments on the application of the policy to the conditions alleged at their facility.

CERCLA Off Site Policy: Eligibility Of Facilities In Assessment Monitoring
9330.2-06 7/28/86 - HSCD 4 pages

Clarifies application of the CERCLA off-site policy to RCRA commercial facilities in assessment monitoring. Assessment monitoring does not automatically reject facilities from consideration. Gives guidelines to Regional decision makers as to the amount of information required and timing of ineligibility determinations.

Participation Of Potentially Responsible Parties (PRPs) In Development Of Remedial Investigations And Feasibility Studies (RI's and FS's.)
9340.1-01 3/20/84 - HSCD 9 pages

Sets forth policy and procedures governing participation of PRP's in development of RI/FS under CERCLA. Discusses circumstances in which RI/FS may be conducted by PRPs; procedures for notifying PRP's when the agency has identified target sites for the development of RI/FS, and principles governing PRP participation in Agency-financed RI/FS.

Preparation Of Decision Documents For Approving Fund-Financed And PRP Remedial Actions Under CERCLA

9340.2-01 2/27/85 - HSCD 32 pages

Assists Regional Offices in the preparation of the decision documents required for approval of Fund-financed and Potentially Responsible Party (PRP) remedial actions. A Record of Decision (ROD) is required for all remedial actions financed from the Trust Fund. Documents the agency's decision-making process and demonstrates that the requirements of CERCLA and the NCP have been met. The ROD and the procedures described in this document become the basis for future cost recovery actions that may be undertaken.

Preliminary Assessment (PA) Guidance FY-1988

9345.0-01 2/12/88 - HSED 88 pages

Provides Regions, States, Field Investigation Teams (FITs) and other Federal agencies with direction for conducting new preliminary assessments (PAs) and reassessing existing PAs during FY-88. Intended to standardize PA scope, products, and decisions and improve overall PA quality. In effect until the Hazard Ranking System (HRS) is revised. Consistent with the anticipated direction of the revised National Contingency Plan (NCP). Provides Regions with directions for handling PA Petitions from the public. Discusses preliminary procedures for the Environmental Priorities Initiative (EPI).

Expanded Site Inspection (ESI) Transitional Guidance For FY-88

9345.1-02 10/1/87 - HSED 88 pages

Provides Regions, States and Field Investigation Teams (FITs) with a reference of general methodologies and activities for conducting inspection work on sites projected to make the National Priorities List (NPL). Describes the goals, scope, procedures, and desired results of expanded site inspections (ESIs) in FY-88. Will be used until new screening SI (SSI) and listing SI (LSI) guidance is prepared and distributed in FY-89.

Pre-Remedial Strategy For Implementing SARA

9345.2-01 2/12/88 - HSED 16 pages

Describes the strategy EPA will follow to address the pre-remedial goals and requirements of SARA. Through SARA, Congress established the mandate to accelerate the pace of identifying those sites needing Superfund remedial action to protect public health and the environment. Responds to this mandate and addresses SARA pre-remedial production goals, program operations under the current HRS, and program operations during and following revisions to the HRS. Discusses procedures for integrating the Environmental Priorities Initiative (EPI) into the pre-remedial program.

Interim RCRA/CERCLA Guidance On Non-Contiguous Sites And On-Site Management of Waste Residue

9347.0-01 3/3/86 - HSCD 9 pages

Provides basic information pending final guidance.

Uncontrolled Hazardous Waste Site Ranking Systems - A Users Manual

9355.0-03 7/16/82 - HSED 66 pages

Describes method developed by MITRE Corporation for ranking hazardous substance facilities for determining eligibility for inclusion on the National Priority List (NPL). A site must score at 28.5 to be eligible. This directive reprints the Federal Register discussion of 7/16/84.

Superfund Remedial Design And Remedial Action (RD/RA) Guidance

9355.0-04A 6/1/86 - HSCD 112 pages

Manual to assist agencies and individuals who plan, administer, and manage Remedial Design and Remedial Action (RD/RA) at Superfund sites. The material is applicable to both Fund-financed and responsible party RD/RAs and provides procedural guidance to ensure that the RD/RA is performed properly. Organized to reflect the sequence of events occurring prior to, during, and after the RD/RA action at a Superfund site. Notes sections that apply only to Fund-financed projects. Does not directly address RD/RA's conducted by other Federal agencies, which are the subject of a projected Federal Facilities Program Manual.

Guidance On Feasibility Studies (FS) Under CERCLA

9355.0-05C 6/1/85 - HSCD 188 pages

Provides a more detailed structure for identifying, evaluating, and selecting remedial action alternatives under CERCLA and the NCP (40 CFR 300). Describes the process from inception: development of specific alternatives based on general response actions identified in the remedial investigation (RI), including screening technologies within the categories for applicability to the site. Analyzes alternatives that pass the screening process, which encompasses engineering, public health, environmental, and cost analyses. Organizes information to compare the findings for each alternative. Document will be replaced by 9335.3-01: Guidance for Conducting Remedial Investigations (RIs) and Feasibility Studies (FS) Under CERCLA, now in draft.

Guidance On Remedial Investigations (RI's) Under CERCLA
9355.0-06B 6/1/85 - HSCD 184 pages

Discusses the conduct of Remedial Investigations (RI's), which are to be planned and implemented by EPA and the States, to obtain data to evaluate and select remedial measures. For use by other Federal agencies and potentially responsible parties (PRPs) when undertaking remedial responses pursuant to the NCP and CERCLA section 104 or section 107. Compliance with this guidance will help meet the requirements of the NCP. Document will be replaced by 9335.3-01: Guidance for Conducting Remedial Investigations (RIs) and Feasibility Studies (FS) Under CERCLA, now in draft.

Data Quality Objectives Development Guidance for Remedial Response Actions (Two Volumes)
9355.0-07b 3/1/87 - HSCD 341 pages

Provides guidance for the process of developing data quality objectives (DQOs) for site-specific RI/FS activities. Specifies qualitative and quantitative standards required to support RI/FS activities. DQOs define the level of risk that is acceptable for making an incorrect decision and the quality of data resulting from sampling an analysis required to keep the level of risk at or below the acceptable level. Provides a formal approach to development of DQO's in the sampling/analytical plan to improve the quality and cost effectiveness of data collection and analysis activities.

Modeling Remedial Actions At Uncontrolled Hazardous Waste Sites
9355.0-08 4/1/88 - HSCD Manual

Provides guidance on the selection and use of models for the purpose of evaluating the effectiveness of remedial actions at uncontrolled hazardous waste sites. Comprehensive set of guidelines to regulatory officials for the incorporation of models into remedial action planning at Federal and State Superfund sites.

Remedial Action Costing Procedures Manual
9355.0-10 9/1/85 - HSCD 68 pages

Provides guidance for the preparation of detailed feasibility cost estimates of remedial action alternatives required under the revised NCP. Provides project managers and decision makers in government and industry with procedures for developing and evaluating cost estimates for alternative remedial responses to the uncontrolled releases of hazardous substances.

A Compendium Of Superfund Field Operations
9355.0-14 12/1/87 - HSCD Manual

This four volume collection contains a consolidated, ready reference to all remedial field procedures. The manual provides the Agency with consistent field procedures among the ten regions. It should be used by Remedial Project Managers, Quality Assurance Officers and State and Regional field staffs.

Interim Guidance On Superfund Selection Of Remedy
9355.0-19 12/24/86 - HSCD 12 pages

Provides interim guidance, regarding implementation of SARA cleanup standards provisions. Highlights new requirements with emphasis on the RI/FS process.

RI/FS Improvements
9355.0-20 7/22/87 - HSCD 14 pages

Identifies methods of reducing overall project schedules and costs while retaining a quality product. The four major points in the directive include: phased RI/FS, streamlined project planning, management of handoffs, and RI/FS control reviews.

Additional Interim Guidance For FY-87 Records Of Decision
9355.0-21 7/24/87 - HSCD 10 pages

Continues with guidance regarding implementation of SARA cleanup standards. Describes the nine criteria to be used in evaluating remedial alternatives and selecting a remedy.

Interim Guidance On Funding For Ground Water And Surface Water Restoration Actions
9355.0-23 10/26/87 - HSCD 4 pages

Discusses interim policy for the funding of water restoration actions. Specifies which types of activities would be eligible for inclusion under the 10-year provision in section 104(c) of SARA.

OSWER Strategy For Management Oversight Of The CERCLA Remedial Action Start Mandate
9355.0-24 12/28/87 - HSCD 22 pages

Establishes a process for managing EPA's efforts to achieve the CERCLA 116(e) statutory mandate for remedial action starts. Sets expectations for each Region's contribution toward this end and provides guidance to enhance EPA's ability to meet these requirements.

Federal Lead Remedial Project Management Manual
9355.1-01 12/1/86 - HSCD 135 pages

Assists EPA Remedial Project Managers (RPMs) to manage Federal-lead remedial response projects. Describes in detail the responsibilities of the RPM during the planning, design, construction, operation, and close-out of remedial response projects. Provides RPMs with information on procedures for conducting Federal-lead remedial projects from pre-RI/FS activities through site close-out.

RPM Primer
9355.1-02 9/30/87 - HSCD 56 pages

Orientation for the new Remedial Project Manager (RPM) to the duties, responsibilities, and decisions required to serve as the agency's representative in charge of a Superfund site. Explains the types of decisions required of the RPM; the resources available, both written and within the management chain; and the accountability aspects of each decision. Walks the RPM through a project site management scenario.

State Lead Remedial Project Manual
9355.2-01 12/1/86 - HSCD 103 pages

Assists the EPA Remedial Project Managers (RPMs) in managing State-lead remedial response projects. Describes in detail the responsibilities of the RPM during the planning, design, construction, operation and close-out of remedial response projects.

Guidance For Providing Alternative Water Supplies
9355.3-02 3/1/88 - HSCD 135 pages

Manual provides direction for those circumstances under which it is appropriate to provide alternative water supplies.

RI/FS Improvements Follow-up
9355.3-05 4/25/88 - HSCD 18 pages

Delineates improvements developed for more effective Remedial Investigations/Feasibility Studies (RI/FS).

Removal Cost Management Manual
9360.0-02B 4/88 - ERD 222 pages

Provides comprehensive cost management procedures for use by EPA at removals authorized by CERCLA. For use by the OSC and other on-scene personnel when performing cost management activities at Superfund removal sites. Includes: a discussion of the concept and an approach to cost management; techniques for cost projection and tracking; techniques for cost control, monitoring and, verification of contractor charges; cost recovery and cost documentation. Appendix includes formats and samples of a variety of memoranda, as well as procedures for initiating removals, procedures for securing assistance from other Federal agencies at Superfund sites; examples of cost projections; a table of Federal and Technical Assistance Team (TAT) personnel cost rates; a copy of the Memorandum of Understanding (MOU) between EPA and the Coast Guard; a copy of the MOU between ATSDR; and a copy of the draft MOU between EPA and FEMA.

Superfund Removal Procedures, Revision #3
9360.0-03B 2/88 - ERD 365 pages

Manual provides EPA response officials with uniform, Agency-wide guidance on removal actions. Describes in one manual all of the procedural and administrative requirements for removal actions. Addresses a wide array of topics and includes NCP definitions relevant to the program, removal policies as determined by OERR, and step-by-step directions for preparation and approval of documentation. Appendices include examples of action memoranda, ceiling increases, and other documentation for various situations.

Relationship Of The Removal And Remedial Program Under The Revised NCP
9360.06A 3/10/86 - OERR 6 pages

Memorandum addresses revisions to the NCP that redefine the response categories of removal and remedial actions so that removals now include all activities formerly considered immediate removals, planned removals, and initial remedial measures. These definitional changes are expected to expedite many cleanup activities by avoiding previous remedial requirements for RI/FS studies and full cost effectiveness studies. Provide a higher degree of program integration and flexibility. All removals are not necessarily urgent and all remedial actions are not necessarily deferrable. This new flexibility will allow additional managerial control of scheduling and completion of all projects.

Removal Actions At Methane Release Sites
9360.0-08 1/23/86 - ERD 2 pages

Clarifies EPA's policy on the appropriateness of CERCLA removal actions at methane gas release sites. As a matter of policy, CERCLA responses to methane gas releases should be carefully evaluated on a case-by-case basis, using this document as well as best professional judgement, and with careful documentation. Because methane gas is not listed or designated under any of the statutory provisions in Section 101(14) CERCLA, it is not a "hazardous waste." However, responses under Section 104 are not limited to hazardous substances. Since methane gas emanating from a landfill is not considered to be natural gas, such releases may therefore be eligible for response under Section 104(a)(1) if methane gas otherwise meets the definition of a pollutant or contaminant under Section 104(a)(2). As a matter of policy, CERCLA responses to methane gas releases should be carefully evaluated on a case-by-case basis, using this document as well as best professional judgement, and including careful documentation.

Expedited Response Actions
9360.0-10 7/8/86 - ERD 9 pages

Memorandum from Director, OERR to Region 7 clarifies the distinction between Expedited Response Actions and First Operable Unit Remedial Actions. Provides guidance on how to choose one or the other and sketches the planning process. Includes flow chart and inquiry memorandum from Region 7.

Guidance On Implementation Of The Revised Statutory Limits On Removal Actions
9360.0-12 4/6/87 - ERD 10 pages

Provides guidance to Regions on the implementation of the SARA $2 million/ 12-month statutory limits on removal actions and the exemption from the statutory limits for "actions otherwise appropriate and consistent with the remedial action to be taken" (consistency exemption).

Guidance On Implementation Of The "Contribute To The Efficient Remedial Performance" Provision
9360.0-13 4/6/87 - ERD 8 pages

Provides guidance to the Regions on implementation of the SARA provision that requires removal actions to contribute to the efficient performance of long-term remedial actions.

Use Of Expanded Removal Authority To Address NPL And Proposed NPL Sites
9360.0-14 2/7/87 - ERD 4 pages

Directs Regions to evaluate NPL/proposed NPL sites to determine if the expanded removal authority in SARA can be used to cleanup, or substantially clean up these sites.

Role Of Expedited Response Action (ERAs) Under Sara
9360.0-15 4/21/87 - ERD 18 pages

Memorandum from Director OERR to Region 7 updates Directive 9360-10 and defines Expedited Response Actions (ERAs) as removal actions performed by remedial contractors. Provides direction on the appropriate use of ERAs.

Removal Program Priorities
9360.0-18 3/31/88 - ERD 4 pages

Sets priorities for managing removal activities at Regional level.

Interim Final Guidance On Removal Action Levels At Contaminated Drinking Water Sites
9360.1-01 10/6/87 - ERD 14 pages

Provides interim final guidance on removal action levels at contaminated drinking water sites.

Model Program For Removal Site File Management
9360.2-01 7/18/88 - ERD 18 pages

Instructs On Scene Coordinators (OSCs) and administrative support staff in the requirements for file management at on-site removal sites. Contains a kit and a list of contents for successful establishment of permanent files.

Award Of Cooperative Agreements To Political Subdivisions
9375.1-06 2/12/87 - HSCD 22 pages

Establishes procedures for providing funding to political subdivisions to perform remedial activities through cooperative agreements.

Interim Guidance On State Participation In Pre-Remedial And Remedial Response
9375.1-09 7/21/87 - HSCD 22 pages

Provides interim guidance on State participation in pre-remedial and remedial response, including the use of cooperative agreements.

Leachate Plume Management
9380.0-05 11/1/85 - HSCD Manual

Provides overview of the fundamental concepts, procedures, and technologies used in leachate plume management. Plume generation dynamics and delineation are discussed. Plume control technologies are evaluated and selection criteria for site applications are defined. Groundwater pumping, subsurface drains, low permeability barriers, and innovative technologies as acquifer restoration technologies are discussed in detail. Basic reference handbook for governmental and industrial technical personnel working on controlling leachate plumes from uncontrolled hazardous waste sites.

Guidance Document For Cleanup Of Surface Impoundment Sites
9380.0-06 7/17/86 - HSCD Manual

Provides guidance to Federal, State, and local officials and private firms that plan and implement remedial actions at NPL sites which have one or more surface impoundments containing hazardous wastes. Used with other documents in conducting remedial investigations and feasibility studies (RI/FS). Provides a systematic approach to remedial action and instruction for scoping and performance of limited remedial investigations or limited feasibility studies to be implemented in a relatively short time period. Utilizes the concept of operable units as definable problem areas which can be addressed independently of other site issues and problems.

Hazardous Waste Bibliography
9380.1-02 10/9/86 - OSWER 52 pages

Prepared by the Technology Transfer Task Force. Lists and abstracts the most important technical materials that should be readily available to all Federal and State hazardous waste staffs and their contractors. Assigns each document a level of importance as primary reference documents for Federal and State headquarters, region, and field staffs.

Superfund Innovative Technology Evaluation (SITE) Program Strategy And Program Plan
9380.2-03 12/1/86 - HSCD 58 pages

Describes the SITE program strategy, program plan, and provides information on participation in the program.

State Procurement Under Superfund Remedial Cooperative Agreements
9375.1-11 7/88 - HSCD Manual

Manual supercedes 9375.1-05 and provides the latest information and direction for managing all aspects of State procurement under Superfund Remedial Cooperative Agreements.

State Access To EPA Contractors During Remedial Process
9375.1-12 4/27/88 - HSCD 2 pages

Memorandum reaffirming procedures for State retention of EPA contractors during remedial response process.

State Core Program Funding Cooperative Agreements
9375.2-01 12/18/87 - HSCD 27 pages

Provides guidance for funding cooperative agreements between Regions and States on non-site-specific CERCLA activities.

Slurry Trench Construction For Polluton Migration Controls
9380.0-02 2/1/84 - HSCD Manual

Provides in-depth guidance on the use of slurry walls for the control of sub-surface pollutants, and describes these barriers for site remediation. Presents the theory of function, design, and use.

Guidance For Cleanup Of Surface Tank And Drum Sites
9380.0-03 5/28/85 - HSCD Manual

Intended for Federal, State and, local officials and private parties engaged in carrying out remedial actions at NPL sites. Provides guidance for implementing concurrent remedial planning activities and accelerating project implementation for cleanup of surface tanks and drums containing hazardous wastes. Should be used with other EPA documents on conducting remedial investigations and feasibility studies. Provides a systematic approach to remedial action for wastes in tanks and drums. One of three guidance documents on specific remedial actions. Bibliography identifies other documents that should be used concurrently.

Remedial Action At Waste Disposal Sites Handbook (Revised)
9380.0-04 10/1/85 - HSCD Manual

Basic reference book describing remedial technology and providing guidance in selecting technologies that are potentially applicable for a given waste site. Assists Remedial Project Managers (RPMs) in understanding remedial technologies.

SECTION III
DOCUMENTS IN FINAL DRAFT DEVELOPMENT

(Note: Descriptions of content and expected issuance date have been supplied when available.)

Quality Assurancnce Plan For Superfund
9200.1-05 Jcint Document - OERR/OWPE

Distribution For HSCD TAG Grant Program
9200.3-04 HSED

NPL Docket Guidance
9200.6-02 HSED

CERCLA Compliance With Other Laws Manual
9234.1-01 (Two Volumes)
9234.1-02 Completion Date, Fall 1988 - OPM/PAS

Provides guidance to RPMs and OSCs in implementing the CERCLA requirement that on-site remedies comply with Applicable or Relevant and Appropriate Requirements (ARARs) under Federal environmental laws and promulgated State environmental or facility siting laws that are more stringent than Federal requirements. Volume I contains an overview and requirements for compliance with RCRA ARARs. Volume II contains requirements for compliance with Safe Drinking Water Act, Clean Water Act ARARs, and ground water policies.

CERCLA Compliance With Other Laws Manual
9234.03 (Volume III) OPM/PAS

Requirements for the Clean Air Act, the Toxic Substances Control Act, and other environmental laws including resource protection statutes such as the Endangered Species Act.

Superfund Analytical Data Review And Oversight
9240.0-03 HSED

Procedures Manual For Superfund Community Relations Contractor Support
9242.5-01 HSCD

Guidance On Remedial Actions For Contaminated Ground water At Superfund Sites
9283.1-02 Estimated Issuance Date, Fall 1988 - HSED

Emphasizes decision-making issues related to contaminated ground water. For use by contractors conducting RI and FS activities at sites where ground water is contaminated; RPMs responsible for ensuring the quality of information contained in the RI/FS and decision makers responsible for selection and subsequent performance evaluation of ground water remedial actions at Superfund sites. Outlines key considerations in selecting a ground water remedy and a consistent approach to making contaminated ground water cleanup decisions. Presents case studies of ground water cleanup decision making processes. Provides detailed discussions of remedial technologies and of the technical aspects of RI/FS, such as monitoring techniques or mideling procedures. Currently in review draft.

Superfund Exposure Assessment Manual
9285.5-01 Fall 88 - HSED

Outlines a framework for a consistent, comprehensive assessment of human exposure associated with uncontrolled hazardous waste sites. Presents integrated methodology to guide the three major component analyses required to assess human population exposure to contaminants: (1) analysis of toxic conataminants released from a site; (2) determination of their environmental fate, and (3) evaluation of the nature and magnitude of human population exposure to toxic contaminants.

Guidance For Conducting RI/FS Under CERCLA
9335.3-01 HSCD

Guidance On Preparing Superfund Decision Documents The Proposed Plan And Record OF Decision
9335.3-02 HSCD

Assist personnel in EPA, States, and other Federal agencies in preparing, reviewing, and defending the Proposed Plan and the Record of Decision (ROD), two key documents in the remedy selection process.

Guidance For Low And Medium Cost Site Discovery Activities
9345.0-02 HSCD

Guidance For Special Study Activities
9345.0-03 HSCD

Site Inspection Sampling To Support HRS Scoring
9345.1-01 HSED

Implementation Guidance For Solvent Dioxin And California List Wastes Subject To RCRA/HSWA Land Disposal Restrictions
9347.1-01 HSCD

Terminating Contracts For Superfund Lead Remedial Action Projects
9355.1-02 HSCD

Guidance In Preparation Of A Superfund Memorandum Of Agreement
9375.0-01 Fall 88 - HSCD

Assists Regions and States in developing of State Memoranda of Agreements (SMOAs). Presents sample individual approaches consisting of articles and attachments corresponding to the major parts of EPA/State interactions, as will be proposed in the NCP revision. EPA Regions and States may choose to develop SMOAs based on this sample framework. Currently under review and will be reissued in draft.

Involvement Of Indian Tribal Governments In The Superfund Pre-Remedial And Remedial Program
9375.1-10 HSCD

Describes proposed NCP provisions for participation by Indian Tribes in the Superfund Program. Describes Agency's involvement with Indian Tribal governments, determination of project lead, capabilities required from Tribal governments in order to receive Fund monies, and the process for application and award of Cooperative Agreements for pre-remedial and remedial activities.

Alternative Treatment/Disposal Technology Guidance Or Removal And Expedited Removal Actions
9802.01 ERD

Site Operations Plan
9380.2-02 HSCD

Decision Criteria For Recycling Wastes From CERCLA Sites
9380.2-04 HSCD

Guidance On Differentiating Alternative Technologies
9380.2-05 HSCD

NUMERICAL INDEX TO SUPERFUND PROGRAM DIRECTIVES

9012.10	Redelegation Of Authority Under CERCLA/SARA And Superfund Internal Delegation Of Authority	16
9200.1-05	Quality Assurance Plan For Superfund (Draft)	42
9200.3-01A	Superfund Comprehensive Accomplishments Plan Manual (SCAP) FY-88	16
9200.3-02	Implementation Strategy For Reauthorized Superfund: Short-Term Priorities For Action	16
9200.3-04	Resource Distribution For TAG Program (Draft)	42
9200.3-05	Flexibility In The FY-88 Superfund Regional Extramural Operating Plan	16
9200.4-01	Guidelines For Producing Superfund Documents	17
9200.6-02	NPL Docket Guidance (Draft)	42
9200.7-01	Catalog Of Superfund Program Directives	17
9221.0-02	CERCLIS Data Handling Support Policy Statement	17
9225.0-02	Forwarding Claims To Headquarters	17
9225.0-03	Notification Of Restrictions On Reimbursement Of Private Party Costs	18
9230.0-02	Superfund Community Relations Policy	18
9230.0-03	Community Relations Handbook	18
9230.0-03a	Community Relations Activities At Superfund Enforcement Sites - Interim Guidance	18
9230.0-03B	Community Relations In Superfund - A Handbook Interim Guidance	19
9230.0-04	Community Relations Guidance For Evaluating Citizen Concerns At Superfund Sites	19
9230.0-05	Community Relations Requirements For Operable Units	19
9230.1-01	Interim Guidance On TAG Grants For Public Participation	19
9230.1-02	TAG Program Activities Prior To Issuance Of Interim Final Rule	19

9230.1-03	Citizens Guidance For The Technical Assistance Grants Program	20
9230.1-04	Regional Guidance Manual For The Technical Assistance Grant Program	20
9234.1-01	CERCLA Compliance With Other Laws Manual Volume 1 (Draft)	42
9234.1-02	CERCLA Compliance With Other Laws Manual Volume 2 (Draft)	42
9234.1-03	CERCLA Compliance With Other Laws Manual Volume 3 (Draft)	42
9234.0-04	Applicability Of RCRA Requirements To CERCLA Mining Waste Sites	20
9234.0-05	Interim Guidance On Compliance With Applicable Or Relevant And Appropriate Requirements (ARAR)	20
9240.0-01	User's Guide To The Contract Laboratory Program	20
9240.0-02	Analytical Support For Superfund	21
9240.0-03	Superfund Analytical Data Revision And Oversight (Draft)	42
9242.2-01B	Emergency Response Cleanup Services (ERCS) Users' Manual	21
9242.3-03	Procedures For Initiating Remedial Response Services	21
9242.3-05	REM II Contract Award Fee Performance Evaluation Plan	21
9242.3-07	Implementation Of The Decentralized Contractor Performance Evaluation And Award Fee Process For Selected Remedial Program Contracts	22
9242.4-01A	TAT Contractor Users' Manual	22
9242.5-01	Procedures Manual For Superfund Com. Relations Contractor Support (Draft)	42
9250.1-01	Policy On Cost-Sharing at Publicly Owned Sites	22
9250.2-01	Policy On Cost-Sharing Of Immediate Removals At Publicly Owned Sites	22
9250.3-01	Waiver Of 10% Cost Share For Remedial Planning Activities At Privately-Owned Sites	22

9250.3-02	Guidance On Implementing Waiver Of 10% Cost Sharing For Remedial Planning	22
9260.1-09	Delegations Of Remedy Selection To Regions (Under Delegation #14-5)	23
9260.3-00	FWPCA Delegations of Authority - Complete Set	23
9272.0-01	Implementation Of CERCLA Strategy At Federal Facilities	23
9272.0-02	Initial Guidance On Federal Facilities CERCLA Sites	23
9272.0-03	Responsibilities For Federal Facilities	24
9272.0-04	Federal Facilities	24
9272.0-05	Responsibilities For Federal Facilities	24
9275.1-01	Removal Financial Management Instructions	24
9275.2-01	Remedial Financial Management Instructions	24
9280.0-02	Policy On Flood Plains And Wetlands Assessments	25
9283.1-01	Recommendations For Groundwater Remediation At The Millcreek, Pennsylvania Site	25
9283.1-02	Guidance On Remedial Actions For Contaminated Groundwater At Superfund Sites (Draft)	43
9285.1-01B	Standard Operating Safety Guide Manual	25
9285.2-01	Field Standard Operating Procedures Manual #4 Site Entry	25
9285.2-02	Field Standard Operating Procedures Manual #7 Decontamination of Response Personnel	25
9285.2-03	Field Standard Operating Procedures Manual #8 Air Surveillance	26
9285.2-04	Field Standard Operating Procedures Manual #6 Work Zones	26
9285.2-05	Field Standard Operating Procedures Manual #9 Site Safety Plan	26
9285.3-01	Occupational And Health Technical Assistance And Enforcement Guidelines For Superfund	26
9285.3-02	Employee Occupational Health and Safety	26

9285.4-01	Superfund Public Health Evaluation Manual	26
9285.4-02	Guidance for Coordinating ASTDR Health Assessment Activities With The Superfund Remedial Process	27
9285.4-03	Health Assessments By ASTDR In FY-88	27
9285.5-01	Superfund Exposure Assessment Manual (Draft)	43
9285.6-01	Superfund Risk Assessment Information Directory	27
9295.1-01	Memorandum Of Understanding Between ASTDR And EPA	27
9295.2-02	Joint CORPS/EPA Guidance	27
9295.2-03	Interagency Agreement Between Corps Of Engineers And EPA In Executing P.L. 96-510 (CERCLA)	27
9295.5-01	MOU Between FEMA And EPA For The Implementation Of CERCLA Relocation Activities Under PL 96-510	28
9295.5-02	Implementation Of EPA/FEMA MOU On CERCLA Relocations	28
9318.0-04	Coordination Between Regional Superfund Staffs And OFA Counterparts on CERCLA Actions	28
9320.1-02	Guidance For Establishing The NPL	28
9320.1-05	RCRA/NPL Listing Policy	28
9320.1-06	RCRA Special Study Waste Definitions: Sites Requiring Additional Consideration Prior To NPL Proposal Under SARA	29
9320.1-07	Interim Guidance for Consideration of Sections 105(G) and 125 of SARA prior to NPL Proposal Of Special Study Waste Sites	29
9320.1-08	Listing of Municipal Landfills On The NPL	29
9320.1-09	Listing of Municipal Landfills On The NPL	29
9320.3-01	Guidance For Updating The NPL	29
9320.3-02	Instructions For Promulgating NPL Update	29
9320.3-03	Procedures For Updating The NPL	30
9320.3-04	Guidance For Proposed NPL Update #3	30

9320.3-05	NPL Information Update #4	30
9320.3-06	Updating The NPL: Update #6 Proposal	30
9320.4-01	Interim Information Release Policy	30
9330.1-01	Requirements For Selecting An Off-Site Option In A Superfund Response Action	30
9330.1-02	Evaluation Of Program And Enforcement-Lead RODS For Consistency With RCRA Land Disposal Restrictions	31
9330.2-04	Discharge Of Wastewater From CERCLA Sites Into POTWS	31
9330.2-05	CERCLA Off-Site Policy: Providing Notice To Facilities	31
9330.2-06	CERCLA Off-Site Policy: Eligibility Of Facilities In Assessment Monitoring	31
9335.3-01	Guidance For Conducting Remedial Investigations And Feasibility Studies Under CERCLA (Draft)	43
9335.3-02	Guidance on Preparing Superfund Decision Documents: The Proposed Plan And Record Of Decision (Draft)	43
9340.1-01	Participation Of Potentially Responsible Parties (PRPs) In Development Of RIs And FSs	31
9340.2-01	Preparation Of Decision Documents For Approving Fund-Financed And PRP Remedial Actions Under CERCLA	32
9345.0-01	Preliminary Assessment Guidance, FY-88	32
9345.0-02	Guidance for Low And Medium Cost Site Discovery Activities (Draft)	43
9345.0-03	Guidance For Special Study Activities (Draft)	43
9345.1-01	Draft Site Inspection Sampling To Support HRS HRS Scoring (Draft)	43
9345.1-02	Expanded Site Inspection - Transitional Guidance - FY-88	32
9345.2-01	Pre-Remedial Strategy For Implementing SARA	32
9347.0-01	Interim RCRA/CERCLA Guidance On Non-Contiguous Sites And On-Site Mgmt Of Waste Residue	33

9347.0-02	Implementation Guidance For Solvent, Dioxin, And California List Wastes Subject to RCRA/HSWA Land Disposal Restrictions	44
9355.0-03	Uncontrolled Hazardous Waste Site Ranking Systems (HRS) - A Users Manual	33
9355.0-04A	Superfund Remedial Design And Remedial Action Guidance (RD/RA)	33
9355.0-05C	Guidance On Feasibility Studies (FS) Under CERCLA	33
9355.0-6B	Guidance On Remedial Investigations (RI) Under CERCLA	34
9355.0-07B	Data Quality Objectives Development Guidance For Remedial Response Actions	34
9355.0-08	Modeling Remedial Actions At Uncontrolled Hazardous Waste Sites	34
9355.0-10	Remedial Action Costing Procedures Manual	34
9355.0-14	A Compendium Of Superfund Field Operations Methods	35
9355.0-19	Interim Guidance On Superfund Selection Of Remedy	35
9355.0-20	RI/FS Improvements	35
9355.0-21	Additional Interim Guidance For FY-87 RODS	35
9355.0-23	Interim Guidance On Funding For Ground And Surface Water Restoration Actions	35
9355.0-24	OSWER Strategy For Management Of Oversight Of The CERCLA Remedial Action Start Mandate	35
9355.1-01	Federal Lead Remedial Project Management Manual	36
9355.1-02	The RPM Primer	36
9355.1-03	Terminating Contracts For SPFD Fund-Lead Remedial Action Projects (Draft)	44
9355.2-01	State Lead Remedial Project Manual	36
9355.3-01	Guidance For Conducting RI/FS Under CERCLA (Draft)	44

9355.3-02	Guidance For Providing Alternative Water Supplies	36
9355.3-05	RI/FS Improvements Followup	36
9360.0-02B	Removal Cost Management Manual	37
9360.0-03B	Superfund Removal Procedures, Revision #3	37
9360.06A	Relationship Of The Removal And Remedial Program Under The Revised NCP	37
9360.08	Removal Actions At Methane Release Sites	38
9360.0-10	Expedited Response Actions	38
9360.0-12	Guidance On Implementation Of The Revised Statutory Limits On Removal Actions	38
9360.0-13	Guidance On Implementation Of The "Contribute To The Efficient Remedial Performance" Provision	38
9360.0-14	Use Of Expanded Removal Authority To Address NPL And Proposed NPL Sites	39
9360.0-15	Role Of Expedited Response Action Under SARA	39
9360.0-18	Removal Program Priorities	39
9360.1-01	Interim Final Guidance on Removal Action Levels At Contaminated Drinking Water Sites	39
9360.2-01	Model Program For Removal Site File Management	39
9375.0-01	Guidance On Preparation Of Superfund MOA (Draft)	44
9375.1-06	Award Of Cooperative Agreements To Political Subdivisions	39
9375.1-09	Interim Guidance On State Participation In Pre-remedial And Remedial Response	39
9375.1-10	Involvement Of Indian Tribal Governments In Superfund Pre-Remedial and Remedial Program (Draft)	44
9375.1-11	State Procurement Under Superfund Remedial Cooperative Agreements	40
9375.1-12	State Access To EPA Contractors During Remedial Process	40

9375.2-01	State Core Program Funding Cooperative Agreements	40
9380.0-02	Slurry Trench Construction For Pollution Migration Controls	40
9380.0-03	Guidance For Cleanup Of Surface Tank And Drum Sites	40
9380.0-04	Remedial Action At Waste Disposal Sites Handbook	40
9380.0-05	Leachate Plume Management	41
9380.0-06	Guidance Document For Cleanup Of Surface Impoundment Sites	41
9380.1-02	Hazardous Waste Bibliography	41
9380.2-01	Draft Alternative Treatment/Disposal Technology Guidance For Removal And Expedited Removal Actions	44
9380.2-02	Draft Site Operations Plan	44
9380.2-03	Superfund Innovative Technology Evaluation (SITE) Program Strategy And Program Plan	41
9380.2-04	Draft Decision Criteria For Recycling Wastes From Superfund Sites	44
9380.2-05	Draft Guidance On Differentiating Alternative Technologies	44
Section III	Documents in Final Draft Development	42

Part V. Existing Cost Recovery Guidance

Administrative Records for Decisions on Selection of CERCLA Response Actions, May 29, 1987, OSWER Directive No. 9833.3.

Coordination of EPA and State Actions in Cost Recovery, August 29, 1983, OSWER Directive No. 9832.2.

Cost Recovery Actions/Statute of Limitations, June 12, 1987, OSWER Directive No. 9832.3-1A.

Cost Recovery Actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), August 26, 1983, OSWER Directive No. 9832.1. Also known as the 1983 Cost Recovery Guidance.

Cost Recovery Referrals, August 3, 1983, OSWER Directive No. 9832.0.

Guidance of Documenting Decisions not to Take Cost Recovery Actions, June 7, 1988, OSWER Directive No. 9832.11.

Guidance on Federal Superfund Liens, September 22, 1987, OSWER Directive No. 9832.12.

Interim CERCLA Settlement Policy, December 5, 1984, OSWER Directive No. 9835.0.

Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites, April 7, 1988, OSWER Directive No. 9831.6.

Interim Guidance on Notice Letters, Negotiations, and Information Exchange, November 19, 1987, OSWER Directive No. 9834.10.

Interim Guidance on Settlements with de Minimis Waste Contributors under Section 122(g) of SARA, June 19, 1987, OSWER Directive No. 9834.7.

Interim Guidance: Streamlining the CERCLA Settlement Decision Process, February 12, 1987, OSWER Directive No. 9835.4.

Policy on Recovering Indirect Costs in CERCLA §107 Cost Recovery Actions, June 27, 1986, OSWER Directive No. 9832.5.

Potentially Responsible Party Search Manual, August 27, 1987, OSWER Directive No. 9834.3-1A.

Procedures for Documenting Costs for CERCLA §107 Actions, January 30, 1985, OSWER Directive No. 9832.0-1A. Also known as the Cost Documentation Procedures Manual.

Revised Hazardous Waste Bankruptcy Guidance, May 23, 1986, OECM.

Small Cost Recovery Referrals, July 12, 1985, OSWER Directive No. 9832.6.

State Superfund Financial Management and Recordkeeping Guidance, November 1987, Office of the Comptroller, Financial Management Division.

Superfund Removal Procedures Revision Number Three, February 1988, OSWER Directive No. 9360.0-03B. See Chapter 5, "Potentially Responsible Parties".

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 117, 302, and 355

[FRL-3207-3]

Reporting Exemptions for Federally Permitted Releases of Hazardous Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, requires that the person in charge of a vessel or facility from which a hazardous substance has been released in a quantity that is equal to or greater than its reportable quantity (RQ) shall immediately notify the National Response Center of the release. Section 102(b) sets an RQ of one pound of hazardous substances, except those for which RQs have been established pursuant to section 311a(b)(4) of the clean Water Act. Section 102(a) authorizes the U.S. Environmental Protection Agency (EPA) to adjust RQs for hazardous substances and to designate as hazardous substances those substances that, when released into the environment, may present substantial danger to the public health or welfare or the environment.

The notification requirement under sections 103(a) and 103(b) of CERCLA applies to any release of a hazardous substance "other than a federally permitted release." Section 101(10) of CERCLA defines "federally permitted release" in terms of the discharge requirements of a number of State and Federal programs. Section 107(j) of CERCLA also exempts a "federally permitted release" from liability under CERCLA for response costs and damages incurred due to the release.

The purpose of this rulemaking is to clarify the federally permitted release exemption from CERCLA release reporting and liability provisions. Today's proposed rule also addresses this exemption from the notification requirements under Title III of the Superfund Amendments and Reauthorization Act of 1986. The Agency also proposes in this rule to make conforming changes to the regulation (40 CFR Part 117) describing the notification requirements for releases of hazardous substances under section 311 of the Clean Water Act. Finally, this rulemaking addresses several issues related to which releases into the environment require notification under CERCLA.

DATES: Comments must be submitted on or before September 19, 1988.

ADDRESSES:

Comments: Comments should be submitted in triplicate to: Emergency Response Division, Superfund Docket Clerk, Attention: Docket Number 101(10) FPR, Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Docket: Copies of materials relevant to this rulemaking are kept in Room LG-100, at the above address. The docket is available for inspection between 9:00 a.m. and 4:00 p.m. Monday through Friday, excluding Federal holidays. Appointments to review the docket can be made by calling 202/382-3046. As provided in 40 CFR Part 2, a reasonable fee (the first 50 pages are free and each additional page costs $.20) may be charged for copying services.

FOR FURTHER INFORMATION CONTACT:

Mr. Hubert Watters, Project Officer, Response Standards and Criteria Branch, Emergency Response Division (WH-548B), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-2463; or the

RCRA/Superfund Hotline, 1-800/424-9346; in Washington, DC, 1-202/382-3000.

The toll-free telephone number of the National Response Center is 1-800/424-8802; in the Washington, DC metropolitan area, the number is 1-202/426-2675.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Introduction and General Comments
A. Background
B. Relationship to Reporting Under Title III
II. Elements of the Exemption
III. Notification for Certain Types of Releases
A. In General
B. PCB Waste Disposal
IV. Discharges to POTWs
V. Regulatory Analyses
A. Executive Order No. 12291
B. Regulatory Flexibility Act
C. Paperwork Reduction Act

I. Introduction and General Comments

A. Background

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510), 42 U.S.C. 9601 *et seq.* (CERCLA or the Act), enacted on December 11, 1980, and amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (Pub. L. 99-499), establishes broad Federal authority to respond to releases or threats of releases of hazardous substances from vessels and facilities. Section 101(14) of CERCLA defines the term "hazardous substances" chiefly by reference to other environmental statutes with authority further granted to the U.S. Environmental Protection Agency (EPA) to designate additional hazardous substances under CERCLA section 102(a). The CERCLA list currently contains 721 hazardous substances.

Section 103(a) of the Act requires that, as soon as the person in charge of a vessel or facility has knowledge of a release of a hazardous substance from such vessel or facility in a quantity equal to or greater than the reportable quantity (RQ) for that substance, the person shall notify the National Response Center immediately. Section 102(b) of CERCLA establishes RQs for releases of hazardous substances at one pound, except for those substances whose RQs were established at a different level pursuant to section 311(b)(4) of the Clean Water Act (CWA). Section 102(a) of CERCLA authorizes the EPA Administrator to adjust all of these RQs by regulation (see 40 CFR 302.4).

Section 109 of CERCLA and section 325 of SARA Title III authorize EPA to assess civil penalties for failure to report releases of hazardous substances that equal or exceed their RQs. Section 103 of CERCLA, as amended, authorizes EPA to seek criminal penalties for submitting false or misleading information in a notification made pursuant to CERCLA section 103, and increases the maximum penalties and years of imprisonment for violation of the CERCLA section 103 reporting requirement.

One of the exemptions from section 103 reporting requirements is for "federally permitted releases." The definition of "federally permitted release" in CERCLA section 101(10) specifically identifies releases permitted under other environmental statutes, including the following general types of releases:

- Discharges covered by a National Pollutant Discharge Elimination System (NPDES) permit, permit application, or permit administrative record;
- Discharges in compliance with a legally enforceable permit for dredged or fill materials under section 404 of the CWA;
- Releases in compliance with a legally enforceable Resource Conservation and Recovery Act (RCRA) hazardous waste management facility final permit;
- Releases in compliance with a legally enforceable permit under the

Marine Protection, Research, and Sanctuaries Act;

• Any injections of fluids authorized under federally approved underground injection control programs (including federally authorized State programs) pursuant to Part C of the Safe Drinking Water Act;

• Any air emissions subject to permit or control regulations under certain provisions of the Clean Air Act (CAA);

• Any injections of fluids or other materials authorized by applicable State law for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, or for other production or enhanced recovery purposes;

• The introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with pretreatment standards and a pretreatment program submitted to EPA for approval; and

• Any release of source, special nuclear, or byproduct material in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act.

In the May 25, 1983 Notice of Proposed Rulemaking (NPRM) (48 FR 23552) to adjust certain RQs, EPA explained the Agency's interpretation of each of the types of releases exempted by the definition of "federally permitted release." EPA has decided to repropose the rule for federally permitted releases today rather than publish a final rule because of the amount of time that has passed since the original proposal. Today's proposed regulation would add a definition of "federally permitted release" to 40 CFR 302.3, Definitions.[1]

EPA received many comments on various aspects of the federally permitted release exemption, most of which urged a broader interpretation of one or more of the exemption categories. General comments on the scope of the exemption are discussed below, followed by discussion of comments on specific types of federally permitted releases.

Several commenters discussed the potential duplication between CERCLA reporting requirements and reporting requirements under existing permit programs for releases exceeding levels set by the terms of the permit. These commenters suggested that, because permit programs already may require notification of a regulatory authority in the event of a release exceeding permit levels, such releases should be exempt from notification when permitted levels are exceeded by an RQ or more. CERCLA section 101(10), however, generally limits the federally permitted release exemption to those releases "in compliance with" permitted or regulatory requirements. A straightforward interpretation of the statute indicates that if a release exceeds permitted levels, it is not "in compliance with" the permit and cannot be "federally permitted." Therefore, if the amount of the release exceeding the permitted level, i.e., the portion of the release that is not federally permitted, is equal to or exceeds the RQ, the release must be reported immediately to the National Response Center. This approach also avoids the numerous and unnecessary reports that could be generated by the reporting of small permit excursions that are better addressed by the permitting authority.

EPA believes that its interpretation is required by the plain language of the statute and is essential to ensure adequate protection of public health and the environment. The Agency believes that CERCLA reporting and reporting under permit programs is not duplicative because there are significant differences between the purposes served by CERCLA notification and the purposes of permit programs. The permit notification requirements and the information that is reported under permit programs may differ from one program to another. If permit notification requirements were allowed to suffice for CERCLA notification, the information available to the CERCLA program on releases might be inconsistent and incomplete. Permit programs also differ in their reporting mechanisms and do not always require immediate notification. In some cases, releases in excess of permitted levels need only be reported at specific intervals (e.g., monthly). Moreover, releases in excess of permit levels are reported to different Federal and State authorities, depending upon the permit. CERCLA requires immediate notification to a central office, the National Response Center, as soon as the person in charge has knowledge of a release equal to or exceeding an RQ, so that timely response may be initiated if the appropriate government authority determines that the release may present substantial danger to public health or the environment.

Moreover, EPA is not convinced that requiring persons in charge of a vessel or facility to make additional telephone calls (to the National Response Center, the local community emergency coordinator, and the State emergency response commission) to a toll-free or local number constitutes an undue burden on the regulated community. The Agency seeks comments on its interpretation of the burdens and the benefits of requiring reporting under CERCLA and Federal or State permit programs.

Several commenters recommended that releases be considered federally permitted releases (and therefore exempt from CERCLA notification and liability provisions) if they are exempt from regulation by the statutes listed in CERCLA section 101(10). EPA believes that exempting such releases would be contrary to the purpose of the notification requirements, which is to protect human health and the environment by requiring that responsible authorities be notified of releases that may require a timely response. The exemption of a type of release from regulation under a particular statute may have little or no bearing on whether a Federal response action might be needed for a specific release.

Examples illustrate the disparate reasons for exemptions. For instance, owners or operators of certain solid waste disposal facilities that handle hazardous waste only from generators of less than 100 kg. per month of nonacutely hazardous waste (See 40 CFR 261.5) are exempt from the requirement to obtain a hazardous waste management facility permit under section 3005 of RCRA. The exemption is based on a balancing of the administrative burden of including such wastes in the Subtitle C system against the threat the Agency determined would be posed by disposing of the wastes in unpermitted facilities (45 FR 33066, 33102–33105 (May 19, 1980)). Certain types of hazardous waste recycling activities—for example, the act of reclamation of a hazardous waste or burning a hazardous waste in a boiler or industrial furnace to recover energy—are exempt from regulation while EPA determines appropriate regulatory regimes for these activities. (See 40 CFR 261.6 and 40 CFR Part 266). Under the CWA, electroplating facilities that produce 1000 gallons of effluent per day are exempted from effluent standards because compliance is economically infeasible for these small firms (39 FR 11510, March 28, 1974). In each instance, the release may require response action, and the fact that the release is exempted from the statutory requirements is not relevant to this determination. The Agency has determined, therefore, that releases exempted from regulation by the statutes listed in section 101(10) will

[1] Further, today's proposal revises the definition of "release" to reflect SARA amendments to CERCLA section 101(22).

not be considered federally permitted releases.

Although certain releases may not qualify as federally permitted, they may not pose a sufficient hazard to warrant reporting to the National Response Center. The Administrator will consider establishing an administrative exemption from CERCLA notification requirements if it appears that certain releases pose no hazard or pose a hazard only rarely and under circumstances that would not likely result in any action being taken to respond to the hazard. However, no such exemptions are proposed under this regulation.

One commenter requested that a release still be considered a federally permitted release when there is only a "technical" violation of permit conditions (i.e., where the violation relates to operating, monitoring, or reporting procedures and does not affect the character or quantity of the release). EPA agrees that notification of the National Response Center would be unnecessary in such a case and should be addressed by the permit programs, where appropriate, as a permit violation. If the characteristics of a release (both the substance involved and the quantity or concentration are in compliance with a permit described in section 101(10), CERCLA notification will not be required. However, to the extent that a release exceeds the permit limit with regard to the quantity of a hazardous substance, it will not be considered a federally permitted release and CERCLA notification will be required when the release of the hazardous substance exceeds its permitted level by an RQ or more. Some Federal permit programs do not include quantitative limits on the amounts of specific hazardous substances that can be released. Accordingly, no "permitted level" exists against which the released quantity can be compared to determine whether CERCLA notification is required (i.e., whether the permitted level has been exceeded by an RQ or more). In such cases, CERCLA notification will be required when the characteristics of the release are not in compliance with the permit (e.g., the allowable concentration of a particular constituent has been exceeded) and an RQ or more of a hazardous substance has been released.

Several commenters urged that various types of releases (such as all "routine" releases or releases covered by other permit programs) not mentioned in section 101(10) be considered federally permitted release. EPA cannot support this position. Federally permitted releases are specifically listed in section 101(10). This detailed list clearly indicated that Congress did not intend releases other than those listed in section 101(10) to be considered federally permitted and thereby exempt from CERCLA reporting and liability requirements.

B. Relationship to Reporting Under Title III

Title III of SARA (sections 301-328) addresses emergency planning and community right-to-know and provides, among other things, emergency and annual notification requirements in addition to those included in section 103 of CERCLA. EPA has provided (see 52 FR 13377, April 22, 1987; 52 FR 21152, June 4, 1987) and will continue to provide regulations and guidance on the Title III requirements as necessary and appropriate.

With respect to emergency notification requirements, section 304 of SARA provides release reporting requirements that parallel the requirements of section 103(a) but are intended to make release information immediately available to State and local emergency officials as well as Federal response officials notified under CERCLA section 103. In addition, section 304(a) requires reporting of (1) releases for which notification is required under section 103(a) of CERCLA, and (2) releases of "extremely hazardous substances" that are not hazardous substances under CERCLA but that "occur in a manner which would require notification under section 103(a)" of CERCLA. Federally permitted releases, as defined by CERCLA section 101(10), are not required to be reported under section 304 of SARA (see 52 FR 13383). To clarify the type of releases that are defined as federally permitted releases, and thereby exempt from SARA section 304 reporting, today's rule proposes to revise the applicability section of the regulation implementing section 304 (40 CFR 355.40(a)) to add the definition of "federally permitted releases" provided in this rule. Thus, the interpretation of federally permitted release proposed in today's rule will define clearly the scope of the releases reportable under SARA section 304. With respect to annual notification of toxic chemical releases required under SARA section 313, however, federally permitted releases are not exempt.

II. Elements of the Exemption

Each element of the federally permitted release exemption is discussed below. Relevant comments received on the may 25, 1983, NPRM pertaining to each element also are discussed.

Releases from Point Sources with National Pollutant Discharge Elimination System (NPDES) Permits. Introduction. Section 101(10) identifies three types of releases from point sources with NPDES permits as federally permitted releases:

(A) discharges in compliance with a permit under section 402 of the Federal Water Pollution Control Act, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Federal Water Pollution Control Act and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Federal Water Pollution Control Act, which are caused by events occurring within the scope of relevant operating or treatment systems * * *.

This language is identical to that used in section 311(a)(2) of the CWA to exclude these releases from the term "discharge" with respect to EPA's oil and hazardous substances spill response and prevention program. Furthermore, Congress intended, in enacting CERCLA section 101(10) (A), (B), and (C), that EPA's interpretation of the provisions under the CWA be continued under CERCLA. (See S. Rep. No. 848, 96th Cong., 2nd Sess. 47 (1980).) Reflective o. Congressional intent, the Agency proposes today that the interpretation provided in the regulatory language and the preambles to the rules implementing the CWA section 311(a)(2) exclusions be applied to the same exemptions under CERCLA section 101(10) (A), (B), and (C).

The legislative history of the CWA explains that the purpose of the section 311 exemptions was to exclude from the spill response provisions of section 311 three types of discharges subject to regulation under other CWA provisions; specifically, section 402 NPDES permits and section 309 enforcement provisions. Senator Stafford explained that:

* * * we are attempting to draw a line between the provisions of the [CWA] under sections 301, 304, 402 regulating chronic discharges and 311 dealing with spills. At the extremes, it is relatively easy to focus on the difference but it can become complicated. The concept can be summarized by stating that those discharges of pollutants that a reasonable man would conclude are associated with permits, permit conditions, operation of treatment technology and permit violations would result in 402/309 sanctions; those discharges of pollutants that a reasonable man would conclude are episodic or classical spills not intended or capable of being processed through the permitted treatment system and outfall would result in

the application of section 311. (124 Congressional Record 37683 (1978).)

In 1979, the Agency promulgated 40 CFR Part 117, which contains CWA reporting requirements for discharges of hazardous substances (44 FR 50776, August 29, 1979). Section 117.12 provided a regulatory interpretation of the three exclusions to the defintion of "discharge" in 40 CFR Part 116 and CWA section 311(a)(2), and the preamble to the rule provided a detailed explanation of the three types of excluded discharges. In 1987, EPA amended the definition of "discharge" in 40 CFR Part 110, the discharge of oil regulation, to codify the same three CWA exclusions (52 FR 10712, April 2, 1987). The preamble to the oil discharge rule adopted the description of the three exclusions from the 1979 preamble to 40 CFR Part 117.

In today's rule, the Agency proposes to apply the existing interpretation of the three types of discharges that are excluded from coverage under CWA section 311 to the first three types of discharges under CERCLA section 101(10). Thus, this interpretation will apply to the following regulatory provisions: 40 CFR 110.1, 116.3, 117.12, 300.5, 302.3, and 355.40. The Agency, however, also is proposing to make two clarifying amendments to 40 CFR 117.12, as explained below, that also will be aplicable to the corresponding exemptions under 40 CFR Parts 110, 116, 300, 302, and 355.

In the paragraphs that follow, the three types of NPDES discharges that correspond to the federally permitted releases in CERCLA sections 101(10)(A), (B), and (C) are described. For simplicity, these discharges will be referred to as Type A, B, and C, respectively.

Type A Discharges. Type A discharges are those that are in compliance with an NPDES permit limit that specifically addresses the discharge in question. To qualify as a Type A discharge, the permit must either address the discharge directly through specific effluent limitations or through the use of indicator pollutants. In the case of the latter, the administrative record prepared during permit development must identify specifically the discharge of the pollutant as one of those pollutants the indicator is intended to represent.

Type B Discharges. Type B discharges are foreseeable (i.e., identified in the NPDES permit's development record) and flow into a facility's effluent treatment system designed to treat the discharge. This second type of discharge is limited to on-site spills to the permitted treatment system that were identified and considered in the issuance of the permit but are not subject to any specific effluent limitations. Discharges are included only where (1) the source, nature, and amount of a potential discharge were identified and made part of the public record, and (2) the permit contained a condition requiring that the treatment system be capable of eliminating or abating the potential discharge.

Therefore, if an on-site spill was processed through a treatment system capable of eliminating or abating the spill, and the spill is subject to a permit condition, a discharge resulting from the on-site spill would be subject to CWA sections 402 and 309 and would be a federally permitted release. If an on-site spill is not passed through a treatment system or is not otherwise treated in any way, the discharge resulting from the on-site spill is subject to CWA section 311 and is not a federally permitted release. Also, discharges that result from on-site spills that are passed through treatment systems (1) that have not been demonstrated as capable of eliminating or abating the discharge or (2) for which no permit condition exists are subject to CWA section 311 and are not federally permitted releases under CERCLA.

A "permit condition" would include the existence of a treatment system or release prevention plans and other best management practices designed to address the discharge. Best management practices are operating methods or procedures to prevent or minimize the potential for the discharge of toxic or hazardous substances from processes ancillary to the industrial manufacturing or treatment process. For example, a discharger has a drainage system that will route spilled material from a broken hose connection to a holding tank or basin for subsequent treatment or discharge at a specified rate. To be eligible as a Type B discharge, the discharger must identify specifically such a system in the permit application. The permit condition discussed in the application must be sufficient to treat the maximum potential spill from the identified source. Discharges that result from an on-site spill larger and more concentrated than the spill contemplated in the public record, and for which a condition was provided in the permit, will be subject to CWA section 311 and CERCLA notification and liability provisions (i.e., the discharge will not be a federally permitted release).

Today's rule proposes to amend 40 CFR 117.12(c) by deleting the phrase "whether or not the discharge is in compliance with the permit." for Type B discharges, to avoid confusion caused by the phrase. The phrase was originally included in the rule because Type B discharges are discharges that result from circumstances identified and considered in the issuance of a permit but that are not subject to any specific effluent limitations. The Agency is concerned that the phrase may be interpreted incorrectly to mean that Type B could refer to discharges in which the permittee did not satisfy the condition placed in the permit. Because the Agency believes that the phrase causes confusion, the Agency proposes to delete the phrase from the regulation. The Agency solicits comments on this proposed revision to 40 CFR 117.12(c).

Type C Discharges. Type C discharges are from a point source and are (1) continuous or anticipated intermittent discharges, (2) identified in a permit or permit application, and (3) caused by events occurring within the scope of the relevant operating and treatment systems. Included within the scope of this provision are chronic, process-related discharges resulting from periodic upsets in the manufacturing and treatment systems, for example, the discharge created by a system backwash. Discharges caused by spills or episodic events that release hazardous substances to the manufacturing or treatment systems are not Type C discharges. The language of 40 CFR 117.12(d) provides further examples of discharges that fit within the category: (1) Provided that an on-site spill is not the cause, contamination of noncontact cooling water or storm water; (2) an upset or failure of a treatment system or of a process producing a continuous or anticipated intermittent discharge; or (3) where the discharge originates in the manufacturing or treatment systems, a continuous or anticipated discharge of process waste water.

Amendment to 40 CFR 117.12. With respect to Type C discharges, the Agency also is proposing in today's rule to amend 40 CFR 117.12(d)(2)(iii) by deleting the term "operator error" from the description of "an upset or failure of a treatment system." [8] The reasons for

[8] Section 117.12(d)(2)(iii) presently states:

(iii) An upset or failure of a treatment system or of a process producing a continuous or anticipated intermittent discharge where the upset or failure results from a control problem, an operator error, a system failure or malfunction, an equipment or system startup or shutdown, an equipment wash, or a production schedule change, provided that such upset or failure is not caused by an on-site spill of a hazardous substance.

the proposal to eliminate the term "operator error" are: (1) The use of the term "operator error" in describing an upset is inconsistent with the NPDES regulations (40 CFR 122.41) that provide that a discharge caused by an operator error is not an upset; and (2) the Agency believes that discharges caused by operator error are not likely to be "continuous or anticipated intermittent discharges," as provided by the statutory language. The Agency expects discharges caused by operator error to be episodic and unpredictable, as compared to discharges caused by system startups and shutdowns. The proposed deletion of the term "operator error" is intended to enhance the clarity and consistency of the regulatory language and is not meant to signal a change in policy. It is possible that under some circumstances an operator error may cause a failure of a treatment system or process, and produce a continuous or anticipated intermittent discharge. Such a discharge may meet the requirements for a federally permitted release. The term "upset" as used in 40 CFR Part 117, however, generally will be interpreted to be consistent with the term "upset" in 40 CFR Part 122, i.e., it does not include incidents caused by operational error. The Agency requests comments on its proposal to delete operator error from 40 CFR 117.12(d)(2)(iii).

Conclusion. Under both CWA section 311 and CERCLA, any discharge or release of a hazardous substance that is not federally permitted, as described above, must be reported immediately to the National Response Center if it exceeds permit limits by an RQ or more; if the hazardous substance discharge or release is not subject to a numerical permit limit, any discharge or release that triggers a permit violation and equals or exceeds an RQ must be reported immediately. Similarly, under 40 CFR Part 110, any oil discharge that exceeds permitted levels and causes an oil sheen must be reported immediately.

Discharges excluded from CWA section 311 coverage and defined as federally permitted releases under CERCLA sections 101(10) (A), (B), and (C) are subject to the CWA section 309 enforcement provision that provides EPA with the authority to issue compliance orders, bring civil actions, and impose criminal and civil penalties. In addition, under CWA section 311(b)(6)(D), if the Federal government incurs any costs of removal of discharges excluded by section 311(a)(2)(C), the Federal government can bring a civil action under the authority provided by CWA section 309(b) to recover such removal costs. Furthermore, under CERCLA section 107(j), the response costs incurred by the Federal government in connection with the federally permitted releases defined by section 101(10) (B) and (C) can be recovered through a civil action brought under the authority of CWA section 309(b).

Finally, all three exemptions raise the issue of timeliness of notification. The reporting requirements for releases exempted from CERCLA reporting and liability under section 101(10) (A), (B), and (C) and excluded from CWA section 311(a)(2) are subject to the 24-hour notification requirements under CWA section 402. The Agency acknowledges that Congress recognized that the 24-hour reporting requirement may "create gaps in action necessary to protect the public or the environment." (See S. Rep. No. 848, 96th Cong., 2nd Sess. 47 (1980).) The legislative history of section 101(10) suggests that the Agency could resolve this issue by amending the CWA section 402 reporting regulation to require that those releases excluded from CWA section 311 coverage and exempt from CERCLA reporting requirements be subject to an immediate notification requirement under the CWA section 402 NPDES regulations. (Ibid.) The Agency has not yet amended the NPDES regulations to require immediate notification of those releases exempt from section 311 and CERCLA. Before the Agency proposes to amend the CWA sectin 402 NPDES regulations (40 CFR Part 122) to revise the 24-hour notification requirement to an immediate notification requirement for the exempted releases, the Agency solicits comments on the "reporting gap," particularly examples of situations where the 24-hour notice was not sufficient to protect human health and the environment.

Releases Subject to CWA Section 404 Permits. Discharges that comply with a legally enforceable permit for dredge or fill materials under section 404 of the CWA also are federally permitted releases exempted from the notification requirements of CERCLA sections 103(a) and 103(b). Before issuing these permits, the government reviews the substances to be discharged. Permits allowing the discharge of hazardous substances are issued only if no significant degradation of the aquatic environment will result. This exemption applies to discharges in compliance with the terms and conditions of either an individual or a general CWA section 404 permit.

In regulations implementing section 311 of the CWA for hazardous substances, 40 CFR 117.12 (but not the regulations for oil in 40 CFR Part 110), EPA exempted from the notification requirement not only those releases that were in compliance with section 404 permits, but also those releases that were exempt from permit requirements under section 404 of the CWA (sections 404(f) and 404(r)). These latter releases are not "federally permitted releases" for purposes of CERCLA because section 101(10)(D) is limited to releases in compliance with a legally enforceable permit under section 404 of the CWA. The Agency interprets the CERCLA notification requirements to exempt only those releases whose environmental and health effects have been evaluated and determined to be allowable under the appropriate permit program.

Releases from Facilities with Final RCRA Permits. Releases in compliance with a legally enforceable RCRA treatment, storage, or disposal final permit are, pursuant to CERCLA section 101(10)(E), federally permitted releases when the hazardous substances released are specified in the permit and subject under the permit to a specific limitation, standard, or control procedure (see 40 CFR Parts 264 and 270). Identifying releases on the record during the permit process is insufficient to qualify them for the section 101(10)(E) exemption because, in order to be exempt, the substances must be specified in the permit and subject to some permit condition or control.

Four commenters requested that facilities with interim status pursuant to section 3005(e) of RCRA and 40 CFR Part 265 be included in the "federally permitted release" definition. Some of the commenters indicated that it may be some time before these facilities are issued final permits. The legislative history specifically rejects application of this exclusion to releases from facilities with interim status (S. Rep. No. 848, 96th Cong., 2nd Sess. 48 (1980)).

Releases Pursuant to Marine Protection, Research, and Sanctuaries Act Permits. Section 101(10)(F) of CERCLA includes, in the definition of a federally permitted release, releases in compliance with legally enforceable permits issued under section 1202 (EPA ocean dumping permits) or section 103 (Corps of Engineers permits for ocean dumping of dredged materials) of the Marine Protection, Research, and Sanctuaries Act. Pursuant to EPA regulations, applicants for ocean dumping permits must identify the physical and chemical properties of the materials to be discharged, and the permit must identify the materials that may be discharged (see 40 CFR Parts 221 and 227). Similar procedures and criteria

apply to permits for ocean dumping of dredged material (see 33 CFR Part 324). These EPA and Corps of Engineers permits cover substances that can be discharged lawfully. Dumping of hazardous substances not specifically allowed in these permits is subject to the notification requirements of CERCLA section 103(a) because emergency response officials should be made aware of releases not evaluated previously by a permit program for health and environmental effects.

Underground Injections Authorized Pursuant to the Safe Drinking Water Act. CERCLA section 101(10)(G) exempts from the notification requirements "any injection of fluids" authorized under Federal injection control programs or State programs submitted for Federal approval pursuant to Part C of the Safe Drinking Water Act (and not disapproved by EPA).

EPA has published regulations establishing technical standards and criteria (40 CFR Part 146) and regulations governing approval of State programs and permit procedures (40 CFR Parts 122-124). Under the Safe Drinking Water Act, the States are to take the primary role in implementing the underground injection control program; EPA is to administer the program only if the State fails to submit an approvable program within a specified time period. Any underground injection of hazardous substances permitted under a State program that has been approved, or submitted and not disapproved by EPA, or permitted under an EPA-administered program, is considered federally permitted for purposes of CERCLA notification.

Emissions Subject to Clean Air Act Controls. Section 101(10)(H) of CERCLA provides an exemption for hazardous substance emissions that are subject to a Clean Air Act (CAA) permit or control regulation (see 40 CFR Parts 52, 60, 61, and 62). However, as stated in the preamble to the May 25, 1983 NPRM, for this exemption to apply, any such CAA controls must be "specifically designed to limit or eliminate emissions of a designated hazardous pollutant or a criteria pollutant." (See S. Rep. No. 848, 96th Cong., 2nd Sess. 49 (1980)). The CAA exemption, therefore, cannot be read broadly to cover any and all types of air emissions. Moreover, as today's proposed rule makes clear, for the exemption to apply, the emission must be in compliance with the applicable permit or control regulation.

Several commenters suggested that the clear and unequivocal nature of the statutory language made elaboration on the CAA exemption unnecessary. Generally, these commenters took the view that the CAA exemption covers nearly all air emissions because such emissions are in one way or another controlled by the CAA—either directly because they contain substances specifically regulated by the CAA, or indirectly, for example, through emission limitations established as part of State Implementation Plans (SIPs) approved under section 110 of the CAA. Some commenters even claimed that because controls could be developed for any hazardous substance, any release to the air is "subject" to CAA controls.

EPA does not agree that the broadest interpretations, under which virtually all air emissions including dangerous episodic releases would be exempt from CERCLA reporting requirements, could have been intended by Congress under section 101(10). Moreover, the exemption for "federally permitted releases" under CERCLA section 101(10) also applies to reporting of air releases to State and local governments under Title III of SARA. Title III, which is the Emergency Planning and Community Right-to-Know Act of 1986, was enacted in large part as a response to dangers posed by chemical air releases to surrounding communities, such as the catastrophic release of methyl isocyanate in Bhopal, India. Because Title III was intended to address particularly the dangers of air releases, interpreting the exclusion for federally permitted releases so that accidental air releases would not be reported locally would be directly contrary to the legislative purpose. Similarly, the purpose of notification requirements under section 103 of CERCLA is to ensure that the government is informed of any potentially dangerous releases of hazardous substances to the environment for which timely response may be necessary. Establishing a very broad interpretation of CAA controls, as requested by the commenters, could eliminate virtually any CERCLA reporting of air emissions and, thus, the potential for early Federal responses; such an approach would eviscerate not only the Congressional intent but also the major purpose of the section 103 notification requirement.

In addition, some commenters urged EPA to interpret the federally permitted release exemption to include any air emission from a permitted source. Some of the commenters used the word "reviewed" almost interchangeably with the word "permitted." A "reviewed" release is not necessarily a "permitted" release or a controlled release. A permitted release is an allowable release of a specific substance or emission. A reviewed release generally may be one of many releases from a permitted source that is being checked for compliance with a variety of laws and regulations. The inclusion of a pollutant in a SIP review provision is not equivalent to subjecting the pollutant to CAA requirements or controls "designed specifically to limit or eliminate" the pollutant. (See S. Rep. No. 848, 96th Cong., 2nd Sess. 49 (1980)). A reviewed release, therefore, is not necessarily a federally permitted release.

Several commenters stated that the air release exemption should apply broadly to substances such as volatile organic compounds (VOC) or total suspended particulates (TSP) regulated under the CAA (including those regulated under approved State programs). The commenters claimed that a permit or regulatory limit on such categorical emissions in effect constitutes a limit on each constituent in the group. EPA generally agrees with this position, but again is concerned that an overbroad interpretation of the air release exemption could result in nonreporting of dangerous chemical releases. A large release of a substance from a pressure release valve over a short period of time could be within a VOC limit established for a source, yet could pose a threat to nearby residents. Although the categorical limits indirectly restrict each constituent, those limits were established based on routine emissions over a specific averaging time, and were not predicated on an upset or excursion from normal operations. The Agency does not believe, therefore, that such an upset or excursion should be considered "permitted" within the meaning of section 101(10)(H) of CERCLA.

EPA is soliciting public comment today on three approaches to distinguishing emissions permitted under the CAA from releases that could create potential hazards to surrounding areas and for which timely notification under CERCLA and Title III is necessary. Under the first approach, EPA would interpret the air release exemption in a manner similar to the exemption for releases regulated under the CWA. Thus, air releases would be permitted to the extent that the constituent hazardous substances have been identified, reviewed, and made part of the public record during the permit issuance, State implementation plan, or regulation development process for the pollutant that includes the hazardous substance. The exemption would not extend to releases of constituent hazardous substances of a permitted or regulated pollutant category that are not identified expressly on the record with respect to

the applicable permit or control program. Once the constituent hazardous substance had been identified and reviewed appropriately, the limitation on the category of emissions of hazardous substances would provide the "permit or control regulation" needed for application of the section 101(10)(H) exemption. A specific issue on which the Agency solicits comments is the inclusion of negative determinations under the CAA section 112 program in the exemption.

The second approach would interpret broadly the regulatory programs governing pollutants for which a National Ambient Air Quality Standard (NAAQS) has been established under CAA section 109. These programs are developed under CAA section 111 New Source Performance Standards (NSPS) or CAA section 110 State Implementation Plans (SIPs). Under this approach, EPA would distinguish between emissions of hazardous substances that are VOCs and regulated as precursors of ozone, and constituents of the other NAAQS pollutants. For example, emissions of constituents of particulate matter would be considered "subject to a permit or control regulation" and, therefore, exempt from notification requirements. Emissions of individual VOCs, however, would not be considered subject to permit or control regulations solely because they are indirectly controlled by regulations limiting total VOC emissions. These emissions of individual VOCs in amounts equal to or in excess of an RQ, consequently, would be subject to notification requirements.

This approach is based on the recognition that for five of the present NAAQS (sulfur dioxide, particulate matter, nitrogen oxides, lead, and carbon monoxide) the standards in each case are based on the evidence of health effects of those emissions. In contrast, emissions of VOCs are regulated based on their reactivity and consequent contribution to the creation of ambient ozone levels for which NAAQS have been set. In setting the ozone NAAQS or establishing emission limitations for VOCs, no consideration was given to any direct health effects of ambient concentrations of total or any constituent VOC. As a result, interpreting VOC emission limitations to subsume consideration of the possible health effects of constituents appears to be inappropriate. Using this interpretation, a substance would be considered federally permitted if it is a constituent of, and, therefore, limited by regulations or standards for, any of the five pollutants enumerated above, but not if it is limited by standards for VOCs.

Reportable quantities for the purpose of release notification requirements are established to ensure appropriate response to episodic releases of hazardous substances that have potential adverse health and environmental effects. A large release of an individual VOC in a quantity equal to or in excess of an RQ may be within total VOC emission limits and may make a negligible contribution to ozone formation, which is affected by photochemical conditions, meteorology, and the contributions of other VOC sources. Such a release may, nonetheless, potentially endanger human health because of the toxicity of the individual substance.

For example, under CAA section 111, EPA established controls on the rubber tire manufacturing industry limiting VOC emissions for a medium-sized plant to approximately 400 tons per year, or about 1.1 tons per day. Predominant VOCs emitted in the manufacturing process are white gasoline and petroleum naptha. Toluene, xylene, ketones, and esters are also used throughout the industry. (48 FR 2678, September 15, 1983.) A release on one day of an RQ or more of one of these VOC constituents, such as 1000 pounds of toluene, although within the total VOC release limit of approximately 1 ton per day may pose a threat to human health or the environment because the total VOC limitation is based on controlling the formation of ozone, and not on the toxicity of toluene or another of the VOC emission constituents. The Agency would take the position that interpreting NSPS or SIP VOC emission limitations to subsume consideration of the possible health effects of such VOC constituents, and thereby exempt them from notification requirements, is inappropriate. Thus, EPA would require notification of releases of VOC constituents in amounts equivalent to or greater than an RQ under the second approach.

As a third option, EPA could interpret the CAA federally permitted release exclusion to apply only to releases that are subject to a CAA permit or control regulation and that are either the "routine" emissions for which the permit or control regulation was designed or in compliance with a specific standard for release of that substance specified in the permit or regulation. Unpermitted, nonroutine releases would include upsets from such devices as pressure release valves, storage tank reactor vessels, or sudden releases from valve and pipe ruptures, equipment failure, and emergency startups and shutdowns.

EPA requests comments on these alternatives for defining the scope of the air release exemption. Specifically, EPA requests comments distinguishing releases of ozone precursors (VOC) constituents from releases of constituents of other categorical pollutants controlled by NAAQS. EPA also is soliciting comment on the "routine" vs. "nonroutine" distinction and the need to define "routine" in terms fo specific emission points or circumstances, and solicits comments on what emission points should be included. In addition, EPA is concerned that the first approach may lead to overreporting of routine releases subject to adequate control under existing regulatory or permit limits that could divert resources from releases requiring immediate response. EPA solicits information on the number of facilities and types of releases that would require reporting under these approaches, and the types of releases that would be excluded under either approach, particularly with respect to any potentially dangerous releases that may be excluded.

In addition, the National Emission Standards for Hazardous Air Pollutants (NESHAPs) limits for radionuclides are health-based annual limits, whereas radionuclide RQs are reporting triggers based on 24-hour releases. The Agency will require a report if an RQ above any annual NESHAP limit is released in a 24-hour period. The Agency requests comments on the number of facilities and types of releases that may require reporting.[3]

Injection of Materials Related to Development of Crude Oil or Natural Gas Supplies. The injection of materials related to the production of crude oil, natural gas, or water is considered a federally permitted release if the injection material is authorized specifically under applicable State law. Because it is probable that all conceivable injection modes are not considered in State laws, EPA, in the preamble to the May 25, 1983 NPRM, interpreted the section 101(10)(I) provision to exempt only those activities or materials that are authorized

[3] In support of the final rule adjusting the RQ for radionuclides (to be published in 1988), the Agency has prepared an Economic Impact Analysis that estimates the cost to the government and regulated community caused by the revised radionuclide RQ reporting requirements. This document is available for public inspection in Room LG-109, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (Docket Number 102RQ-RN).

specifically by State law, rather than those that are not prohibited by State law. This interpretation ensures that the appropriate authorities have consciously considered and intentionally authorized the injection activities and materials that are to be exempt from notification requirements and that the National Response Center will be made aware immediately of the potential need to respond to releases that have not been evaluated previously by a permitting authority.

EPA interprets the section 101(10)(I) exemption to apply only to those materials specifically authorized by State law to be used in activities whose sole purpose is the production of crude oil, natural gas, or water; the recovery of crude oil or natural gas; or the reinjection of fluids brought to the surface from such production. Some commenters objected to this interpretation and instead supported a broader interpretation that would exempt from CERCLA notification all materials used in gas and oil field operations. The National Response Center must be notified in any situation involving the use of injection fluids or materials that are not authorized specifically by State law for purposes of the development of crude oil or natural gas supplies and resulting in a release of a hazardous substance in an amount that equals or exceeds the applicable RQ. This will allow an immediate evaluation of the need for a response.

Introduction of Pollutants into Publicly Owned Treatment Works. A release to a Publicly Owned Treatment Works (POTW) is subject to the federally permitted release exemption if the release is (1) in compliance with applicable categorical pretreatment standards and local limits developed in accordance with 40 CFR 403.5(c), and (2) into a POTW with an approved local pretreatment program or a § 403.10(e) State-administered local program. One of the commenters on the May 23, 1983 NPRM suggested that the Agency broaden its approach to the POTW exemption to provide that the discharge be in compliance only with general pretreatment requirements and not with site-specific requirements. The Agency believes that for POTW to be considered "federally permitted," not only must the hazardous substance be a pollutant specified in applicable pretreatment standards and the release of the pollutant be in compliance with the categorical pretreatment standards, but the release also must be in compliance with the local limits developed on the basis of the site-specific conditions, because the categorical standards alone may not be adequate to address the impact of pollutants on the POTW. Therefore, even though a release into a POTW is in compliance with the categorical pretreatment standards, the National Response Center must be notified if the release exceeds the local limits by an RQ or more, because the release may cause interference with the POTW's processes or may pass through the POTW to the navigable waters, either of which may result in a situation requiring an emergency response. This exemption applies only to industrial users [4] discharging to POTWs; a POTW is subject to CERCLA reporting and liability provisions if its discharge of a hazardous substance violates its NPDES permit by an RQ or more. POTWs are not required to report hazardous substances that are traveling through their collection systems in quantities that equal or exceed RQs; however, the industrial user is responsible for reporting such releases into the collection system.

Sections 307(b)(1) and (c) of the CWA direct EPA to establish pretreatment standards "to prevent the discharge of any pollutant through treatment works * * * which are publicly owned, which pollutant interferes with, passes through, or is otherwise incompatible with such works." These sections address the problems created by discharges of pollutants from nondomestic sources to municipal sewage treatment works that interfere with the POTW or pass through the POTW to navigable waters untreated or inadequately treated. Pretreatment standards are intended to prevent those problems from occurring by requiring nondomestic users of POTWs to pretreat their wastes before discharging them to the POTW. In 1977, Congress amended section 402(b)(8) of the CWA to require POTWs to help regulate their industrial users by establishing local programs to ensure that industrial users comply with pretreatment standards.

In establishing the national pretreatment program to achieve these pretreatment goals, the Agency adopted a broad-based regulatory approach that implements the statutory prohibitions against pass through and interference at two basic levels. The first is through the promulgation of national categorical standards that apply to certain industrial uses within selected categories of industries that commonly discharge toxic pollutants. Categorical standards establish numerical technology-based discharge limits derived from an assessment of the types and amounts of pollutant discharges that typically interfere with or pass through POTWs with secondary treatment facilities.

The potential for many pass through or interference problems depends not only on the nature of the discharge but also on local conditions (e.g., the type of treatment process used by the POTW, local water quality, POTW's chosen method for handling sludge), and thus needs to be addressed on a case-by-case basis. Examples of such problems include discharges to a POTW that may consist of pollutants not covered by a categorical standard or from nondomestic sources that are not in one of the industrial categories regulated by the categorical standards. Because categorical standards are established industry-wide, they cannot consider site-specific conditions and therefore may not be adequate to prevent all pass through and interference even for the regulated pollutants. EPA's General Pretreatment Regulations (40 CFR Part 403) address these areas of concern. First, 40 CFR 403.5(b) establishes specific prohibitions that apply to all nondomestic users and are designed to guard against common types of pollutant discharges that may result in interference and pass through (e.g., no discharge of flammable, explosive, or corrosive pollutants). Second, 40 CFR 403.5(a) establishes a general prohibition against pass through and interference that serves as a backup standard to address localized problems that occur. In addition, POTWs must develop and enforce specific local limits as part of their local pretreatment programs to prevent pass through and interference. POTWs not required to develop pretreatment programs also must develop local limits if they have recurring pass through and interference (see 40 CFR 403.5(c)).

The pretreatment standards a POTW user must meet to claim the federally permitted release exemption include both applicable national categorical standards and standards established by local law as described below. Compliance only with the general and specific prohibitions (40 CFR 403.5(a) and (b)) of the general pretreatment regulations is insufficient to qualify a release as federally permitted.

Only local limits applicable to the pollutant, developed in accordance with 40 CFR 403.5(c), and designed to implement the general prohibition against interference and pass through (§ 403.5(a)), can qualify the release of such pollutant as a federally permitted

[4] "Industrial users," as the term is used in this discussion, includes mobile sources discharging hazardous substances to a POTW.

release. The development of local limits under 40 CFR 403.5(c) involves three basic steps. First, a POTW must determine which, if any, of the pollutants discharged by its industrial users have a reasonable potential to pass through or interfere with the POTW. For each of the pollutants the POTW concludes may be of concern, the POTW must then determine the maximum amount of the pollutant it can accept (maximum headworks loading) and still prevent the occurrence of pass through or interference. Finally, after maximum allowable headworks loadings are determined for each of the pollutants of concern, the POTW must implement a system of local limits applicable to industrial users to assure that these loadings will not be exceeded.

EPA believes that only local limits that have been developed based upon procedures that evaluate the site-specific characteristics and treatment capabilities of a POTW should qualify the release of the pollutant for the exemption. Such an extensive analysis is needed to assure that pass through and interference problems do not arise. A discharge of a pollutant by an industrial user in compliance with a local limit not designed using these procedures may not address the statutory prohibitions against pass through and interference or provide the requisite degree of environmental protection to qualify for the federally permitted release exemption.

Thus, a release that exceeds by an RQ or more an applicable categorical pretreatment standard or a local limit developed in accordance with 40 CFR 403.5(c) must be reported. Moreover, the absence of a categorical pretreatment standard or a local limit for a specific pollutant precludes coverage for releases of that pollutant under the federally permitted release exemption. If an industrial user releases an RQ or more of a hazardous substance into a POTW that has not set a local limit for such a substance, or for which there is no limit based on a categorical standard, then the release is not federally permitted and is subject to CERCLA reporting and liability provisions.

Furthermore, the release of a pollutant to a POTW only would qualify for the federally permitted release exemption if (1) the POTW has a local pretreatment program approved by the "approved authority" (as defined in § 403.3(c)), or (2) a State, in lieu of the municipality, is implementing a pretreatment program for that POTW pursuant to 40 CFR 403.10(e).

Section 101(10)(J) provides that the pretreatment program must be "submitted by a State or municipality for Federal approval." The Agency interprets this provision to mean that the program not only must be submitted for approval but must be approved. A strict reading of the statutory language would be contrary to the expressed congressional intent that discharges of hazardous substances into sewer systems qualify as federally permitted releases only if they are authorized under a pretreatment program (S. Rep. No. 848, 96th Cong., 2nd Sess. 48 (1980)). The fact that a POTW has submitted a program for approval does not necessarily mean the program is adequate to control the introduction of pollutants from nondomestic users of the POTW. Such a program may not be approved by the approval authority due to major deficiencies. For the discharge to be a federally permitted release, therefore, it must be specifically regulated in an approved program, a program that the approval authority has determined is consistent with the federally mandated minimum standard.

An approved program may be (1) designed and implemented locally by a POTW and approved by either EPA or an EPA-approved State pretreatment program, or (2) designed and implemented by an EPA-approved State pretreatment program. EPA approval of a State pretreatment program pursuant to section 402(b) of the CWA would not automatically qualify a release to a POTW in that State as federally permitted. The local pretreatment program must be approved either by EPA or by an EPA-approved State program. Generally, EPA approval of a State pretreatment program merely changes the approval authority for the POTW programs from EPA to the EPA-approved State pretreatment program. The approved State has primary responsibility for requiring local POTWs to develop and implement a pretreatment program to regulate users directly. The fact that a State pretreatment program has been approved by EPA does not in and of itself change the quality or approvability of local POTW programs. POTWs in approved States would still need to develop local pretreatment programs and receive pretreatment program approval if they have not done so already. Thus, to satisfy the federally permitted release exemption, individual approval of each POTW pretreatment program is necessary (except for a State administered § 403.10(e) program as described below).

Section 403.10(e) allows the State in lieu of the POTW to assume responsibility for developing and implementing POTW pretreatment program requirements. Because the § 403.10(e) program must meet the same standard as would be required for pretreatment programs developed by a municipality (§ 403.8(f)), EPA believes that the § 403.10(e) programs are the State pretreatment programs Congress intended to include under section 101(10)(J).

In the event that a State's § 403.10(e) program does not extend to all its POTWs, only those releases to POTWs for which the State has implemented the pretreatment program pursuant to § 403.10(e) would qualify as federally permitted. If a POTW is not regulated directly by its State NPDES program, the POTW nevertheless must implement an approved local pretreatment program in order for the discharges of industrial users to qualify for the federally permitted release exemption.

In summary, for a release to a POTW to be subject to the federally permitted release exemption, the release must be: (1) In compliance with applicable categorical pretreatment standards and local limits developed in accordance with 40 CFR 403.5(c), and (2) into a POTW with an approved local pretreatment program or a 40 CFR 403.10(e) State administered local program.

One of the commenters on the May 23, 1983 NPRM stated that discharges into a POTW are transfers between facilities, not "into the environment," and therefore all discharges into POTWs should be exempt from CERCLA reporting. The commenter's approach to defining "into the environment" is not consistent with the approach in today's proposal. To determine whether its release is federally permitted, therefore, an industrial user should measure its discharge at the point the substance leaves the industrial user's facility. In the case of indirect dischargers, the release should be measured when it leaves the discharger's building. Mobile sources should measure the discharge at the point it is released into the POTW, which will be at the headworks in most cases. Industrial users are not required under CERCLA to conduct monitoring activities different from those required by the applicable pretreatment program.

Releases of Source, Byproduct, or Special Nuclear Material. Radionuclides (which include source, byproduct, and special nuclear material) are listed generically under section 112 of the CAA and are therefore considered hazardous substances under CERCLA. CERCLA section 101(22)(C), however, excludes from the definition of "release" the discharge of:

source, byproduct, or special nuclear material from a nuclear incident, as those terms are

defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act, or, for the purposes of section 104 of this title or any other response action, any release of source, byproduct, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978 [UMTRCA] * * *.

—It should be noted that releases of source, byproduct, or special nuclear material from processing sites designated under section 102(a)(1) or section 302(a) UMTRCA are exempted from CERCLA response action provisions but not from reporting requirements under CERCLA section 103.

CERCLA section 101(10)(K) includes within the definition of federally permitted release, releases of source, byproduct, or special nuclear material that comply with the conditions of a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act (AEA). Therefore, releases of source, byproduct, or special nuclear material that exceed the licensed or permitted levels by an RQ or more, and that are not excluded by section 101(22), must be reported immediately to the National Response Center.

Under the AEA, the Nuclear Regulatory Commission is responsible for issuing licenses for the possession and use of source, byproduct, and special nuclear material. States that have entered into an agreement with the Nuclear Regulatory Commission (i.e., Agreement States) are also authorized under the AEA to issue licenses for the possession and use of source, byproduct, or special nuclear material. Releases of source, byproduct, or special nuclear material in compliance with licenses issued by the Nuclear Regulatory Commission or Agreement States are federally permitted releases under CERCLA section 101(10)(K).

The regulations of the Nuclear Regulatory Commission contain several important exemptions from their provisions, some of which are based on the small quantities of material involved or the low levels of radioactivity the materials emit. The Nuclear Regulatory Commission has developed "exempted quantities" for purposes of identifying facilities that are not subject to Commission licensing requirements. These quantities are smaller than the radionuclide RQs and, therefore, releases from these facilities will not be reported under CERCLA. Nevertheless, these releases are not federally permitted under CERCLA and, therefore, these facilities are subject to the CERCLA section 107 liability provisions.

Some releases of source, byproduct, and special nuclear material may comply with licenses, permits, orders, or regulations issued under the AEA through provisions administered not by the Commission or its Agreement States, but by DOE, the Department of Defense, or EPA. For example, DOE governs its radiation protection activities under the AEA by a series of internal orders. When such orders are issued under DOE's AEA authority and releases of source, byproduct, or special nuclear material are in compliance with the applicable order(s), these releases are federally permitted under section 101(10)(K).[8] The Department of Defense issues regulations under the AEA governing weapons and reactors within its jurisdiction, and EPA issues regulations under the AEA for certain operations involving radioactive material (e.g., 40 CFR Parts 190, 191, and 192). Releases of source, byproduct, or special nuclear material in compliance with these regulations are also federally permitted under section 101(10)(K). Any release that is an RQ or more above federally permitted levels, however, would be subject to the CERCLA notification requirements.

Further clarification is needed regarding the applicability of the definition of federally permitted releases to a fourth category of radioactive material called naturally occurring and accelerator-produced radioactive material (NARM). The AEA gives DOE broad authority to control its radiation-related activities and to protect public health and safety and the environment. This authority applies to activities involving NARM, as well as activities involving source, byproduct, and special nuclear material. CERCLA section 101(10)(K) refers, however, only to releases of source, byproduct, and special nuclear material. Thus, it provides no basis for exempting DOE's NARM releases from CERCLA's reporting and liability provisions. Furthermore, the AEA currently does not give authority to the Nuclear Regulatory Commission to license NARM, only source, byproduct, and special nuclear material. Although Agreement States may regulate NARM, this regulatory authority is not federally derived. Therefore, releases of NARM are not considered federally permitted under section 101(10)(K). Certain NARM releases are, however, considered federally permitted under other CERCLA sections. For example, air releases of NARM that are in compliance with NESHAPs are federally permitted under section 101(10)(H).

In making this finding with respect to NARM and the definition of federally permitted releases in section 101(10)(K), the Agency wishes to differentiate between NARM, source material, and byproduct material. Both source and byproduct material are defined under the AEA to include certain naturally occurring radionuclides. Specifically, source material is natural uranium, natural thorium, or ores that contain 0.05 percent or more (by weight) of natural uranium or thorium. Byproduct material is defined to include naturally occurring decay products of uranium or thorium when those decay products are associated with mill tailings. The exclusion of NARM from the definition of federally permitted releases under section 101(10)(K) applies only to those naturally occurring radionuclides that do not qualify as either source or byproduct material. For example, naturally occurring radium used in medical and well logging devices does not meet the definition of source or byproduct material and, therefore, releases of radium from these devices does not qualify for the reporting exemption under section 101(10)(K).

All of the commenters on the radionuclides exemption felt that a broader exemption is warranted. Some commenters suggested that reports of releases currently required by the Nuclear Regulatory Commission are sufficient and comprehensive because they enable the Commission to determine the need for and the adequacy of response. These commenters felt that any additional reports to the National Response Center would be an unnecessary burden. EPA expects that most releases involving radionuclides will be excluded from the definition of release, will be federally permitted, or will involve a quantity smaller than the RQ. (The Agency published a rule that proposed RQs for radionuclides on March 16, 1987 in 52 FR 8172; these RQs are being revised and the Agency expects to publish final RQs for radionuclides in 1988.) EPA believes, however, that the reporting requirements imposed on the remaining releases of radionuclides, including

[8] Under the DOE procurement regulations, provisions of the relevant DOE environmental and safety orders must be incorporated by reference into contracts entered into with managers and operators of DOE facilities (see 48 CFR 970.2303-2, 970.5204-2, 970.5104-38(b)). By virtue of their incorporation into binding contracts, the provisions of the DOE orders become binding on the managers and operators of DOE facilities and are enforceable by DOE on the basis of the facility management and operation contracts.

releases not subject to or in compliance with applicable permits, regulations, or orders, are essential to mitigate the risk to public health or welfare or the environment posed by such releases.

III. Notification for Certain Types of Releases

A. In General

This section addresses several recurring questions not related specifically to the definition of "federally permitted release" but that arise under the CERCLA section 103(a) reporting requirements. One such question involves releases to engineered structures designed specifically to prevent materials from reaching the land surface. The issues involve both interpretation of the phrase "release into the environment" and the appropriateness of CERCLA notification requirements for releases to such secondary containment devices. The Agency solicits comments on the following issues.

In the preamble to the April 4, 1985 final rule adjusting RQs for 340 CERCLA hazardous substance, EPA stated:

> Hazardous substances may be released "into the environment" even if they remain on plant or installation grounds. Examples of such releases are spills from tanks or valves onto concrete pads or into ditches open to the outside air, releases from pipes into open lagoons or ponds, or any other discharges that are not wholly contained within buildings or structures. Such a release, if it occurs in a reportable quantity (e.g., evaporation of an RQ into the air from a dike or concrete pad), must be reported under CERCLA. On the other hand, hazardous substances may be spilled at a plant or installation but not enter the environment, e.g., when the substance spills onto the concrete floor of an enclosed manufacturing plant. Such a spill would need to be reported only if the substances were in some way to leave the building or structure in a reportable quantity. (Note, however, that the federal government may still respond and recover costs where there is a threatened release into the environment.) 50 FR 13462.

In applying the phrase "into the environment" to releases to secondary containment devices, EPA believes that a release inside a building or structure is not a release "into the environment" unless the spilled substance leaves the building.

On one hand, a release to a secondary containment device that is not wholly contained and that is located outside of a building or structure is "into the environment." Examples of releases to such devices that illustrate both the potential for a serious problem and an existing serious situation have been brought to the Agency's attention. These include a release of hydrochloric acid to a dike that would have overflowed in a heavy rain, and radioactive contamination of water supplies apparently resulting from an improperly functioning secondary containment device at a nuclear facility.

On the other hand, it has been suggested that where engineered structures are open to the air, releases into such structures should be exempt from CERCLA notification unless an RQ or more of the substance reaches any ground or surface waters or land surface or evaporates into the ambient air. Releases to such structures may include such occurrences as releases onto concrete pads, secondary containment devices with sealed floors around storage tanks, or drip pans used to catch minor hose or line drainage.

The Agency is interested in receiving comments and data discussing the circumstances under which immediate notification of releases into secondary containment devices would not provide useful information for Federal response purposes under CERCLA. EPA is particularly interested in information on the significance of the issue, specific examples of procedures followed where there is a release to a secondary containment device and techniques used to prevent releases from such devices, data discussing the integrity of secondary containment devices, and suggestions on the appropriate means of eliminating any such unnecessary reporting. If the Agency decides to exempt from CERCLA notification certain releases into secondary containment devices, a demonstration may be required to show that the device is sufficiently protective and reliable.

B. PCB Waste Disposal

A second issue concerning the necessity for section 103 notification is whether approved polychlorinated biphenyl (PCB) disposal by incineration, landfilling, or alternate methods needs to be reported as a release under section 103. Because PCB disposal approvals under the Toxic Substances Control Act (TSCA) are not included in the CERCLA section 101(10) definition of federally permitted release, EPA does not believe that it has the authority to apply that exemption to such approvals.

At the same time, however, EPA does not believe that notification under section 103 of CERCLA provides any significant additional benefit so long as the disposal facility is in substantial compliance with all applicable regulations and approval conditions. The PCB regulations under TSCA, 40 CFR Part 761, require owners or operators of PCB disposal facilities, incinerators, chemical waste landfills, and high efficiency boilers to obtain written EPA approval, based on compliance with detailed technical requirements designed to ensure proper disposal, before accepting PCB wastes. The TSCA approval process is designed to ensure that the operation of PCB disposal facilities does not present an unreasonable risk of injury to health or the environment from PCBs. In addition, 40 CFR Part 761, Subpart J, requires PCB disposal facility owners or operators to monitor carefully the facility's inventory and operation, maintain detailed records for periods of 5 to 20 years, and report under certain circumstances. The TSCA regulations provide the Federal government with the information necessary to determine whether an emergency response to a PCB disposal is required. Today's proposal not to require CERCLA reporting for EPA-approved PCB disposals is consistent with the overall objective of the CERCLA notification requirements. Therefore, EPA will not require reporting under section 103(a) of the approved, proper disposal of PCB wastes into a disposal facility. The Agency requests comments on this proposal to exempt administratively these releases from CERCLA notification.

A party responsible for a release of PCB wastes that need not be reported under CERCLA, however, remains liable for the costs of cleaning up the release and for any natural resource damages caused by the release. In addition, where the disposer knows that the facility is not in compliance with applicable regulations and approved conditions under TSCA, disposal of an RQ or more of PCB waste must be reported to the National Response Center. Likewise, spills and accidents occurring during disposal and outside of the approved operation and that result in releases of an RQ or more of PCB waste must be reported to the National Response Center. Finally, PCB releases of an RQ or more from a TSCA-approved facility (as opposed to disposal into such a facility) must be reported under CERCLA.

IV. Discharges to POTW's

The Agency recognizes that the regulation implementing CWA section 311 for hazardous substance discharges must be revised to be consistent with the Agency's regulatory approach taken under CERCLA section 101(10)(J). Under CERCLA seciton 101(10)(J), an indirect discharge to a POTW must be subject to and in compliance with categorical pretreatment standards and local limits applicable in an approved local

pretreatment program (see discussion under Section III of today's preamble). All indirect dischargers, ie., both mobile and stationary sources, are subject to the same requirements for their discharges to be considered federally permitted releases.

Under 40 CFR 117.13, mobile sources discharging industrial waste are not subject to CWA section 311 coverage if the mobile source has contracted with, or otherwise received written permission from the POTW to discharge a designated quantity of industrial waste treated to comply with effluent limitations (under CWA sections 301, 302, or 306) or pretreatment standards (under CWA section 307). Indirect dischargers are not addressed under § 117.13. Paragraph (a) of § 117.13 was reserved to provide the conditions under which indirect discharges are subject to CWA section 311.

The Agency is proposing to amend 40 CFR 117.13 to state that indirect discharges are not subject to section 311 coverage if the indirect discharge is in compliance with applicable categorical pretreatment standards and local limits developed in accordance with 40 CFR 403.5(c) and is into a POTW with an approved local pretreatment program or a 40 CFR 403.10(e) State administered local program. EPA also is proposing to revise paragraph (b) to apply the same conditions to mobile sources as would be applied to indirect discharges under paragraph (a). The Agency requests comments on this proposal.

V. Regulatory Analyses

A. Executive Order No. 12291

Rulemaking protocol under Executive Order (E.O.) 12291 requires that proposed regulations be classified as major or nonmajor for purposes of review by the Office of Management and Budget (OMB). According to E.O. 12291, major rules are regulations that are likely to result in:

(1) An annual effect on the economy of $100 million or more; or

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Today's regulation is nonmajor, because adoption of the rule will result in zero costs and will not cause any of the significant adverse effects mentioned in (3) above. The Background Document for the Proposed Regulation on Federally Permitted Releases, available for inspection in the public docket, shows that the proposed rule is simply a clarification of existing statutory requirements.

This rule has been submitted to OMB for review, as required by E.O. 12291.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires that a Regulatory Flexibility Analysis be performed for all rules that are likely to have a "significant impact on a substantial number of small entities." Today's proposed rule is not expected to significantly impact small entities because the rule proposes simply to clarify the existing statutory requirement. EPA certifies, therefore, that this proposed regulation will not have a significant impact on a substantial number of small entities and that a Regulatory Flexibility Analysis is not required.

C. Paperwork Reduction Act

There are no reporting or recordkeeping provisions included in this proposed rule that require approval from the Office of Management and Budget under section 3504(h) of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

List of Subjects

40 CFR Part 117

Hazardous Substances, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 302

Air pollution control, Chemicals, Hazardous materials transportation, Hazardous substances, Intergovernmental relations, Natural resources, Nuclear materials, Pesticides, and pests, Radioactive materials, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control.

40 CFR Part 355

Chemical accident prevention, Chemical emergency preparedness, Chemicals, Community emergency response plan, Community right-to-know, Contingency planning, Extremely hazardous substances, Hazardous substances, Reportable quantity, Reporting and recordkeeping requirements, Threshold planning quantity.

Dated: July 11, 1988.

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, it is proposed to amend Title 40 of the Code of Federal Regulations as follows:

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

1. The authority citation for Part 117 is revised to read as follows:

Authority: 33 U.S.C. 1321 and 1361.

2. Section 117.12 is revised to read as follows:

§ 117.12 Applicability to discharges from facilities with NPDES permits.

(a) This regulation does not apply to:

(1) Discharges in compliance with a permit under section 402 of the Clean Water Act;

(2) Discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Clean Water Act, and subject to a condition in such permit; or

(3) Continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Clean Water Act, which are caused by events occurring within the scope of relevant operating or treatment systems.

(b) A discharge is "in compliance with a permit issued under section 402 of the Clean Water Act" if the permit contains an effluent limitation specifically applicabale to the substance discharged or an effluent limitation applicable to another waste parameter that has been specifically identified in the permit as intended to limit such substance, and the discharge is in compliance with the effluent limitation.

(c) A discharge results "from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Clean Water Act, and subject to a condition in such permit" where:

(1) The permit application, the permit, or another portion of the public record contains documents that specifically identify:

(i) The substances and the amounts of substances; and

(ii) The origin and source of the substances; and

(iii) The treatment that is to be provided for the discharge either by:

(A) An on-site treatment system separate from any treatment system treating the permittee's normal discharge; or

(B) A treatment system that is designed to treat the permittee's normal discharge and that is additionally capable of treating the identified amount of the identified substance; or

(C) Any combination of the above; and

(2) The permit contains a requirement that the substances and the amounts of the substances, as identified in §117.12(c)(1)(i) and §117.12(c)(1)(ii), be treated pursuant to § 117.12(c)(1)(iii) in the event of an on-site release; and

(3) The treatment to be provided is in place.

(d) A discharge is a "continuous or anticipated intermittent" discharge "from a point source, identified in a permit or permit application under section 402 of the Clean Water Act," and "caused by events occurring within the scope of relevant operating or treatment systems", whether or not the discharge is in compliance with the permit, if:

(1) The hazardous substance is discharged from a point source for which a valid permit exists or for which a permit application has been submitted; and

(2) The discharge of the hazardous substance results from:

(i) The contamination of noncontact cooling water or storm water, provided that such cooling water or storm water is not contaminated by an onsite spill of a hazardous substance; or

(ii) A continuous or anticipated intermittent discharge of process waste water, and where the discharge originates within the manufacturing or treatment systems; or

(iii) An upset or failure of a treatment system or of a process producing a continuous or anticipated intermittent discharge where the upset or failure results from a control problem, a system failure or malfunction, an equipment or system startup or shutdown, an equipment wash, or a production schedule change, provided that such upset or failure is not caused by an on-site spill of a hazardous substance.

3. Section 117.13 is revised to read as follows:

§ 117.13 Applicability to discharges from other facilities.

(a) These regulations apply to all discharges of reportable quantities to a POTW, where the discharge originates from stationary industrial users, so long as the discharge is:

(1) In compliance with applicable categorical pretreatment standards and local limits developed in accordance with 40 CFR 403.5(c); and

(2) Into a POTW with an approved local pretreatment program or a 40 CFR 403.10(e) State administered local program.

(b) These regulations apply to all discharges of reportable quantities to a POTW, where the discharge originates from a mobile source, so long as the mobile source can show that:

(1) Prior to accepting the substance from an industrial discharger, the substance being discharged was in compliance with applicable categorical pretreatment standards and local limits developed in accordance with 40 CFR 403.5(c); and

(2) The substance is being discharged into a POTW with an approved local pretreatment program or a 40 CFR 403.10(e) State administered local program.

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

4. The authority citation for Part 302 is revised to read as follows:

Authority: 42 U.S.C. 9602; 33 U.S.C. 1321 and 1361.

5. Section 302.3 is amended by adding in alphabetical order the definition "federally permitted release" and by revising the introductory text of the definition "release" to read as follows:

§ 302.3 Definitions.

* * * * *

"Federally permitted release" means

(1) a discharge in compliance with a permit under section 402 of the Clean Water Act;

(2) A discharge resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Clean Water Act and subject to a condition in such permit;

(3) A continuous or anticipated intermittent discharge from a point source, identified in a permit or permit application under section 402 of the Clean Water Act, which is caused by events occurring within the scope of relevant operating or treatment systems;

(4) A discharge in compliance with a legally enforceable Federal or State, individual or general permit under section 404 of the Clean Water Act;

(5) A release in compliance with a legally enforceable Federal or State final permit issued pursuant to section 3005 (a) through (d) of the Solid Waste Disposal Act from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure, or bioassay limitation or condition, or other control on the hazardous substances in such a release;

(6) Any release in compliance with a legally enforceable permit issued under section 102 or section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972;

(7) Any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator) pursuant to Part C of the Safe Drinking Water Act;

(8) Any emission of a substance into the air which is named specifically or is included in a specifically named group of substances subject to and in compliance with a permit or control regulation under section 111, section 112, Title I Part C, Title I Part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator) when such permit or control regulation is specifically designed to limit or eliminate such emission of a designated hazardous pollutant or a criteria pollutant, including any schedule or waiver granted, promulgated, or approved under these sections;

(9) Any injection of fluids or other materials specifically authorized under applicable State law; solely for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water; solely for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas; or which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected;

(10) The introduction of any pollutant into a publicly owned treatment works (POTW) when such pollutant is specified in and in compliance with applicable categorical pretreatment standards and local limits developed in accordance with 40 CFR 403.5(c) and into a POTW with an approved local pretreatment program or a 40 CFR 403.10(e) State administered local program; and

(11) Any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954, in compliance with a legally enforceable license, permit, regulation, or other issued pursuant to the Atomic Energy Act of 1954.

Federally permitted releases do not include releases exempt from regulation under the authority of one of the cited statutes; releases not in compliance with the applicable permit limit or condition, license, regulation, order, standard, or program; or releases into a medium other than that covered in the applicable

permit, license, regulation, order, standard, or program.

* * * * *

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes * * *

* * * * *

6. Section 302.6 is amended by adding new paragraphs (e) and (f) as follows:

§ 302.6 Notification requirements.

* * * * *

(e) Whenever a release of a hazardous substance exceeds its federally permitted level as defined under § 302.3 ("federally permitted release") by a reportable quantity or more, notification shall be made for such release in accordance with the requirements of this section or, if applicable, § 302.8. Where numerical levels for hazardous substances are not specified, any release not in compliance with the terms, related to the character or quantity of the release, of the applicable permit, license, regulation, order, standard or program that equals or exceeds a reportable quantity must be reported to the National Response Center in accordance with this section or, if applicable, § 302.8.

(f) Notification is not required for the disposal of polychlorinated biphenyl (PCB) approved by EPA and in substantial compliance with the applicable Toxic Substance Control Act (TSCA) regulations, 40 CFR Part 761, and approval conditions.

7. Section 302.7 is amended by revising paragraph (a)(3) to read as follows:

§ 302.7 Penalties.

(a) * * *

(3) In charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that reportable quantity determined under this part who fails to notify immediately the National Response Center as soon as he or she has knowledge of such release or who submits in such a notification any information which he or she knows to be false and misleading shall be subject to all of the sanctions, including criminal penalties, set forth in section 103(b) of the Act.

* * * * *

PART 355—EMERGENCY PLANNING AND NOTIFICATION

8. The authority citation for Part 355 is revised to read as follows:

Authority: 42 U.S.C. 11002 and 11048.

9. Section 355.40 is amended by revising paragraph (a) to read as follows:

§ 355.40 Emergency release notification.

(a) *Applicability.* (1) The requirements of this section apply to any facility:

(i) At which a hazardous chemical is produced, used, or stored; and

(ii) At which there is a release of a reportable quantity of any extremely hazardous substance of CERCLA hazardous substance.

(2) This section does not apply to:

(i) Any release that results in exposure to persons solely within the boundaries of the facility;

(ii) Any release that is a "federally permitted release," as defined as follows:

(A) A discharge in compliance with a permit under section 402 of the Clean Water Act;

(B) A discharge resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Clean Water Act, and subject to a condition in such permit;

(C) A continuous or anticipated intermittent discharge from a point source, identified in a permit or permit application under section 402 of the Clean Water Act, which is caused by events occurring within the scope of relevant operating or treatment systems;

(D) A discharge in compliance with a legally enforceable Federal or State, individual or general permit under section 404 of the Clean Water Act;

(E) A release in compliance with a legally enforceable Federal or State final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure, or bioassay limitation or condition, or other control on the hazardous substances in such a release;

(F) Any release in compliance with a legally enforceable permit issued under section 102 or section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972;

(G) Any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator) pursuant to Part C of the Safe Drinking Water Act;

(H) Any emission of a substance into the air which is named specifically or is included in a specifically named group of substances subject to and in compliance with a permit or control regulation under section 111, section 112, Title I Part C, Title I Part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator) when such permit or control regulation is specifically designed to limit or eliminate such emission of a designated hazardous pollutant or a criteria pollutant, including any schedule or waiver granted, promulgated, or approved under these sections;

(I) Any injection of fluids or other materials specifically authorized under applicable State law: solely for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water; solely for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas; or which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected;

(J) The introduction of any pollutant into a publicly owned treatment works (POTW) when such pollutant is specified in and in compliance with applicable categorical pretreatment standards and local limits developed in accordance with 40 CFR 403.5(c) and into a POTW with an approved pretreatment program or a 40 CFR 403.10(e) State administered local program; and

(K) Any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954, in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

(iii) Federally permitted releases do not include releases exempt from regulation under the authority of one of the cited statutes; releases not in compliance with the applicable permit limit or condition, license, regulation, order, standard, or program; or releases into a medium other than that covered in the applicable permit, license, regulation, order, standard, or program.

* * * * *

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

JUL 29 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive No. 9832.13

MEMORANDUM

SUBJECT: Transmittal of the Superfund Cost Recovery Strategy

FROM: for J. Winston Porter
Assistant Administrator

TO: Regional Administrators, Regions I-X

Attached is the final Superfund Cost Recovery Strategy. The Strategy sets forth the Agency's priorities and case selection guidelines, emphasizes the advance planning necessary to initiate cost recovery actions within the Agency's preferred time frames, and describes the cost recovery process for removal and remedial actions.

Cost recovery is one of the highest priorities of the Superfund program. This document should assist you in advancing the Agency's objectives.

Attachment

cc: Directors, Waste Management Divisions
Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division
Region II
Directors, Hazardous Waste Management Divisions
Regions III, VI
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X
Directors, Environmental Services Divisions
Regions I, VI, VII
Regional Counsel, Regions I-X
Thomas L. Adams, Assistant Administrator for Enforcement and Compliance Monitoring
Charles Grizzle, Assistant Administrator for Administration and Resources Management
Roger J. Marzulla, Assistant Attorney General, Land and Natural Resources Division, Department of Justice

OSWER Directive No. 9832.13

THE SUPERFUND COST RECOVERY STRATEGY

Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

July 29, 1988

Table of Contents

Purpose of this Guidance.....1

I. Program Priorities and Management.....2

II. Case Selection Guidelines.....7

III. The Cost Recovery Process for Removal Actions.....12

A. Pre-Removal Cost Recovery Activities.....12

1. The Potentially Responsible Party Search
2. Development of the Administrative Record
3. Notice, Negotiation and the Issuance of Administrative Orders

B. Cost Recovery Activities during the Removal Action....17

1. Documentation of Activities and Cost Accounting
2. Supplemental PRP Search

C. Post-Removal Cost Recovery Activities.....19

1. Evaluation and Completion of the Potentially Responsible Party Search
2. Cost Documentation
3. Demand Letters
4. Negotiation
5. Settlements
6. Consideration of Referral in the Event of No Settlement

IV. Cost Recovery Process for Remedial Sites.....30

A. Pre-Remedial Cost Recovery Activities.....31

1. The Potentially Responsible Party Search
2. General and Special Notice Letters and Negotiations for a PRP Remedial Investigation and Feasibility Study
3. Settlement for PRP Remedial Investigation/ Feasibility Study

B. Cost Recovery Activities during the Remedial Investigation/Feasibility Study.....35

1. Documentation of Activities and Cost Accounting
2. Supplemental PRP Search

3. Development of the Administrative Record
4. Special Notice Letters and Negotiation for PRP Remedial Design and Remedial Action

C. Settlement for PRP Remedial Design and Remedial Action.....38

1. Full Settlement
2. Partial Settlement
3. No Settlement

D. Cost Recovery Activities during the Remedial Design and Remedial Action.....41

1. PRP RD/RA
2. Fund-Financed RD/RA
   a) Cost Documentation
   b) Demand Letters
   c) Consideration of a Referral in the Event of No Settlement

V. Existing Cost Recovery Guidance.....47

Purpose of this Guidance

This guidance document is intended to provide a framework for planning and initiating actions to recover Federal funds expended by EPA or a State[1] in CERCLA response actions. Part I discusses general cost recovery program priorities. Part II identifies case selection guidelines to aid managers in setting priorities for case referrals for the most efficient use of cost recovery resources. Parts III and IV identify activities required to support the development of cost recovery actions for each site where the Agency spends Fund monies in response actions: Part III sets out the cost recovery process for removal actions; Part IV sets out the cost recovery process for remedial actions. Part V is a bibliography of guidance documents related to cost recovery.

1/ While a State may be the lead agency for response actions taken at a site, EPA retains responsibility for pursuing recovery of Federal funds expended.

Part I. Program Priorities and Management

The policy of the CERCLA Enforcement program is to obtain response actions in the first instance by responsible parties, rather than by the Environmental Protection Agency (EPA) or a State. However, there have been and will continue to be cases in which the Agency will respond to releases using funds from the Hazardous Substances Superfund (the Fund) for site response actions. The recovery of Fund expenditures through the cost recovery program is one of the highest priorities of the Superfund program. The costs associated with such Fund-financed response actions are recoverable from the party or parties who are liable under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA, or the Act).[2] CERCLA provides for the recovery of costs through judicial actions under section 107 of the Act, as components of settlements for prospective work under section 106, or 122, and in administrative settlements under section 122.

The priorities and objectives of the cost recovery program are to: 1) maximize return of revenue to the Fund; 2) initiate

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2/ Section 107 provides generally that past and present owners and operators of a site, and persons (e.g., generators) who arranged for disposal or treatment of, and transporters who contributed, hazardous substances to a site, shall be liable for all costs incurred in response to a release or threat of release undertaken by the United States government, a State, an Indian tribe, or any other person, for damages to or loss of natural resources and the costs of assessing such damages or loss, and for costs of any health assessment or health effects study carried out under §104(i).

necessary litigation or resolve ripe cases for cost recovery within strategic time frames but no later than the time provided under the statute of limitations; 3) encourage PRP settlement by implementing an effective cost recovery program against non-settlers (i.e., recalcitrants); and, 4) use administrative authorities and dispute resolution procedures effectively to resolve cases without unnecessary recourse to litigation.

In managing the program and achieving these objectives, EPA must ensure that each response action (and supporting case development activities) undertaken using Fund monies proceeds in a manner that will optimize its cost recovery potential. (See Part III, Cost Recovery Process for Removal Actions, and Part IV, Cost Recovery Process for Remedial Sites.) In addition, EPA must evaluate each ripe response action in a manner consistent with this strategy to determine when, whether and how to proceed with cost recovery.

The stage at which a case becomes ripe for cost recovery is an important concept. A conventional removal is ripe when it is completed.[3] A remedial is ripe concurrent with the initiation of on-site construction of the remedial action. (See footnote 5, page 5.)

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[3]/ Although a RI/FS may be considered to be a removal, cost recovery generally is pursued as part of remedial action cost recovery.

Since resources available to the cost recovery program are limited, EPA must set priorities and select and plan actions in a manner and at a time which will provide for the maximum return to the Fund. A major factor in setting priorities is the amount of funds involved. However, statute of limitations may warrant the pursuit of a case of lower dollar value before one of higher value. Priorities are discussed in Part II, Case Selection Guidelines.

Where possible, an attempt should be made to settle cost recovery cases administratively under the authority provided in CERCLA §122(h). Use of this authority should result in cost recovery case resolution for some cases in a shorter time frame and with fewer resources than traditional litigation or settlement through judicial means. Use of the administrative settlement authority for smaller cost recovery cases, especially those with total costs of response less than five hundred thousand dollars, should reduce case resolution time since these may be directly settled by Regional offices without the prior concurrence of either EPA headquarters or the Department of Justice.[4]

Where judicial actions are warranted, referral of cases selected consistent with the guidelines set forth in Part II,

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[4]/ Authority to settle cost recovery cases administratively (CERCLA §122(h) authority) was delegated to Regional Administrators on September 21, 1987, (Delegation 14-14-D). Novel issues should be discussed with EPA Headquarters.

below, within the Agency's preferred time frames[5] will ensure that the best cases will be filed well within the required statute of limitations.

Finally, the realization of the program's objectives depends on the effective management of all aspects of the cost recovery program. Each Region must have a well-defined process in place to ensure coordination among the Superfund program/enforcement office, the financial management office, and the Office of Regional Counsel (and Headquarters, where appropriate). The process should also foster the efficient management of the elements of the cost recovery program including systems to cover the following:

a) the on-going review, selection, and referral of ripe cases;

b) the assembly of cost documentation and the issuance of demand letters;

c) tracking and collection of oversight cost recovery in settlements;

d) the review and documentation to close-out cases for

5/ Cost recovery actions for removals should be referred to the Department of Justice as soon as possible after the action has been completed but in most cases, not later than one year after the completion date. Cost recovery actions for remedials should be referred to the Department of Justice at the time of initiation of physical on-site construction of the remedial action. See the June 12, 1987, Memorandum entitled Cost Recovery Actions/Statute of Limitations, OSWER Directive No. 9832.3-1A.

which cost recovery will not be pursued;

e) the effective use of administrative settlement authority;

f) the tracking and follow-through of active cases (those in litigation); and,

g) the establishment and collection of accounts receivable.

Effective information management on the status of each ripe case, coupled with forward planning, is essential. Timely and accurate reporting in information management systems, especially CERCLIS, is essential for management of the above processes and the entire cost recovery program.

The Agency must continue to utilize cost recovery enforcement authorities to create an incentive for settlement and disincentive for refusal to settle. An atmosphere of risk of cost recovery litigation will promote settlement for PRP response actions as well as settlements for cost recovery.

Part II. Case Selection Guidelines

As the Superfund program matures, an increasing number of sites are moving beyond the early stages of the Superfund process and into the remedial design and action phases, where greater amounts of money are spent. The vast majority of potential reimbursement to the Fund in future years depend on recovery of funds associated with these sites.

Regions must make management decisions regarding which sites to refer for judicial action under 107. The following case selection guidelines, when applied to candidates for referral, help ensure that resources are mainly directed towards those cases which have the highest potential for replenishing the Fund. The guidelines are generally based on the amount of money expended at a site and take into account its recoverability (i.e., strength of the case, financial viability of PRP(s)).

Generally, the sites that will generate the largest returns to the Fund are ripe remedials, defined as those where the remedial action has been initiated. These sites should be considered high priority for referral. A cost recovery referral should be scheduled for every site where a federally funded remedial action is planned and there are viable PRPs. The action should be filed no later than the initiation of physical on-site construction of the remedial action. (Note that in order to meet this timing requirement, case preparation activities should begin early. See Part IV, Cost Recovery Process for Remedial Portions

of NPL Sites, for further information.) The Agency will defer the filing of a remedial action beyond this date only in limited circumstances for technical or strategic reasons.[6]

The second category of sites to which resources should be directed are those NPL or non-NPL sites where EPA has completed a removal action (including an expanded removal action or ERA), remedial investigation/feasibility study (RI/FS), or an initial remedial measure (IRM), where the total costs of response are two hundred thousand dollars or greater, and the possible statute of limitations deadline is approaching. Although the Agency's position is that the SARA statute of limitations applies only to those response actions initiated after the effective date of SARA (October 17, 1986), the Regions should refer all cases well within the SARA statute of limitations time frames, whether or not the action was initiated prior to the effective date of SARA. Where a conflict exists between referring a case in the first category and referring a case in the second category, the referral of cases with approaching statute of limitations deadlines and costs greater than two hundred thousand dollars should normally take precedence over the referral of ripe remedial sites. Pre-SARA cases in the second category that are

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6/ For example, a Region may desire to delay the initiation of a cost recovery case until after evaluation of the success of implementation of an unproven remedial technology.

beyond the time frame of the SARA statute of limitations should be referred as soon as possible.

A related category of sites to which resources should be directed are those NPL or non-NPL sites where EPA has completed a removal action and the total costs of response are two hundred thousand dollars or greater. Sites in this category are distinguished from the above category because they are not nearing a potential statute of limitations deadline. These cost recovery referrals should be made no later than twelve months after completion of the removal action. In some instances, strategic reasons may warrant that EPA defer filing for cost recovery of a removal action until the remedial action is initiated.

The fourth category of sites are those where there has been a partial settlement providing the government less than full relief and there are viable non-settlers. These actions should be pursued promptly as a disincentive to non-settlers.

The fifth category of sites are those where total costs of response are less than two hundred thousand dollars. Consistent with available resources, cost recovery referrals should be considered for these sites where evidence linking the PRPs to the site is good, and PRPs are recalcitrant, or the case may be used to create good precedent or an example that EPA is willing to pursue costs when the merits of the case warrant it. Each Region should plan to bring some small cost recovery actions each year

primarily to maintain an atmosphere of risk to PRPs associated with sites with total costs of response less than two hundred thousand dollars.

Within each category above, decisions should generally be made on the basis of an evaluation of the factors identified on pages 26 and 43, below, which will provide an indication of the strength of the case. This recognizes that cost recovery may not be pursued for PRP viability and evidentiary reasons as well as the lack of Agency resources for some small cases and bankruptcies.

The guidelines above do not relate directly to bankruptcy referrals because they often present particularly difficult case selection and management issues. The Agency is frequently operating under time constraints with imperfect information. Nonetheless, it is important in bankruptcy cases to make reasoned and informed judgments on whether a bankruptcy action is worth pursuing, given other demands on Agency resources. This requires, at a minimum, an evaluation of the following factors: the amount of funds to be recovered; the case against the PRP and the possibility of full recovery from other PRPs; the likelihood of significant recovery given the assets and liabilities of the PRP (e.g., bankruptcies at multi-generator sites where viable PRPs remain as compared to bankruptcy cases at sites where the owner/operator is bankrupt and no other viable PRPs exist); the claims of secured and unsecured creditors; and, the likely Agency

resources involved. When the likelihood of significant recovery compared to resource utilization in pursuit of the recovery is high, bankruptcy referrals should be prioritized in accordance with the categories above. The Revised Hazardous Waste Bankruptcy Guidance, May 23, 1986, OECM, contains additional information regarding the pursuit of bankrupt parties in hazardous waste cases.

Part III. THE COST RECOVERY PROCESS FOR REMOVAL ACTIONS

Before, during, and following a removal action there are specific steps that the Agency[7] must take to facilitate settlement or maximize the potential for recovery of funds in any future cost recovery action. The extent of each of the steps may vary depending upon the cost, size and duration of the removal action. The timing may vary depending upon the exigencies of the situation. This section identifies and explains each of the steps taken in the removal process to facilitate cost recovery.[8]

A. Pre-Removal Cost Recovery Activities

Pre-removal activities that may be carried out in preparation for future cost recovery actions include the initiation of the potentially responsible party search, the development of the administrative record, notice to identified PRPS and negotiations with those PRPs who are interested, and the issuance of administrative orders. While each of these

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[7]/Throughout Parts III and IV, the terms "Agency" and "Regions" are used frequently in discussions of activities to be conducted. When a State has entered or will enter into a cooperative agreement with EPA to conduct any activities on a site, the Region must ensure that activities identified in Parts III and IV are conducted by either EPA or the State, as appropriate. Refer to the Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites, OSWER Directive No. 9831.6 for additional information on activities that can be undertaken by States.

[8]/ See, also, Chapter 5 of the Superfund Removal Procedures Revision Number Three, OSWER Directive No. 9360.0-03B.

activities is an integral part of the broader Superfund program, each has a special significance in light of potential cost recovery actions.

A.1. The Potentially Responsible Party Search. The identification of potentially responsible parties (PRPs) in the potentially responsible party search is central to all cost recovery actions. The search should uncover potentially liable parties with whom EPA may negotiate and from whom EPA may seek recovery of costs in the future, as well as develop the evidence of liability that may be used in a judicial action. While the PRP search initiated following site discovery may continue throughout the Superfund process certain PRP search activities should be conducted prior to the initiation of a removal action. The extent of further activities may depend on the expected costs of the removal.

At the time of discovery of a problem site, a preliminary PRP search is conducted by the Agency to identify the owner/operator of a site and other readily identifiable PRPs. The completed PRP search for a removal action should include the following tasks, as appropriate: history of operations at the site; a title search of the site property; Agency record collection and file review; interviews with government officials; PRP status/PRP history; records compilation; issuance of CERCLA 104(e) letters/RCRA 3007 letters; financial status; PRP name and address updates; appropriate identification of generators and

transporters; and, report preparation. Any or all of these tasks may and should be initiated prior to the initiation of a removal action where time permits. However, since many removals are of an emergency nature, and there is often little time prior to initiation of the action, all PRP search activities will not commonly be initiated prior to the removal. Each PRP search task should be initiated at the earliest possible time during or shortly after completion of the removal action.

Program, enforcement and legal staff, and the Region's civil investigator should work closely together in the development of the PRP search from the initial planning stages through the production of the PRP search report. Regions should rely on the expertise of the Office of Regional Counsel and the civil investigator as well as outside contractors where necessary to conduct the PRP search and prepare and review the PRP search report. More information on the tasks listed above is provided in detail in Chapter 3.1 of the Potentially Responsible Party Search Manual, August 27, 1987, (OSWER Directive No. 9834.6).

If total response costs are not expected to exceed two hundred thousand dollars, the Region may defer implementation of many of the tasks of the PRP search listed above until completion of the removal action. If total costs of the completed removal do not exceed two hundred thousand dollars, the Region should evaluate available resources and competing priorities, and in light of the evaluation, decide whether or not to conduct

additional PRP search activities. At a minimum, a title search of the property should be conducted. If total costs of the completed removal exceed two hundred thousand dollars, additional PRP search tasks should be conducted in anticipation of further enforcement activities.[9]

A.2. Development of the Administrative Record. The development of the administrative record supporting the selection of a response action is central to the Agency's ability to recover costs. If after completion of a removal action, a decision is made to file a §107 judicial action, the administrative record will serve as the basis for judicial review of issues concerning the selection of the response action. See section 113(j) of CERCLA. Prior to the initiation of a removal action, Regions should develop the administrative record consistent with the applicable procedures set forth in the May 29, 1987 memorandum entitled Administrative Records for Decisions on Selection of CERCLA Response Actions (OSWER Directive No. 9833.3).

A.3. Notice, Negotiations and the Issuance of Administrative Orders. Notice, negotiations, and the issuance of administrative orders are activities that should be conducted to obtain an

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9/ Where the removal exceeds two hundred thousand dollars, the property is marketable and of value and it may be sold, the Agency should evaluate, during the PRP Search, the value of filing notice of a lien on the property affected by the removal action. OECM's Guidance on Federal Superfund Liens, September 22, 1987, (OSWER Directive No. 9832.12), provides guidance on the use of Federal liens.

agreement from the PRP(s) to implement a response action, thus eliminating the need for cost recovery of response action costs. There are important cost recovery aspects to each of these activities.

The Interim Guidance on Notice Letters, Negotiations, and Information Exchange, October 19, 1987 (OSWER Directive No. 9834.10) provides information on the content and timing of notice letters for removal actions.

If notice to PRPs leads to negotiations for a PRP removal action, Regions should obtain an agreement from the PRPs for the reimbursement of EPA's oversight costs.[10] This is particularly important for large removals that will involve extensive contractor oversight costs. The administrative order on consent should contain a provision which describes the manner of determining the amount, the documentation to be furnished by EPA, the schedule for billing by EPA, and payment by the PRP of the oversight costs incurred by EPA. Where a consent order for a removal action contains a provision for the reimbursement of EPA's oversight costs, the Regional program office should provide a copy of the order to the Regional Financial Management Officer with a request to establish an account receivable and track receipt of the oversight costs. The Office of Waste Programs

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10/ CERCLA §104(a), as amended, requires reimbursement for oversight costs for the RI/FS. See Part IV, page 30.

Enforcement is developing further guidance on collection of oversight reimbursement from PRPs.

Where negotiations for a PRP response action are unsuccessful, or the exigencies of the situation at the site do not allow for extended negotiations, there is a presumption, rebuttable for documented good cause, that Regions should issue a §106 unilateral administrative order to viable PRPs.[11] A unilateral order may encourage PRP response and has the added advantage of setting up treble damages[12] and penalties[13].

B. Cost Recovery Activities During the Removal Action

Cost recovery activities that occur during a removal action depend upon whether the removal is conducted by the Agency (or

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11/ See the Issuance of Administrative Orders for Immediate Removal Actions, (OSWER Directive No. 9833.1).

12/ Section 107(c)(3) of CERCLA establishes the authority of the United States to collect treble damages for non-compliance with an administrative order: "If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action."

13/ Section 106(b) provides that "any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues."

its contractors) or a potentially responsible party, or both.[14] During a fund-financed removal action, all EPA and contractor activities and costs must be carefully recorded and the PRP search should be reviewed and supplemented, as necessary. During a PRP removal action, the Agency must keep track of its oversight costs.

B.1. Documentation of Activities and Cost Accounting. During a removal conducted by EPA or PRPs, the Agency must maintain an accounting of activities and costs associated with the response action. These costs may include: EPA in-house expenditures; contracts; money paid to other federal agencies through interagency agreements (IAG's); and, money paid to States through cooperative agreements. EPA personnel must take care to charge all time and travel associated with a removal action using the site-specific account number (site/spill identifier number, SSID). Contracts, IAG's and cooperative agreements should provide that charges are made site-specifically, also.

B.2. Supplemental PRP Search. During the removal action, the search for potentially responsible parties should continue. Newly identified PRPs should be issued notice letters and administrative orders as appropriate. The Region should consider

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14/ In some instances, the EPA conducts initial site stabilization work and then negotiates with PRPs for them to conduct the remainder of the removal action under a consent order. Activities conducted in preparation for potential cost recovery actions would necessarily include those for both fund-financed removal actions and PRP removal actions.

the total expected response costs at a site when conducting a supplemental PRP search. Generally, the higher the total cost of removal, the greater the effort the Agency should make to identify PRPs and develop the information that links them to the site. For all removal actions over two hundred thousand dollars, the tasks identified in Section A.1 must be completed in advance of a final decision to proceed or not with litigation for cost recovery.

C. Post-Removal Cost Recovery Activities

After the completion of a fund-financed removal action, the major components of the potential cost recovery case are collected (administrative record, the PRP search, total costs of response at the site, the demand letter and response to it, and other pertinent information) and the likely success of cost recovery efforts is evaluated. Based on the evaluation, the Region must make a final decision to proceed or not to proceed with further efforts at cost recovery.

C.1. Evaluation and Completion of the Potentially Responsible Party Search. After the removal has been completed, the PRP search should be evaluated for completeness. The Regional Counsel assigned to the case should review the PRP search for evidentiary sufficiency. The decision to conduct any additional PRP search activities not yet initiated should be made on the basis of the sufficiency of the evidence and consistent with the total costs of response and the likelihood of identifying

additional PRPs. The higher the costs of response, the stronger the effort should be to locate PRPs and link them to the site. Some cases with total costs of response less than two hundred thousand dollars will not be litigated. Extensive PRP searches should not be conducted for such smaller cases without prior evaluation of the site expenditures, costs of additional PRP search activities, likelihood of identifying viable PRPs, and likelihood of litigation if PRPs fail to respond satisfactorily to a demand letter.

If the PRP Search has not identified any PRP, the case should be closed out by way of a cost recovery close-out memorandum.[15] This will provide documentation that the cost recovery potential has been evaluated and remove the case from further consideration. The execution of a Cost Recovery Close-Out Memorandum on a site must be reported in the CERCLIS system.

C.2. Cost Documentation. Following the conclusion of the removal, and sometimes earlier, the Region should begin gathering the records which serve to support a demand letter. The threshold of two hundred thousand dollars should be used to determine the initial extent of cost documentation. Initially, documentation for cases less than two hundred thousand dollars should include the total costs of the response activity broken

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15/ See the "Guidance of Documenting Decisions not to Take Cost Recovery Actions", (OSWER Directive No. 9832.11).

down by general categories. These categories include EPA in-house expenditures, contracts, other federal agency costs (through interagency agreements) and Fund monies expended by States through cooperative agreements. Additional documentation may be required later to respond to a Freedom of Information Act request, to respond to PRPs in negotiation, or to prepare for litigation.

For those viable cases with costs greater than two hundred thousand dollars, full cost documentation, including the submittal of the Cost Recovery Checklist to Headquarters should proceed prior to issuance of the demand letter. The checklist, once completed, must be sent to OWPE allowing adequate time (typically twelve weeks or more) for document collection. EPA Headquarters, the Region, the Department of Justice, other federal agencies, and States, each have certain responsibilities in the collection and packaging of cost documentation. The Procedures for Documenting Costs for CERCLA §107 Actions, January 30, 1985 (OSWER Directive No. 9832.0-1a) describes roles and responsibilities of each office in preparing cost documentation for litigation.

C.3. Demand Letters. As soon as the Region has documented costs consistent with the level of expenditures and likelihood of litigation, the Region should issue a demand for payment of all

past costs to PRPs.[16] The demand letter should be sent to all PRPs as soon as practicable after the completion of the removal. A demand letter should be issued in all cases where response costs have been incurred under CERCLA regardless of whether a decision has been made to initiate a judicial proceeding for cost recovery.

Guidance on the content of a demand letter, and a model demand letter can be found in the Cost Recovery Actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, August 26, 1983 (OSWER Directive No. 9832.1). In addition to the items listed in the 1983 Cost Recovery Guidance to be included in a demand letter, all demand letters shall reflect the revisions of the SARA amendments to section 107(a) which provides that the "amounts recoverable in an action under this section shall include interest on all [costs incurred by EPA not inconsistent with the national contingency plan]. Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned."

C.4. Negotiation. When the PRP(s) responds to a demand letter expressing interest in meeting with the Agency to discuss the

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16/ The authority to issue demand letters under SARA has been delegated to Regional Administrators. Program and legal personnel should consult with their supervisors to determine who has redelegated responsibility for preparing and issuing demand letters in their Region.

Agency's claim, negotiations should be initiated and carried out within a limited period of time. The time period should be determined by the Region on the basis of factors affecting the complexity of the negotiations (e.g., the number of potentially responsible parties that will participate, the amount of the claim). Further information on the development of a negotiating team and related issues can be found in 1983 Cost Recovery Guidance.

The Region may also decide to utilize alternative dispute resolution techniques to achieve settlement. Arbitration, for example, is specifically addressed in section 122(h)(2) of CERCLA. Arbitration may be utilized for cases where total response costs (excluding interest) do not exceed $500,000. (At the time of issuance of this guidance, the Office of Enforcement and Compliance Monitoring is drafting a regulation on procedures for resolving small cases through arbitration.) Additional information may be found in Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases, August 14, 1987, issued by the Office of the Administrator.

In those cases where the Region receives no response or an unsatisfactory response to a demand letter, the Region must decide whether to pursue cost recovery efforts further. See section C.6, Consideration of Referral in the Event of No Settlement, below.

C.5. Settlements. If negotiations are successful, agreements will be formalized in an administrative document or a judicial consent decree. The Region may enter a partial settlement with some PRPs and seek to recover unreimbursed costs from non-settlors. Where the Agency does enter into a partial settlement, viable recalcitrant PRPs should be pursued as soon as practicable for the remainder of the costs.

Administrative settlements[17] may be entered into by the Agency for cost recovery pursuant to Section 122(h) of SARA[18]. Administrative settlements in cases where total costs of response at a facility, excluding interest but including all future costs, do not exceed five hundred thousand dollars may be signed by the Regional Administrator without Department of Justice concurrence. Pursuant to §122(i), the Agency must solicit public comment on proposed 122(h) administrative settlements by placing a notice of the settlement in the Federal Register. The comment period is thirty days. Administrative settlements for cost recovery for cases where the total cost of response on a site are expected to exceed five hundred thousand dollars may only be entered into

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17/ The Office of Enforcement and Compliance Monitoring is drafting guidance on the procedures to be followed for administrative cost recovery settlements.

18/ Section 122(h) of CERCLA gives the Agency the authority to settle cost claims administratively. Such settlements require the prior written approval of the Department of Justice if total costs of response at a facility exceed five hundred thousand dollars (excluding interest).

with the advance concurrence of EPA Headquarters and the Department of Justice. Administrative settlements are fully enforceable pursuant to CERCLA §122(h)(3).[19]

Judicial consent decrees may require consultation or concurrence with EPA's Office of Waste Programs Enforcement and Office of Enforcement and Compliance Monitoring in addition to the approval of the Department of Justice. See the Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E, June 17, 1988, (OSWER Directive No. 9012.10-a), for information on settlement authorities and their requirements.

C.7. Consideration of Referral in the Event of No Settlement. In each case where the Agency has conducted a response action under the authority of section 104 of CERCLA, the Agency must make an affirmative decision to proceed or not to proceed with a judicial cost recovery action. This applies to those sites where no response or an unsatisfactory response to a demand letter was received as well as to those sites for which negotiations occurred but were unsuccessful. The Region should have gathered all the information necessary to decide the final disposition of

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19/ CERCLA section 122(h)(3), Recovery of Claims, states "If any person fails to pay a claim that has been settled under this subsection, the department or agency head shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of settlement. In such actions, the terms of the settlement shall not be subject to review."

the case. The relevant factors to be considered include:

(a) the amount of costs at issue;

(b) the strength of evidence connecting the potential defendant(s) to the site;

(c) the availability and merit of any defense, (See CERCLA §107);

(d) the quality of release, remedy, and expenditure documentation by the Agency, a State or third party;

(e) the financial ability of the potential defendant(s) to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement;

(f) the statute of limitations; and

(g) other cases competing for resources.

If upon review of the case on the basis of the above factors, the Region decides not to pursue a cost recovery action, the decision must be documented in a cost recovery close-out memorandum.[20] A close-out memorandum will provide documentation for why EPA has not pursued cost recovery in a particular case, and provide the Agency with information necessary for selecting referrals and predicting revenues to the Fund in future years.

20/ See the Guidance on Documenting Decisions not to Take Cost Recovery Actions, (OSWER Directive No. 9832.11).

These elements are discussed in Cost Recovery Actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (OSWER Directive No. 9832.1) and Procedures for Documenting Costs for CERCLA §107 Actions, (OSWER Directive No. 9832.0-1a). In addition, the referral should anticipate the defense that the response was inconsistent with the national contingency plan. The referral should comport with the applicable guidance and include or reference the administrative record, PRP search, and activity and cost documentation. Evidence substantiating each element of proof must be discussed in a referral package submitted to the Department of Justice when proceeding with a judicial action.

Generally, referrals seeking the recovery of costs expended in a removal action should occur no later than twelve months after completion of the removal, whether or not the site is on the National Priorities List[21] and regardless of whether further response action is to be taken. Exceptions to this policy may be possible in certain instances for legitimate litigation strategy reasons. For instance, where a remedial action is to be initiated within three years of the completion of the removal, it

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21/ Although sites on the National Priorities List will have further costs, e.g., costs of a remedial investigation and feasibility study, the action for the recovery of removal costs should be brought within a year of completion of the removal to assure that we litigate the case while the evidence is most readily available. See Cost Recovery Actions/Statute of Limitations, June 12, 1987 (OSWER Directive No. 9832.3-1A).

Generally, the Regions should anticipate developing cases for litigation for all sites where total costs of response exceed two hundred thousand dollars and negotiations for settlement were unsuccessful. Sites where total costs of response do not exceed two hundred thousand dollars, and negotiations were unsuccessful, are also candidates for referral consistent with the case selection criteria discussed in Part II, above. The cases selected for litigation involving sites where total costs of response are less than two hundred thousand dollars should be those where PRPs are recalcitrant, evidence linking PRPs to the site is good, the case may be used to create good precedent (such as a site where EPA issued a unilateral order, PRPs did not comply, and EPA is likely to obtain a favorable ruling for treble damages or penalties), or the case is otherwise meritorious.

A decision to proceed with a judicial action for cost recovery requires the assembly of all documents associated with the case including those necessary to substantiate that:

1) there is a release or the threat of a release of a hazardous substance;

2) the release or threat of release is from a facility;

3) the release or threat of release caused the United States to incur response costs;

4) the Defendant is in one or more of those categories of liable parties in CERCLA section 107(a).

Part IV. COST RECOVERY PROCESS FOR REMEDIAL SITES

The remedial process in the Superfund program includes the remedial investigation and feasibility study, remedial design, and remedial action. Activities related to cost recovery must be conducted in each phase of the remedial process in order to maximize the potential for recovery of funds.

The cost recovery process for remedial sites[23] includes the following elements: the search for potentially responsible parties (PRPs); the opportunity for PRPs to conduct the work; the development of the administrative record; cost documentation; and the timely issuance of demand letters. While the process for remedial sites is similar to the previously described process for removal sites, the level of effort of each element must be increased over that for removal actions because of the greater amount of money involved. Sites that proceed through a remedial investigation and feasibility study and remedial design and action will generally exceed the threshold level of two hundred thousand dollars used in the removal cost recovery process. Described below are the activities required for each of the elements in the remedial cost recovery process and the timing of each of the activities.

23/ Where a site has more than one operable unit, cost recovery activities described in the remedial process should be conducted for each operable unit, where appropriate, since operable units may be held to be separate actions for purposes of cost recovery statute of limitations.

may be appropriate to combine an action for the recovery of the removal costs with the action for the recovery of RD/RA costs.[22] However, in no event should filing be delayed beyond the statute of limitations.

22/ Where further response action is contemplated, the Agency ordinarily seeks a declaratory judgment for future response costs. See CERCLA section 113(g)(2).

be conducted prior to the initiation of the RI/FS to ensure that all PRPs may be given general notice of their potential liability well before they are given special notice of the opportunity to conduct the RI/FS: history of operations at the site; a title search of the site property; Agency record collection and file review; interviews with government officials; PRP status/PRP history; records compilation; issuance of CERCLA 104(e) letters/RCRA 3007(c) letters; financial status; PRP name and address updates; identification of generators and transporters; report preparation; and, an evaluation of the value of filing notice of a lien on the site property. (The Guidance on Federal Superfund Liens, September 22, 1987, (OSWER Directive No. 9832.12), provides guidance on the use of Federal liens to enhance Superfund cost recovery.) The Region should rely on the expertise of the civil investigator and the Office of Regional Counsel and utilize available contract resources to conduct the PRP search and prepare the PRP search report.

Sufficient information should be collected on all PRPs to satisfy the special notice requirements of section 122 of CERCLA.[24] If possible, the PRP search should be completed prior to the initiation of the RI/FS. In some instances, completion of

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[24]/ CERCLA §122(e)(1) identifies information that should be included, to the extent it is available, in a special notice letter. This information includes the names and addresses of other PRPs, the volume and nature of the hazardous substances contributed by each PRP, and a ranking by volume of the substances at the facility.

A. Pre-Remedial Cost Recovery Activities

Activities that may be carried out in preparation for future cost recovery actions prior to the initiation of a remedial investigation and feasibility study (RI/FS) include the potentially responsible party search, general notice, special notice, negotiations, and the issuance of an administrative order on consent for a PRP RI/FS. While each of these activities is an integral part of the broader Superfund program, each has a special significance in light of potential cost recovery actions.

A.1. The Potentially Responsible Party Search The identification and location of potentially responsible parties is central to all future enforcement activities, including cost recovery actions. The PRP search will generate names of potentially responsible parties as well as the information to link the PRPs to the site. This information is likely to serve as evidence in future judicial actions to prove the liability of the defendants.

Concurrent with the NPL listing process, the Region should initiate a PRP search in accordance with the guidelines set out in the Potentially Responsible Party Search Manual, August 27, 1987, (OSWER Directive No. 9834.6). Fund-lead, enforcement, civil investigators, and Office of Regional Counsel staff should work closely together in the development of the PRP search from the initial planning stages through the production of the PRP search report. Ideally, the following activities should

A.3. Settlement for PRP Remedial Investigation/Feasibility Study. A settlement for PRP conduct of the RI/FS must include the requirement that PRPs pay for cost incurred by EPA in obtaining assistance from third parties in the oversight of the RI/FS and may also involve the recovery of past costs incurred by the Agency.

Where negotiations result in a settlement for a PRP RI/FS, EPA will require the settling PRPs to commit in the settlement agreement to pay the costs of oversight of the RI/FS including extramural costs (contracts and interagency agreements) and intramural costs (EPA payroll, travel, and other costs) on a specified schedule. The Region should track reimbursement in CERCLIS and contact the Regional Financial Management Officer to set up an accounts receivable in the Financial Management System (FMS) for the receipt of oversight costs.

In the case of those sites where removal actions have occurred prior to the negotiation, and the cost recovery is not being pursued on a separate track, additional provisions for recovery of past costs or a reservation of EPA's rights to pursue those costs should be included in the administrative order. If some but not all past costs are recovered in the settlement, and a reservation of the Agency's right to pursue all of the remaining costs is included, the advance concurrence of the Department of Justice under section 122(h)(1) of CERCLA will not be necessary. Of course, if the settling PRPs agree to pay all

all PRP search activities prior to the initiation of the RI/FS will not be possible. For example, it may be necessary to undertake an RI to determine the source of contamination. In other instances, the search for generators may be complicated or "new" information may be discovered late in the process.

A.2. General and Special Notice Letters and Negotiations for a PRP Remedial Investigation and Feasibility Study. Once PRPs have been identified, the Region should issue General Notice Letters to apprise PRPs of their potential liability. This should be done as soon as possible after they have been identified. In addition, information relating to names and addresses of other PRPs, volumetric rankings and nature of substances should be provided as soon as possible.

Special notice letters will provide PRPs with a specific opportunity to negotiate terms of agreement concerning their participation in the conduct of the RI/FS. Special notice letters should also include a demand for payment of past costs if a Fund-financed removal action was conducted at the site and a demand letter has not already been sent. Information regarding the content and timing of general notice letters, special notice letters, and negotiations for PRP RI/FS can be found in the Interim Guidance on Notice Letters, Negotiation, and Information Exchange, October 19, 1987 (OSWER Directive No. 9834.10).

action and may serve as evidence of costs incurred in future judicial actions to substantiate cost recovery claims.[25]

When the RI/FS is being conducted by the PRP(s), the lead agency must carefully record the costs of all Fund-financed activities associated with the oversight of that action. The settlement agreement should specify the schedule for payment of oversight costs throughout the RI/FS. Normally, the Agency will issue a demand for payment at the end of a one year period throughout the course of the PRP RI/FS for all costs incurred during that year. Quality record keeping using CERCLIS is essential since the Agency must be able to substantiate the amount of money demanded and what activities were performed for that amount. The Regional Financial Management Officer should set up an accounts receivable in FMS for the receipt of oversight costs.

B.2. Supplemental PRP Search. As the RI/FS proceeds, the Agency should continue to develop the PRP search as necessary. Additional PRPs found since the start of the RI/FS who did not receive notice letters should be issued general notice letters as soon as they are identified. This will give them an opportunity to participate, to the extent feasible, in on-going work. The evidence linking each PRP to the site should be fully reviewed by the Office of Regional Counsel in anticipation of pursuing

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25/ Cost documents are not part of the administrative record for a site.

past costs, a claim is not being compromised and DOJ's prior concurrence is not necessary.

Where negotiations do not result in settlement, the Agency will proceed with a Fund-financed RI/FS.

B. Cost Recovery Activities During the Remedial Investigation/ Feasibility Study

The activities that occur during the remedial investigation and feasibility study in support of future cost recovery actions may include a supplemental PRP search, the development of the administrative record, the documentation of activities and costs, notice and demand letters, and negotiation for PRP remedial design and action.

B.1. Documentation of Activities and Cost Accounting. The documentation of activities and accounting of costs must occur whether the remedial investigation and feasibility study are being conducted by the Agency, a State, or the PRPs.

During a Fund-financed RI/FS, each organization involved (e.g., EPA, a State, other Federal agencies, EPA's contractors) is responsible for keeping an accounting of its activities and the costs corresponding to those activities/items. Cooperative agreements with States for State-lead, Fund-financed RI/FS's must include requirements that States maintain documentation according to standard EPA procedures for cost recovery. These records will be assembled later during the RI/FS in preparation for negotiations with PRPs for private-party remedial design and

settlement for less than one hundred per cent should document the basis for not pursuing the unrecovered costs. If a decision not to pursue the unrecovered costs is made after the settlement analysis has been prepared in final form, a close-out memorandum should be prepared to document the basis for that decision.[27]

C.3. No Settlement. Where negotiations do not result in any settlement, the site classification will determine the next step.

For Fund-lead sites, unless a statute of limitations problem is anticipated for the recovery of RI/FS costs, the Region should proceed with Fund-financed remedial design and remedial action before initiating an action for the recovery of RI/FS costs. Consistent with applicable and relevant guidance, consideration should be given to issuing unilateral §106(a) orders to recalcitrant parties in order to encourage PRP response and set up claims for treble damages and penalties.

For Federal enforcement-lead sites, where the remedial action is not funded and the case is not settled, the Region generally should issue a unilateral section 106 administrative order and, where compliance is not forthcoming, immediately thereafter (taking into account whether there is a funded RD) refer the case for injunctive relief and past costs (combined CERCLA §§106/107 judicial actions). The cost documentation must be completed by the time of the referral to support the section

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[27]/ See footnote 15, page 20.

action under CERCLA. The cost recovery consequences of each of these are discussed below.

C.1. Full Settlement. Where negotiations result in a full settlement, the settling PRPs agree to conduct the work and reimburse the Agency for past costs. In addition, the settling PRPs will have agreed to reimburse EPA for future oversight costs. The agreement will be formalized in a consent decree which must specify the manner and timing of billings and payments and be filed in the appropriate United States District Court. For future oversight costs, EPA may be required to send demand letters at regular intervals according to the schedule set forth in the consent decree. The schedule for payment should be recorded in the appropriate CERCLIS file. The Regional Financial Management Officer must be advised that an account for receipt of the recovered money should be established.

C.2. Partial Settlement. Where negotiations result in a partial settlement, unrecovered costs should be sought from non-settlers in a §107 judicial action. The referral of a case against non-settlors should occur concurrent with referral of the consent decree with settlors, or as soon as possible thereafter. This will serve to highlight enforcement against the non-settling PRPs.[26] If the Region will not pursue the costs waived in the settlement with the PRPs, the ten point analysis justifying the

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[26]/ Of course, this should take into account accrual of a cause of action.

procedures. (See Administrative Records for Decisions on Selection of CERCLA Response Actions, May 29, 1987, OSWER Directive #9833.3.)

B.4. Special Notice Letters and Negotiation for PRP Remedial Design and Remedial Action. As the proposed plan and draft RI/FS are made available for public comment, the Regions should again send special notice letters to all identified PRPs to provide them with an opportunity to negotiate regarding conduct of the remedial design and remedial action (RD/RA).

The special notice letters for RD/RA should include a demand for payment of past costs not yet reimbursed, e.g., the costs of a Fund-financed RI/FS. The Region should determine total past costs (to the extent possible), and subtract from those costs any costs already reimbursed. The Region must ensure that the amount of past costs demanded is qualified to account for costs incurred but not yet paid by the Agency. Interest which has accrued on amounts previously demanded should be included in the demand as appropriate (see page 22).

C. Settlement for PRP Remedial Design and Action.

As mentioned above, past costs will be one of the subjects of negotiation for PRP remedial design and action. The negotiations will result in one of three outcomes: full settlement, partial settlement, or no settlement. See the Interim CERCLA Settlement Policy, OSWER Directive No. 9835.0. for a complete discussion of the factors to consider when settling an

litigation against the PRP, and supplemented as necessary. Again, the Region should ensure that all activities identified in the Potentially Responsible Party Search Manual, (OSWER Directive No. 9834.3) have been conducted or are planned. All sources of information identified by the Region's civil investigator should be thoroughly pursued.

If the PRP search indicates that there are no PRPs at the site, the Region should prepare a close-out memorandum to document the basis for a decision not to proceed with cost recovery. If the PRPs are not financially viable, the Region should review the merits of proceeding with cost recovery. See the discussion of bankruptcy referrals in the Case Selection Guidelines section for factors to consider in such cases.

B.3. Development of the Administrative Record. As in removal actions, the development of an administrative record which will support the selection of one of the remedial alternatives is critical to the cost recovery potential of a case. Section 113(j) of CERCLA limits judicial review of issues concerning the adequacy of a response action to the administrative record. An accurate and complete record, therefore, should simplify future cost recovery actions. Section 113(k) requires that interested persons be given the opportunity to participate in the development of the administrative record. During the RI/FS, whether conducted by a PRP, a State, or EPA, Regions should develop the administrative record consistent with the applicable

Officer must be provided with a copy of the consent decree so that an accounts receivable can be established in FMS and payments tracked.

The Agency should continue to account separately for all other EPA site-specific costs not attributable to oversight (e.g., costs associated with a separate operable unit which the PRPs are not implementing) in the event that a judicial action against non-settlors (or settlors) occurs.

D.2. Fund-Financed RD/RA. Fund-financed remedial design and action will normally account for the largest site-specific expenditures attributable to a site. Therefore, remedial design and action costs provide the largest potential for return of site-specific expenditures. This fact makes it essential that the Agency devote significant resources to the prompt development of cost recovery actions for remedial design and action costs.

a) Cost Documentation. There is a presumption that absent full resolution, the Agency will proceed with judicial cost recovery actions for all Fund-financed remedial actions and/or unreimbursed costs unless a decision has been made not to pursue cost recovery. In preparation for a referral, the Agency must continue maintaining an accounting of all costs incurred on the site, including costs incurred by Agency personnel and contractors, and costs incurred through cooperative agreements with States and interagency agreements with other Federal agencies. The Cost Documentation Procedures Manual (1985)

107 claim. Again, see the 1983 Cost Recovery Guidance and the 1985 Cost Documentation Procedures Manual for details of preparing the cost recovery portions of a case.

D. Cost Recovery Activities during the Remedial Design and Remedial Action

By the time a site has reached the remedial design and remedial action phases, much of the work for assembling a cost recovery case has already been completed. Additional activities, which will mainly consist of updating information collected earlier, will depend upon the outcome of settlement negotiations, and the viability of the remaining case. Where the Agency has agreed to a partial settlement, cost recovery activities to be conducted may include those necessary in overseeing the PRP work as well as those necessary for pursuing a judicial action against non-settlors.

D.1. PRP RD/RA. Cost recovery activities required during a PRP RD/RA depend upon the type of settlement (i.e., full or partial) and the specific provisions included in the settlement for reimbursement of past costs and oversight costs. Any settlement that includes reimbursement of EPA's oversight costs throughout the course of the remedial design and action will require the Agency to regularly document all costs associated with the oversight function. Demand letters for oversight costs should be sent according to the schedule set forth in the consent decree and tracked in CERCLIS. The Regional Financial Management

(c) the quality of release, remedy, and expenditure documentation by the Agency, a State or third party;

(d) the financial ability of the potential defendant(s) to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement; and

(e) the statute of limitations.

If upon review of the above factors, the Region believes that a judicial cost recovery action will not be fruitful, a cost recovery close-out memorandum should be prepared and its issuance documented in the appropriate CERCLIS field.

A decision to proceed with a judicial action for cost recovery requires the assembly of all documents associated with the case including those necessary to substantiate that:

1) there is a release or the threat of a release of a hazardous substance;

2) the release or threat of release is from a facility;

3) the release or threat of release caused the United States to incur response costs.

4) the Defendant is in one of those categories of liable parties in CERCLA section 107(a).

These elements are discussed in Cost Recovery Actions under

provides details on cost documentation preparation for section 107 actions.

b) Demand Letters. As soon as practicable after the completion of the remedial design, the Region should send demand letters to all identified PRPs. The amount of money demanded should include total past costs not yet recovered, and applicable interest, plus a projection of the costs expected to be spent in remedial action. While the demand letter should include the projected costs, it should also state that the amount is an estimate and is subject to change. Demand letters at this point should not invite discussion on any subject but costs, i.e., negotiation on the selected remedial action will not be reopened at this point.

c) Consideration of Referral in the Event of No Settlement. Assuming that attempts at negotiation at this point are fruitless, the Region must make a final determination of the disposition of the case. The relevant factors to be considered are the same as those for removal action cases:

(a) the strength of evidence connecting the potential defendant(s) to the site;[28]

(b) the availability and merit of any defense. (See CERCLA §107);

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[28]/ In the case of large remedial actions with PRP searches done early in the program, the PRP search should be reviewed and, as appropriate, upgraded, before a decision is made to close-out the case.

the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (OSWER Directive No. 9832.1) and Procedures for Documenting Costs for CERCLA §107 Actions, (OSWER Directive No. 9832.0-1a). In addition, the referral should anticipate the defense that the response was inconsistent with the national contingency plan. The referral should comport with the applicable guidance and include or reference the administrative record, PRP search, and activity and cost documentation. Evidence substantiating each element of proof must be discussed in a litigation report included in the referral package submitted to the Department of Justice when proceeding with a judicial action. At this point, the assembly of evidence should merely require updating information previously assembled, e.g., the administrative record, cost documentation, the PRP search report.

Referrals seeking the recovery of costs expended in a remedial design and remedial action should occur concurrently with the initiation of on-site construction of the remedial action. RD/RA referrals should not affect the schedule of design or construction. Where remedial design and remedial action are divided into operable units, referrals should occur concurrent with the initiation of each remedial action operable unit.[29] The

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[29]/ Section 113(g) of CERCLA provides that in cost recovery actions under section 107 "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further

Agency will defer beyond this date the filing of a remedial case only in limited circumstances for technical or strategic reasons.

Once a case for the recovery of remedial action costs has been referred to the Department of Justice, the Region must periodically document on-going costs incurred and submit these costs to DOJ. The litigation team should discuss the frequency and timing of the periodic cost up-dates.

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response costs or damages."

OSWER # 9834.4-A

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

AUG 25 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Transmittal of Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators, Regions I - X
Regional Counsel, Regions I - X
Directors, Waste Management Divisions, Regions I - X

With this memorandum, I am transmitting guidance on the use and enforcement of EPA's information gathering authorities under CERCLA §§ 104(e) and 122(e)(3)(B). The attached guidance document replaces existing guidance entitled, "Policy on Enforcing Information Requests in Hazardous Waste Cases," dated September 10, 1984, to the extent that the earlier guidance addressed information gathering under CERCLA §104(e).

Attachment

cc: Bruce Diamond, Director, Office of Waste Programs Enforcement
Lloyd Guerci, Director, CERCLA Enforcement Division, Office of Waste Programs Enforcement
Frank Russo, Chief, Compliance Branch, Office of Waste Programs Enforcement
Robert J. Mason, Acting Chief, Guidance and Oversight Branch, Office of Waste Programs Enforcement
Lisa K. Friedman, Associate General Counsel, Office of General Counsel
David Buente, Chief, Environmental Enforcement Section, Department of Justice
Nancy Firestone, Deputy Chief, Environmental Enforcement Section, Department of Justice
Office of Regional Counsel Hazardous Waste Branch Chiefs, Regions I - X
Clem Rastatter, Executive Assistant, Office of Emergency and Remedial Response

Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas

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

AUG 25 1988

OFFICE OF
ENFORCEMENT AND
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MEMORANDUM

SUBJECT: Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators, Regions I - X
Regional Counsel, Regions I - X
Directors, Waste Management Divisions, Regions I - X

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), provides EPA with several methods of obtaining various types of information from a wide range of entities [1]. Section 104(e), entitled "Information Gathering and Access," grants EPA the authority to issue "information requests." Section 122(e)(3)(B), entitled, "Collection of Information," authorizes the use of administrative subpoenas. These information-gathering tools and enforcement powers represent a significant improvement in EPA's

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1 This guidance focuses solely on information gathering in the context of civil enforcement. In instances where a criminal enforcement action is contemplated or pending, Regional personnel should consult with OECM - Office of Criminal Enforcement, before proceeding with information gathering under CERCLA.

GUIDANCE ON USE AND ENFORCEMENT OF CERCLA INFORMATION REQUESTS AND ADMINISTRATIVE SUBPOENAS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

A. Prior Information-Gathering Authorities 2

B. Administrative Information-Gathering Distinguished from Discovery 3

III. DELEGATED AUTHORITIES TO USE INFORMATION-GATHERING TOOLS .. 6

IV. SCOPE AND TIMING OF INFORMATION-GATHERING PROCEDURES 7

A. Information Requests 7

B. Administrative Subpoenas 12

V. SERVICE OF INFORMATION REQUESTS AND SUBPOENAS 13

VI. GENERAL DUE PROCESS CONSIDERATIONS IN INVESTIGATIVE PROCEEDINGS PURSUANT TO AN ADMINISTRATIVE SUBPOENA 14

A. Agency Adjudications and Investigations Distinguished 14

B. Role of Witness' Counsel at Administrative Subpoena Proceedings 15

VII. ENFORCEMENT OF INFORMATION REQUESTS AND SUBPOENAS 16

A. Information Requests 16

1. Initial Steps 16

2. Administrative Orders to Compel Compliance 17

3. Civil Actions to Compel Compliance 18

4. Scope of Judicial Review 20

5. Penalties 21

B. Subpoenas 23

1. Jurisdiction and Venue 23

2. Procedures for Enforcing Subpoenas 24

C. Referrals 25

VIII. DISCLAIMER 26

ability to obtain information. A full exercise of these authorities, including taking enforcement action when necessary, can aid considerably in the implementation of CERCLA, and the attainment of statutorily mandated goals.

This guidance [2] serves two purposes: 1) it gives an overview of the information-gathering tools under CERCLA §§104(e) and 122(e)(3)(B), and 2) it focuses on the steps to be taken throughout the information-gathering process to ensure that EPA is in the strongest possible position to enforce an information request or subpoena, [3] if necessary.

II. BACKGROUND

A. Prior Information-Gathering Authorities

Prior to the enactment of SARA, information regarding hazardous waste sites was gathered primarily under the pre-SARA provisions of CERCLA §104(e) and RCRA §3007. Section 104(e)(5), authorizing administrative orders, civil actions and penalties of up to $25,000 for each day of noncompliance, now eliminates the need to incorporate RCRA §3007 solely for enforcement purposes. However, in appropriate circumstances where RCRA information gathering authorities are applicable, Regions may

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2 This guidance replaces existing guidance entitled, "Policy on Enforcing Information Requests in Hazardous Waste Cases," dated September 10, 1984, to the extent that the previous guidance addressed information gathering under CERCLA §104(e).

3 CERCLA §109(a)(5), as amended, also authorizes EPA to use administrative subpoenas "in conjunction with hearings" on Class I administrative penalties. This guidance does not specifically address the use of administrative subpoenas in that context.

still consider citing §3007 since RCRA provides the option of enforcement in a proceeding before an administrative law judge.[4]

The administrative subpoena authority in CERCLA §122 is new to CERCLA. However, it is similar to the authority contained in §11(c) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2610(c).[5]

B. Administrative Information-Gathering Distinguished from Discovery

As an initial matter, a distinction must be drawn between an investigation conducted by an administrative agency such as EPA and the information-gathering that commonly takes place during the discovery phase of a civil action. An administrative investigation is related in some way to implementation of an agency's statutory responsibilities. The manner and extent of the investigations are prescribed by the authorizing statute. Such an investigation may ultimately lead to the filing of a civil action, (at which time both parties may be allowed discovery), or it may simply be related to an agency's ongoing oversight activities.

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4 More extensive guidance on information-gathering under RCRA §3007 may be found in the guidance, "Policy on Enforcing Information Requests in Hazardous Waste Cases," OECM, September 10, 1984.

5 The use of TSCA §11(c) subpoena authority was recently upheld by the Ninth Circuit in EPA v. Alyeska Pipeline Serv. Co., 836 F.2d 443, 446-48 (9th Cir. 1988). In that case, the Court upheld the use of a TSCA subpoena to gather information relevant to a lawful inquiry under TSCA, even though the Court recognized that other environmental statutes, specifically the Clean Water Act, may later prove to be a more appropriate means of addressing the environmental problem under investigation.

Discovery, on the other hand, is conducted after an action is filed in court. The Federal Rules of Civil Procedure govern the manner and scope of this type of information-gathering. [6]

During the course of both an administrative investigation and discovery, a party may be required to provide oral testimony or produce documents. [7] However, the information-gathering tools used in an administrative investigation, and discussed in this guidance, are not the legal or functional equivalents of the more familiar interrogatory, deposition or request for production of documents. [8]

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[6] Nonetheless the Agency is not precluded from using its administrative information gathering authority once a civil action is commenced. In re Stanley Plating Co., Inc., 637 F. Supp. 71 (D. Conn. 1986), United States v. Browning - Ferris Chemical Services, et al., No. 87-317-B (M.D. La., November 16, 1987).

[7] It should be noted that since there is no opportunity for cross-examination, testimony obtained by administrative subpoena might not be admissible at trial. If the Agency wishes to preserve a respondent's testimony for trial, rather than use it only to develop other admissible evidence, two options are available. First, when it becomes clear that the testimony is necessary for trial, the respondent's deposition can be taken in the usual course of discovery. Alternatively, if the Agency expects to bring an enforcement action and it is not likely that the respondent will be available later during the discovery phase of the case, it may be possible to preserve a witness' testimony pursuant to Fed.R.Civ.P. 27 either in lieu of issuing an administrative subpoena, or following the issuance of a subpoena. See, Petition of Gary Constr., Inc., 96 F.R.D. 432, 433 (D.Colo. 1983), Ash v. Cort, 512 F. 2d 909, 911-913 (3d Cir. 1975), In re Boland, 79 F.R.D. 665, 667 (D.D.C. 1978), Petition of Benjamin, 52 F.R.D. 407 (E.D. La. 1971).

[8] The Notes of the Advisory Committee on the Federal Rules of Civil Procedure explicitly state that the provisions of Fed.R.Civ.P. 45 (Subpoenas) do not apply to administrative subpoenas. Other Rules are less explicit but are

(continued...)

In U.S. v. Morton Salt Co., 338 U.S. 632, 642-643 (1950), the Supreme Court described the difference between administrative investigatory power and a court's adjudicatory power in the following manner:

> The only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Limitations on this information seeking power do exist. However, the limitations themselves are narrow in scope.

> Of course a governmental investigation ... may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power... But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. Id. at 652 (citations omitted).

Thus, there are three basic parameters which are relevant to a request for information or an administrative subpoena. It must be:

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[8](...continued)
also, by their terms, inapplicable. For example, Fed.R.Civ.P. 26 (General Provisions Governing Discovery) contemplates an ongoing oversight role of the court. In administrative information gathering, the court has no role unless specifically petitioned by the government to enforce a subpoena or information request. See, Belle Fourche Pipeline Co. v. U.S., 751 F.2d 332, 334 (10th Cir. 1984), citing Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964).

1. Within the underlying statutory authority of the agency;
2. Sufficiently definite/specific;
3. Reasonably relevant to the agency's basic inquiry.

In addition, it should be noted that courts may also consider whether a request is unduly burdensome. [9]

III. DELEGATED AUTHORITY TO USE INFORMATION GATHERING TOOLS

On January 23, 1987, the President signed Executive Order 12580 delegating information-gathering authority in §§ 104(e) and 122 to the Administrator of EPA. [10] This authority was, in turn, delegated from the Administrator to the Assistant Administrator for Solid Waste and Emergency Response, the Assistant Administrator for Enforcement and Compliance Monitoring and the Regional Administrators by Delegation 14-6, "Inspections, Sampling, Information Gathering, Subpoenas and Entry for Response," signed on September 13, 1987.

Under Delegation 14-6, the authority of the Regional Administrator and the Assistant Administrator for Solid Waste and Emergency Response to issue compliance orders or subpoenas is limited by the requirement that they first consult with the Assistant Administrator for Enforcement and Compliance

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9 See, e.g., F.T.C. v. Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977), where the court stated,

> the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest.

10 The Administrator's authority, however, is limited with regard to federal facilities. (See Sections 3(j)(1) and 3(b)(1) of Executive Order 12580.)

Monitoring or his/her designee. On November 19, 1987, the Assistant Administrator for Enforcement and Compliance Monitoring redelegated his consultation authority under Delegation 14-6 to the Associate Enforcement Counsel for Waste.

IV. SCOPE AND TIMING OF INFORMATION GATHERING PROCEDURES

A. Information Requests

The scope of investigation authorized by CERCLA §104(e) is broad. CERCLA §104(e)(2), as amended by SARA, provides:

> Any [duly authorized] officer, employee, or representative [of the President]... may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:
>
> (A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.
> (B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.
> (C) Information relating to the ability of a person to pay for or to perform a cleanup.
>
> In addition, upon reasonable notice, such person either (i) shall grant any such officer, employee, or representative access at all reasonable times to any vessel, facility, establishment, place, property, or location to inspect and copy all documents or records relating to such matters or (ii) shall copy and furnish to the officer, employee, or representative all such documents or records at the option and expense of such person. (Emphasis added.)

Section 104(e)(1) provides:

> The authority of this subsection may be exercised only for the purposes of determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title. (Emphasis added.)

Initial attempts to gather information about a given site commonly will be through the use of information requests issued under CERCLA §104(e). While an information request may be sent in advance of a general notice letter, as a component of the general notice letter, or after the general notice letter, as needed, [11] an effort should be made to issue initial information requests earlier rather than later in the PRP search process to aid in the process of establishing liability and clarifying the universe of PRPs. Initial information requests typically should seek the following types of information:

-relationship of the PRP to the site;

-business records relating to the site, including, but not limited to, manifests, invoices, and record books;

-any data or reports regarding environmental monitoring or environmental investigations at the site;

-descriptions and quantities of hazardous substances transported to, or stored, treated or disposed at the site;

-any arrangements made to transport waste material to the site;

-names of any transporters used in connection with the site;

-where financial viability is or will be at issue, and the Agency is unable to assess financial viability effectively through review of publicly available

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11 For further information on notice letters, their timing, and content, see "Interim Guidance on Notice Letters, Negotiations and Information Exchange," 53 Fed. Reg. 5298 (Feb. 23, 1988).

data,[12] information relating to ability to pay for or perform a cleanup;[13],

Where financial viability is or will be at issue, information requests regarding insurance coverage should strike a balance between the need to make an initial determination about the extent of an insured's coverage and the need to avoid requiring an insured to construe the coverage of its policies. If a request is overly specific, and a party (the insured) fails to identify insurance that may afford coverage regarding a response action, the insurer may attempt to use that failure to identify the policy in the information request to avoid payment

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12 The ability to obtain financial information about a PRP from a source other than the PRP itself is limited by the Right to Financial Privacy Act, 12 U.S.C. 3401, et seq., which limits Government access to a customer's financial records at a financial institution in accordance with the provisions of the Act. In most cases, it will not be necessary to seek information about a PRP's assets from a financial institution. That information can be obtained from a PRP as a condition of negotiation if the PRP raises ability to pay as an issue. If circumstances arise where a Region believes that it is necessary to obtain information from a financial institution, it should first consult with Headquarters.

13 Under CERCLA §104(e)(2)(c), EPA now has explicit authority to request information relating to the ability of a person to pay for or perform a cleanup. Before it was amended, CERCLA §104 authorized EPA simply to obtain "information relating to [hazardous] substances." EPA typically construed this language to include all information that EPA considered relevant to any aspect of enforcement. In U.S. v. Charles George Trucking Co., 624 F. Supp. 1185 (D. Mass.), aff'd on other grounds, 823 F.2d 685 (1st Cir. 1987), the court took issue with EPA's broad interpretation of "information relating to [hazardous] substances" and denied EPA's request for information relating to a defendant's ability to pay for or perform a cleanup. The court held that information about assets and insurance coverage "in no way informs EPA about the hazardous substances involved." 624 F. Supp. at 1188. This decision is no longer supported in light of CERCLA §104(e)(2)(c).

under the policy. Failure to identify the policy in a response to an information request may tend to show that the insured did not intend to address that type of liability with the policy in issue. Such subjective intent is often critical in litigation over the extent of coverage of insurance policies. The ultimate result might be that potentially fewer funds would be available for a response action, and the potential for settlement diminished.

Hence, requests for information about insurance policies should be as neutral as possible. Rather than seeking information about discrete periods of time during which it is suspected that a given party may be active at a site, the information request should cover the period from the first known instance of waste disposal to the present. Terms such as "pollution exclusion," "sudden," "non-sudden," or "accidental" should be avoided and the insured should not be asked to state whether its insurance contains such exclusions or coverage. Instead, the information request should simply ask the insured to provide a list of all property and casualty insurance (e.g. comprehensive general liability, environmental impairment and automobile liability insurance) and to specify the insurer, policy, effective dates, and per occurrence policy limits for each policy. In this way, the Agency obtains the information it needs to make an initial determination about insurance coverage, and the insured has not compromised any potential insurance coverage should it ultimately be liable for any response costs.

In the alternative, the insured may always be given the option of providing copies of the policies themselves. A similar, general request about directors' and officers' insurance may also be made in situations where personal liability of a corporation's directors or officers is or will be at issue.

Information requests should include a brief identification and description of the site, a citation to the statutory authority, and a general statement setting forth the purpose of the request and its relation to the overall case. An information request should also state the date by which the recipient must respond or adequately justify his inability to respond. This due date should reasonably reflect the type and volume of information that the agency anticipates will be responsive to the request. Thirty days is usually adequate. In addition, the information request should state that the respondent may have an opportunity for consultation with the Agency, and that failure to respond may give rise to a penalty. An information request should also require the recipient to indicate the types of files searched in response to the request, and ask the recipient to submit an affidavit describing his search efforts if the search does not disclose any of the information sought. [14]

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[14] Previous guidance, "Policy on Enforcing Information Requests in Hazardous Waste Cases", September 10, 1984, suggested that an affidavit be requested in a second, "reminder" letter. However, by including an affidavit request with a request for a description of the types of files searched in the initial information request, one can more quickly (continued...)

A model information request, largely developed by Region I, is attached as Attachment 1.

B. Administrative Subpoenas

Section 122(e)(3)(B) gives EPA the power to issue administrative subpoenas requiring the attendance and testimony of witnesses (referred to as a subpoena ad testificandum) and the production of documents (referred to as a subpoena duces tecum). Such subpoenas may be issued as is "necessary and appropriate" for performing a non-binding preliminary allocation of responsibility (NBAR) "or for otherwise implementing" CERCLA Section 122.

Since the language of §122 is broad and permits the use of administrative subpoenas "for otherwise implementing [Section 122]," there is no requirement that EPA first decide to prepare an NBAR before issuing an administrative subpoena or that the information gathered by an administrative subpoena be used only for an NBAR. [15] Instead, an administrative subpoena may be used once the Agency has begun to implement the settlement process under §122 (e.g. through initiation of informal discussions or

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[14](...continued)
determine which information requests should be followed up with an enforcement action.

[15] Nonetheless, the factors that may be considered when preparing an NBAR are a useful outline of the types of information that may be reached, at a minimum, with an administrative subpoena. These factors are set forth in §122(e)(3) and include: "volume and toxicity of wastes, strength of the evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors."

formal negotiations with some or all affected PRPs, or where the Agency judges that available information points to favorable prospects for settlement). Since the use of administrative subpoenas may be judicially challenged, it is important to identify and document the reasons relied upon in deciding to use the authority in §122(e)(3)(B). In particular, it is important to be able to show how the subpoena's issuance either furthers the NBAR process or meets the criteria of "otherwise implementing this section."

Although there is no statutory prohibition against doing so, a subpoena generally should not be used in the first instance to gather information. Rather, a §104(e) information request is the preferred method of obtaining information.

V. SERVICE OF INFORMATION REQUESTS AND SUBPOENAS

Information request letters are a formal means of obtaining information, and consequently should be served by registered or certified mail, return receipt requested. (Note that when serving any document by registered or certified mail, post office box addresses should be avoided.)

Service of a subpoena can be effectuated in a number of ways depending upon the circumstances of the investigation. Whenever possible, personal service is preferable, especially when it is likely that the subpoena may be ignored or challenged. When personal service is not practical, a subpoena can be served by registered or certified mail, return receipt requested. Regardless of the method of service, the correct

person must be served. Service upon a domestic corporation, or upon a partnership or other unincorporated association, should be made by personal service or certified mail to an officer, partner, managing or general agent, or to any other person authorized by law to receive service of process. The person serving the subpoena, including the person who actually mails the subpoena when that method of service is used, must complete an affidavit of service at the time of service. (See Attachment 2 for a model subpoena and affidavit of service.)

The statute places no explicit limit on the distance that a witness may be required to travel to appear in response to a subpoena. Potential locations for such an appearance include an EPA regional office, EPA Headquarters, a local U.S. Attorney's office, a court reporter's office, or any other location considered appropriate under the circumstances.

VI. GENERAL DUE PROCESS CONSIDERATIONS IN INVESTIGATIVE PROCEEDINGS PURSUANT TO AN ADMINISTRATIVE SUBPOENA

A. Agency Adjudications and Investigations Distinguished

When an agency such as the EPA orders a person to appear at an agency proceeding, the procedural rights of the person ordered to appear vary depending upon whether the agency's purpose is to adjudicate or to investigate. Examples of EPA adjudication include the issuance of compliance orders or the assessment of civil penalties under §3008(a) of RCRA. Before the Agency may issue a compliance order or assess civil penalties under RCRA §3008(a), the person against whom the Agency is taking action is accorded the procedural rights set

forth in 40 CFR Part 22.[16] These rights are similar to those of a defendant in a civil trial and include the right to notice, to submit evidence, and to cross-examine.

In contrast, when an agency issues an administrative subpoena pursuant to §122(e)(3)(B), its purpose is only to investigate or gather information and "it is not necessary that the full panoply of judicial procedures be used." Hannah v. Larche, 363 U.S. 420, 442 (1960).

> [W]hen...agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, or cross-examination generally do not obtain. Id. at 446.

Despite this limitation, a witness may nonetheless invoke his Fifth Amendment privilege as to particular questions presenting a threat of self-incrimination. U.S. v. Malnik, 489 F.2d 682, 685 (5th Cir. 1974).

B. Role of Witness' Counsel at Administrative Subpoena Proceedings

The practical effect of the fact that witnesses have limited procedural rights during information-gathering under an administrative subpoena is that the role of a witness' counsel is limited. Although §555(b) of the Administrative Procedure Act (APA) provides a person with the right to counsel at any

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16 Part 22 procedures do not apply to compliance orders issued under CERCLA §104(e)(5). Due process is assured under §104(e)(5) by the statutory requirements that the respondent have an opportunity to confer with the Agency prior to issuance of the order (discussed below) and that orders be enforced by commencing a civil action. Similarly, Part 22 procedures do not apply to the assessment of penalties under §104(e) as that can only be accomplished by commencing a civil action.

agency proceeding at which he is compelled to appear, "representation" under the APA "varies in meaning depending upon the nature of the function being exercised." F.C.C. v. Schreiber, 329 F.2d 517,526 (9th Cir. 1964).

> [W]hile counsel may, as a matter of right, object and argue objections on the record, just as he may, as a matter of right, cross-examine and call witnesses in a trial-type adjudicatory proceeding, these rights do not exist in the fact-finding, nonadjudicative investigation unless specifically provided by statute or duly promulgated rules. The right to object and argue objections on the record is not to be implied, here, from use of the word "represented" [in the Administrative Procedure Act.]
> Id.

Thus, although subpoena proceedings under CERCLA are recorded, and the witness is under oath and may have an attorney present for consultation, counsel for the witness is not allowed to "speak to the record," to cross-examine, to aid in developing testimony, or to otherwise "coach" the witness. Furthermore, other parties potentially affected by the investigation do not have a right to be present during the questioning.

VII. ENFORCEMENT OF INFORMATION REQUESTS AND SUBPOENAS

A. Information Requests

1. Initial Steps

When the deadline for responding to an information request has passed, a reminder letter should be sent to the unresponsive information request recipient, 1) informing the recipient that §104(e) provides for a penalty of up to $25,000 per day for noncompliance, and 2) stating the date after which a civil judicial or administrative enforcement action may be initiated.

The reminder letter should also provide an opportunity for consultation.[17] This will fulfill the requirement of §104(e)(5)(A) if enforcement by administrative order is contemplated and should also fulfill any due process requirements for record review. (See Section VII.A.4., "Scope of Judicial Review," below.) Whenever a recipient takes advantage of an opportunity for consultation, the issuing official should send a letter to the recipient summarizing any contacts with the recipient, and stating EPA's resolution of any objections. If there is no response or if the response to a request is still unsatisfactory after the reminder letter deadline has passed, EPA may compel compliance with the request through either an administrative or judicial action.

2. Administrative Orders to Compel Compliance

Under CERCLA §104(e)(5)(A), EPA can issue an administrative order directing compliance with an information request. Each administrative order should include a finding by the Regional Administrator that there exists a reasonable belief that there may be a release or threat of release of a hazardous substance and a description of the purpose for which the information request was issued. The order should state the date on which it becomes effective and also advise the respondent that penalties

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17 The statute leaves the decision whether to provide notice and opportunity for consultation to the discretion of the Agency. However, the Agency believes that it is in the best interests of all concerned to provide an opportunity for consultation whenever possible, particularly prior to the issuance of an administrative order.

of up to $25,000 per day may be assessed by a court against any party who unreasonably fails to comply with the order.

In addition, the order should note that an opportunity for consultation was provided and should briefly summarize any contacts with the respondent. [18]

3. Civil Actions to Compel Compliance

Alternatively, or in the event that an administrative order does not lead to compliance, EPA, through DOJ, can commence a civil action under §104(e)(5)(B). [19] In that civil action, EPA can seek injunctive relief and/or civil penalties not to exceed $25,000 per day for each day of noncompliance.

A referral to DOJ for an inadequate response or no response

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[18] Normally, the consultation requirement will be fulfilled by offering the recipient an opportunity to contact the EPA with questions or objections, in the information request itself or in any subsequent reminder letter. Given this prior opportunity for consultation and the narrow scope of the order, it generally will not be productive to delay the order and offer another opportunity for consultation. However, if it is likely that additional discussion will lead directly to compliance, and the extra delay does not result in an unreasonable threat to human health or the environment, the Region may provide another opportunity for consultation prior to issuance of the order.

[19] Section 104(e)(5)(B) states:

> The President may ask the Attorney General commence a civil action to compel compliance with a request or order referred to in subparagraph (A).

EPA's ability to commence a civil action without first issuing an administrative order to compel compliance under §104(e) was upheld in U.S. v. Charles George Trucking Co., No. 85-2463-WD (1st Cir. March 31, 1988). See also, U.S. v. Northside Sanitary Landfill, Inc., No. IP 88-172-C, (S.D. Ind. April 12, 1988).

at all should include all evidence needed to support the case. This includes evidence or findings that:

(1) EPA has a "reasonable basis to believe that there may be a release or threat of a release of a hazardous substance, pollutant or contaminant" at a given site or vessel;

(2) the information request was issued for the purpose of determining the need for a response or choosing or taking any response action under CERCLA Title I, or otherwise enforcing CERCLA Title I, with respect to the site or vessel;

(3) the respondent was requested to provide information relating to one or more of the three categories of information identified in §104(e)(2)(A)-(C);

(4) respondent did not comply with the request in a timely manner.

(5) where appropriate, respondent should pay a civil penalty, recommended at $___ . (See Section VII.A.5., "Penalties," below.)

In addition, the referral should include proof of service and should address possible defenses, such as that a good faith effort was made to comply, or that the request for information or documents is arbitrary and capricious, unduly burdensome, an abuse of discretion or otherwise not in accordance with law.

The decision to either issue an administrative order or initiate a civil action must be made on a case-by-case basis. Where there is r[illegible]o to believe that an administrative order will not bring immediate compliance, a civil action should be

favored. For example, if the recipient of an information request has made little or no effort to respond to the request, or has a history of disregarding requests for information or delaying responses to requests, issuing an administrative order may serve little purpose. While an administrative order typically can be issued within a shorter period of time than a complaint can be filed, the overall duration of the enforcement action may well be extended if the administrative order is disregarded since enforcement of the order will be through the referral and filing of a civil judicial action.

4. Scope of Judicial Review

In an action to enforce an information request or an administrative order for compliance with an information request, the court's review is limited to considering whether the information request is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." §104(e)(5)(B)(ii). [20] This clearly limited review should not serve as an opportunity to review other aspects of the case,

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20 Judicial review is not thusly limited when the amount of the penalty is the issue before the court.

such as remedy selection or liability. [21] (Cf. U.S. v. Western Processing, Inc., No. C83-252M (W.D. Wash. February 19, 1986).

In cases where the Agency has provided an opportunity for consultation regarding the administrative order, and has created an administrative record reflecting the parameters and elements noted on pages 6 and 19, above, the Government may argue that judicial review of the administrative order should be limited to an administrative record. This argument is based upon the language in §104(e)(5)(B) that provides for judicial review under the arbitrary and capricious standard. The success of obtaining record review hinges on providing and documenting adequate procedural due process administratively. [22]

5. Penalties

Under §104(e)(5)(B)(ii) of CERCLA, civil penalties may be assessed against any person who unreasonably fails to comply

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21 Related to the scope of judicial review is the degree to which a defendant may engage in discovery once an enforcement action is initiated. Discovery generally is restricted in enforcement proceedings involving administrative subpoenas (see n. 27, infra) and similarly, should be restricted in actions brought under §104(e) of CERCLA. If discovery is allowed at all in a given action, the Government's position is that its scope should be limited to addressing the parameters for administrative investigations noted on page 6.

22 It may also be possible to seek record review of an information request without first issuing an administrative order since CERCLA §104(e)(5)(B)(ii) provides for review of both information requests and administrative orders under an arbitrary and capricious standard. Before seeking record review of an information request, the Agency would first have to provide sufficient procedural due process, including an opportunity for consultation, and an administrative record would have to be created reflecting the parameters and elements noted on pages 6 and 19, above.

with the initial information request or subsequent compliance order. The question of whether to seek penalties may arise in two situations: 1) where injunctive relief is sought to compel the respondent to answer the information request and penalties are sought in addition to injunctive relief; and 2) where the respondent has answered the information request, albeit not in a timely manner, and penalties are the only relief sought. [23]

In both situations, to support penalties, the evidence must demonstrate: 1) that the information request is enforceable, [24] and 2) that the respondent's conduct was unreasonable. To assess the reasonableness of a respondent's conduct, and thus determine whether to seek penalties, Regional personnel should consider factors such as the respondent's good faith or lack of good faith efforts to comply with the information request, and

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[23] In information request enforcement actions, penalties can be assessed against a respondent even if he eventually complies with the information request. See e.g. U.S. v. Liviola, 605 F. Supp. 96 (N.D. Ohio 1985), U.S. v. Charles George Trucking Co., 823 F.2d 685 (1st Cir. 1987).

[24] For an information request to be enforceable, it must conform to the basic parameters noted above on page 6. Any issue of the reasonableness of the information request itself is subsumed by these parameters. Thus, once it is determined that an information request is enforceable, the focus in terms of liability for penalties is limited to the respondent's conduct. The statute provides that a civil penalty may be imposed "against any person who unreasonably fails to comply with" an Agency request or administrative order. Failure to respond adequately to an information request is presumptively unreasonable, and the recipient of the request bears the burden of proving that noncompliance with that request is in fact reasonabl

any willfulness or negligence associated with the respondent's actions. [25]

B. Subpoenas

1. Jurisdiction and Venue

If a respondent to an administrative subpoena refuses to appear to testify or provide documentary evidence, or refuses to answer any or all of the questions put to him, the Agency may commence enforcement proceedings in U.S. district court. [26] CERCLA §122(e)(3)(B) states:

> In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as contempt thereof.

Venue for such an action "shall lie in any district court in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office." CERCLA §113(b).

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[25] The decision to seek penalties should also include consideration of the Supreme Court's recent decision in Tull v. United States, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed. 2d 365 (1987), which provided for a 7th Amendment right to a jury trial in the context of a Clean Water Act enforcement case, where civil penalties were sought by the Government.

[26] All proceedings in the U.S. district court must be initiated by the Department of Justice on behalf of EPA. The court lacks jurisdiction to review the propriety of an administrative subpoena upon motion of a respondent. Belle Fourche Pipeline Co. v. U.S., 751 F.2d 332 (10th Cir. 1984). If a respondent wishes to challenge a subpoena, he may refuse to cooperate and force the Government to initiate an enforcement action.

2. Procedures for Enforcing Subpoenas

Enforcement proceedings are begun by submitting a petition to any appropriate federal district court seeking an order that the respondent show cause why he should not be ordered to comply with the subpoena. (See Attachment 3, model petition.) Although Fed.R.Civ.P. 81(a)(3) states that the Federal Rules of Civil Procedure apply to administrative subpoena enforcement proceedings "unless otherwise provided by statute or by rules of the district court or by order of the court in the proceedings," courts have consistently held that subpoena enforcement proceedings are summary, and that discovery is generally inappropriate given the scope of the issues before the court. [27]

To prevent a respondent from attempting to engage in discovery prior to the show cause hearing, the petition may include a request that Rules 26-37 and 45 be suspended unless specifically reinstituted by the court following the hearing.

The petition, accompanied by affidavits and legal memoranda, must demonstrate that the subpoena was issued for a lawful

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[27] The court, in its discretion, may order discovery, but only where the defendant meets the "heavy burden of showing extreme circumstances that would justify further inquiry..." U.S. v. RFB Petroleum, Inc., 703 F.2d 528, 533 (Temp. Emerg. Ct. App.)(quoting U.S. v. Juren, 687 F.2d 493, 494 (Temp. Emerg. Ct. App. 1982).] This burden is not a "meager one...[the defendant] must come forward with facts suggesting that the subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the issuing agency." N.L.R.B. v. Interstate Dress Carriers, 610 F.2d 99, 112 (3d Cir. 1979) (emphasis added citations omitted). See also U.S. v. McGovern, 87 F.R.D. 590 (M.D. Pa. 1980), Lynn v. Biderman, 536 F.2d 820, 825 (9th Cir.) cert. denied sub nom. Biderman v. Hills, 429 U.S. 920 (1976).

purpose and is relevant to an agency investigation. At the show cause hearing, the burden is on the respondent to show that the subpoena is unenforceable in some respect.

At the conclusion of the show cause hearing, the court may order compliance, deny enforcement or modify the subpoena. Subsequent failure of the respondent to comply with the court's order may result in contempt proceedings against the respondent.

C. Referrals

Referrals to the Department of Justice of cases to enforce information requests and administrative subpoenas will be handled in accordance with the procedures set forth in the January 14, 1988 memorandum from the Assistant Administrator for Enforcement and Compliance Monitoring entitled, "Expansion of Direct Referral of Cases to the Department of Justice." In time-critical situations, the procedures outlined in the the April 15, 1988 memorandum from the Acting Associate Enforcement Counsel for Waste entitled, "OECM-Waste Procedures for Processing Oral and Other Expedited Referrals" should be followed.

A referral to enforce an information request will not differ significantly from a referral to enforce most other sections of CERCLA. However, due to the summary nature of an action to enforce an administrative subpoena, a referral to enforce an administrative subpoena should contain certain additional elements not commonly included in other referrals.

A referral to enforce an administrative subpoena should consist of a draft petition for an order to show cause, a draft memorandum of points and authorities in support of the petition, and a draft order to accompany the petition. The memorandum of points and authorities should briefly set out the facts of the case and apply the legal standards for enforcement to those facts. In addition, the memorandum should address any arguments or defenses that the respondent is likely to raise.

The referral should also contain all necessary exhibits in support of the petition, including an affidavit of service, a copy of the subpoena, an affidavit supporting the facts alleged in the petition from a person with knowledge of those facts, and any other relevant material which serves as the administrative record documenting the subpoena process.

VIII. DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

MODEL Information request
CERTIFIED MAIL [OR DHL]
RETURN RECEIPT REQUESTED

Attachment 1
[Note: No certified or express mail to P.O.Boxes]

[Date]

[PRP Name]
[PRP Address]

Re: Request for Information Pursuant to Section 104 of CERCLA [and Section 3007 of RCRA,] for [Site Name] in [Site location] hereinafter referred to as "the Site"

Dear Sir or Madam:

The United States Environmental Protection Agency (EPA) is currently investigating the source, extent and nature of the release or threatened release of hazardous substances, pollutants or contaminants, or hazardous wastes on or about the [Site Name] in [Site Location] (the Site). This investigation requires inquiry into the identification, nature, and quantity of materials that have been or are generated, treated, stored, or disposed of at, or transported to, the Site and the nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from the Site. EPA also is seeking information relating to the ability of a person to pay for or to perform a cleanup of the Site.

Pursuant to the authority of Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604, as amended, [and Section 3007 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6927,] you are hereby requested to respond to the Information Request set forth in Attachment A, attached hereto.

Compliance with the Information Request set forth in Attachment A is mandatory. Failure to respond fully and truthfully to the Information Request within [insert reasonable number of days to respond, spell out number and put number in parentheses, e.g., thirty (30)] days of receipt of this letter, or adequately to justify such failure to respond, can result in enforcement action by EPA pursuant to Section 104(e) of CERCLA, as amended, [and/or Section 3008 of RCRA.] [Each of these statutes/ This statute] permits EPA to seek the imposition of penalties of up to twenty-five thousand dollars ($25,000) for each day of continued non-compliance. Please be further advised that provision of false, fictitious, or fraudulent statements or representations may subject you to criminal penalties under 18 U.S.C. § 1001 or Section 3008(d) of RCRA.

This Information Request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, et seq.

OSWER # 9834.10-1a

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

SEP 26 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Waiver of Headquarters Approval for Issuance of RD/RA Special Notice Letters at the Time of ROD Signature

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement (OS-500)

Henry L. Longest II, Director
Office of Emergency and Remedial Response (OS-200)

TO: Waste Management Division Directors, Regions I-X
Regional Counsels, Region I-X

The Interim Guidance on Notice Letters, Negotiations, and Information Exchange (OSWER Directive Number, 9834.10, October 19, 1987) provides generally for the issuance of RD/RA special notice letters when the draft FS and proposed plan are released to the public for comment. The guidance further states that if the RD/RA special notice is issued later in the process (i.e., when the ROD is signed) the Regional Administrator must obtain prior written approval from EPA Headquarters. Effective immediately, it is no longer necessary to obtain written approval from the Directors of OERR and OWPE to issue special notice letters at ROD signature.

As the policy states, the strongly preferred option is to issue special notice when the proposed plan is released for public comment in order to begin the negotiations process early, ensure prompt initiation of remedial design and remedial action and initiate any necessary enforcement action if negotiations are unsuccessful. Issuance of special notice at the ROD stage should continue to be the exception rather than the rule.

Management of the negotiations time frames remains a high priority and is essential to the successful completion of RD/RA negotiations and as such, it warrants continued attention by management. This waiver does not change the Regional Administrator's authority to extend the special notice moratorium up to 30 days where justified. Beyond that, requests for Assistant Administrator extensions to the special notice moratorium should continue to be submitted in a timely fashion. Special notice information must be entered into CERCLIS on a regular basis. OWPE will continue to monitor negotiations and provide assistance, as appropriate.

We appreciate your cooperation. If you have any questions, please contact Michelle Roddy at FTS 382-7790.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JUN 21 1991

MEMORANDUM

SUBJECT: Model CERCLA RD/RA Consent Decree

FROM: Raymond B. Ludwiszewski
Acting Assistant Administrator for Enforcement

Don R. Clay
Assistant Administrator for Solid Waste and Emergency Response

Richard B. Stewart
Assistant Attorney General for the Environment and Natural Resources, U.S. Department of Justice

TO: Regional Administrators
Regions I-X

Attached is the interim final Model CERCLA RD/RA Consent Decree. As discussed below, this document should be used as the basis for fashioning remedial design/remedial action settlements with potentially responsible parties under Sections 106, 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended. The Model Consent Decree provides boiler-plate language for most provisions in order to standardize CERCLA consent decrees as much as possible and expedite settlements. The United States will commence negotiations with a document which, for most provisions, is the same document the government will insist on in a settlement because it reflects legal and procedural terms that have been found acceptable to both the Agency and the PRPs in a large number of situations.

The philosophy underlying the Model Consent Decree is consistent with that espoused in the CERCLA Timeline prepared as a result of the Superfund Management Review and in the Pre-Referral Negotiations Procedures for Superfund Enforcement Cases. That philosophy is to initiate and conclude RD/RA settlement negotiations as expeditiously as possible and, ideally, within the statutory 120-day special notice moratorium. See CERCLA Section 122(e)(2). The goal is to achieve a greater number of settlements in a more expeditious manner, on terms acceptable to the United States and consistent with the intent of CERCLA, thereby permitting more remedial work to proceed. Use of the Model Consent Decree is designed to reduce the time and resources consumed during extensive RD/RA settlement discussions by reducing across the board the

number of issues the United States will negotiate with the PRPs. In addition, use of the Model will reduce the amount of time spent on internal government reviews of the document and will promote national consistency.

In future RD/RA negotiations, EPA Regional Offices should provide the PRPs with a proposed consent decree, based on the Model, that reflects site-specific considerations.[1] The Office of Enforcement (OE) and the Office of Solid Waste and Emergency Response (OSWER) will support efforts by Regional Offices and the Department of Justice (DOJ) to draft and negotiate settlement terms that go beyond the Model's provisions in terms of protecting the interests of the United States. The Regions should work with the Department of Justice and, as appropriate, EPA Headquarters to craft site-specific language before sending the draft to the PRPs.[2] When the United States sends the consent decree to the PRPs, the negotiation team should inform the PRPs that many provisions of the consent decree are nationally consistent boiler-plate provisions that the United States does not plan to negotiate.

The Model Consent Decree does not include those provisions that may be necessary to handle the wide-range of special situations which may arise in the context of structuring CERCLA settlements. For example, some settlements may require the inclusion of a covenant not to sue by the United States to de minimis defendants. In addition, a trust fund or other PRP funding mechanism may be appropriate in cases involving large numbers of PRPs. The negotiation team members should work with their respective managements to develop language for such provisions. If the provision raises issues of national or precedential significance or if the settlement would otherwise require concurrence by EPA Headquarters, the Region should consult with OE before offering it to or agreeing to it with the PRPs.

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[1] For examples of provisions that must be modified in each case, we direct your attention to the definition of "Site" and Section VI (Performance of the Work by the Settling Defendants). The term "Site" must be carefully defined not only to take into account the work to be performed at the Site but the scope of the covenant not to sue that the United States typically provides the Settling Defendants. In addition, the section of the decree detailing the "Work" must be tailored to take into account the type of remedy that will be implemented at the Site.

[2] If the state will be a party to the consent decree, it is critical for the United States' negotiation team to coordinate with the state's representatives prior to commencement of negotiations with the PRPs.

In addition, as previously noted, while the presumptions are that the Regions will use the Model as the basis for fashioning settlements and that much of the document is considered to be boiler-plate, Regions have the flexibility to adopt a baseline approach to certain provisions that is more stringent than the Model. Moreover, except as provided below and consistent with current Agency delegations, the Regions may, in conjunction with the Department of Justice, modify provisions of the Model in developing the proposed consent decree in a particular case.

With respect to those provisions of the Model Consent Decree that embody issues of national significance, the Regions must consult with Headquarters before offering or agreeing to any changes that would result in a significant deviation from national policy. The following provisions fall into this category: Access, Contribution Protection, Covenants, Dispute Resolution, Force Majeure, Additional Response Actions (Section VII of the Model Consent Decree), Certification of Completion, Stipulated Penalties (structure of the provision, not the amount of penalties), and Indemnification. The Department of Justice and EPA Headquarters will respond to the Region as expeditiously as possible in order to insure that negotiations are not delayed.

The U.S. EPA Periodic Review provision also involves issues of national significance. However, in recognition of the case-specific evaluation that must be performed with respect to the role and importance of this provision in a given settlement, the Regions are not required to consult with Headquarters with respect to changes in this provision. Among the factors to be considered in determining whether to include this provision are the completeness and reliability of the remedy, the strengths and weaknesses of the liability case against the defendants, and the scope of the covenant not to sue that is given to the defendants in the settlement. The Regions should work closely with the Department of Justice in evaluating these factors and determining the government's final position in this provision in a given settlement.

The attached Model Consent Decree does not include a paragraph identifying the performance standards for the remedy. However, these standards must be identified in the ROD and the SOW and those documents will be attached to the consent decree and incorporated therein. The attorneys and technical staff on the negotiation team both must focus on those documents to ensure that the standards are clearly stated and enforceable.

Of course, processing of any final settlements shall be in accordance with current Agency delegations. Nothing in this memorandum should be interpreted as modifying the existing waivers of Headquarters' settlement concurrence authorities that are embodied in the June 17, 1988 memorandum from the Assistant

Administrators for the Office of Enforcement and Compliance Monitoring and the Office of Solid Waste and Emergency Response. Moreover, EPA Headquarters will continue its general policy of referring any inquiries to Headquarters from PRPs or their counsel regarding site-specific issues or negotiations back to the appropriate Regional Office or the Department of Justice.

The attached Model Consent Decree and the procedures for its use outlined in this memo shall be applicable to all sites for which special notice letters are issued or a proposed consent decree is sent to the PRPs beginning 60 days after the date of this memorandum. For all other sites, the attached Model Consent Decree is not applicable, and current negotiation positions and schedules will not be affected by this Model. In particular, the Agency will not re-negotiate provisions in on-going or concluded negotiations which were previously agreed to with PRPs or in decrees lodged but not yet entered.

If you have any questions regarding the Model Consent Decree, please contact Sandra Connors in OE (382-3110) or Paul Connor in OWPE (245-3656).

Attachment

cc: Donald Elliot, General Counsel
David Ryan, Comptroller
Henry Longest, Director, Office of Emergency and Remedial Response
Bruce M. Diamond, Director, Office of Waste Programs Enforcement
Regional Counsel, Regions I-X
Waste Management Division Directors, Regions I-X

OSWER Directive Number 9835.17

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
MODEL CERCLA RD/RA CONSENT DECREE

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

TABLE OF CONTENTS

MODEL CERCLA RD/RA CONSENT DECREE

I.	BACKGROUND	1
II.	JURISDICTION	4
III.	PARTIES BOUND	5
IV.	DEFINITIONS	6
V.	GENERAL PROVISIONS	11
VI.	PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS	14
VII.	ADDITIONAL RESPONSE ACTIONS	21
VIII.	EPA PERIODIC REVIEW	23
IX.	QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS	24
X.	ACCESS	26
XI.	REPORTING REQUIREMENTS	28
XII.	SUBMISSIONS REQUIRING AGENCY APPROVAL	31
XIII.	PROJECT COORDINATORS	33
XIV.	ASSURANCE OF ABILITY TO COMPLETE WORK	35
XV.	CERTIFICATION OF COMPLETION	36
XVI.	EMERGENCY RESPONSE	39
XVII.	REIMBURSEMENT OF RESPONSE COSTS	41
XVIII.	INDEMNIFICATION AND INSURANCE	44
XIX.	FORCE MAJEURE	47
XX.	DISPUTE RESOLUTION	50
XXI.	STIPULATED PENALTIES	54
XXII.	COVENANTS NOT TO SUE BY PLAINTIFFS	58
XXIII.	COVENANTS BY SETTLING DEFENDANTS	63
XXIV.	EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION	64

XXV. ACCESS TO INFORMATION 65

XXVI. RETENTION OF RECORDS 67

XXVII. NOTICES AND SUBMISSIONS 69

XXVIII. EFFECTIVE DATE 70

XXIX. RETENTION OF JURISDICTION 70

XXX. APPENDICES 71

XXXI. COMMUNITY RELATIONS 71

XXXII. MODIFICATION 71

XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT 72

XXXIV. SIGNATORIES/SERVICE 73

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____
_____ DIVISION

UNITED STATES OF AMERICA [and STATE OF _____] Plaintiffs, v. _____, INC., Defendants.	CIVIL ACTION NO.

CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the _____ Superfund Site in _____, _____, together with accrued interest; and (2) performance of studies and response work by the Defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of _____ (the "State") on _____, 19__ of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

[D. The State of _____ (the "State") has also filed a complaint against the defendants in this Court alleging that the defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [list state laws cited in the State's complaint], for: _____.]

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the [relevant Federal natural resource trustee(s)] on _____, 19__ of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

F. The Defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40

C.F.R. Part 300, Appendix B, by publication in the Federal Register on _____, 19__, __ Fed. Reg. _____;

H. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, EPA [or the Settling Defendants, other PRPs at the Site, or the State] commenced on _____, 19__, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430;

I. EPA [or the Settling Defendants, other PRPs at the Site, or the State] completed a Remedial Investigation ("RI") Report on _____, __, 19__, and EPA [or the Settling Defendants, other PRPs at the Site, or the State] completed [issued] a Feasibility Study ("FS") Report on _____, 19__;

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on _____, 19__, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

K. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on _____, 19__, [on which the State had a reasonable opportunity to review and comment/on which the State has

given its concurrence.] The ROD includes [EPA's explanation for any significant differences between the final plan and the proposed plan as well as]a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

L. Based on the information presently available to EPA [and the State], EPA [and the State] believe[s] that the Work will be properly and promptly conducted by the Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

M. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

N. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal

jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint[s], Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States [and the State] and upon Settling Defendants and their [heirs,] successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendants shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With

regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq*.

"Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXX). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"_____" shall mean the (State Pollution Control Agency or Environmental Protection Agency) and any successor departments or agencies of the State.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States [and the State] incur(s) in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, VIII, X (including, but not limited to, attorneys fees and the amount of just compensation), XVI, and Paragraph 84 of Section XXII. Future Response Costs shall also include all costs, including direct and indirect costs, paid by the United States [and the State] in connection with the Site between [insert the date identified in the Past Response Costs definition] and the effective date of this Consent Decree and all interest on the Past Response Costs from [insert the date identified in the Past Response Costs definition] to [the date of payment of the Past Response Costs].

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (SOW).

"Owner Settling Defendants" shall mean the Settling Defendants listed in Appendix E.

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the United States[, the State of _____,] and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs and interest, that the United States [and the State] incurred and paid with regard to the Site prior to [the date of the most recent cost update].

"Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations set forth in the ROD or Section __ of the SOW.

"Plaintiff[s]" shall mean the United States [and the State of _____].

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the [Site or __ Operable Unit at the Site]

signed on _____, 19__, by the Regional Administrator, EPA Region ___, and all attachments thereto.

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the final plans and specifications submitted by the Settling Defendants pursuant to the Remedial Design Work Plan and approved by EPA.

"Remedial Action Work Plan" shall mean the document submitted by the Settling Defendants pursuant to Paragraph 12.a of this Consent Decree and described more fully in Paragraph 12.b.

"Remedial Design" shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

"Remedial Design Work Plan" shall mean the document submitted by the Settling Defendants pursuant to Paragraph 11.a of this Consent Decree and described more fully in Paragraph 11.b.

"Section" shall mean a portion of this Consent Decree identified by a roman numeral.

"Settling Defendants" shall mean those Parties identified in Appendices D (Non-Owner Settling Defendants) and E (Owner Settling Defendants).

["Site" shall mean the _____ Superfund site, encompassing approximately __ acres, located at [address or description of location] in [name of city], _____ County,

[name of state] and depicted generally on the map attached as Appendix C.]

"State" [or "Commonwealth"] shall mean the State [Commonwealth] of _____.

"Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance at the Site, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

"Supervising Contractor" shall mean the principal contractor retained by the Settling Defendants to supervise and direct the implementation of the Work under this Consent Decree.

"United States" shall mean the United States of America.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); [(3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" under [State statutory citation]].

"Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree, except those required by Section XXVI (Retention of Records).

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

NOV 3 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER DIRECTIVE
No. 9836.0-1A

MEMORANDUM

SUBJECT: Chapter 6 of the Community Relations Handbook

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I-X

When the revised version of Community Relations in Superfund: A Handbook went to print this summer, Chapter 6 was not yet in final form. This Chapter, "Community Relations during Enforcement Activities and Development of the Administrative Record", is attached in interim final form. Please insert it into the Handbook in lieu of the prior version (August, 1985).

The Chapter deserves wide distribution to the technical and enforcement branches, Office of Regional Counsel, and Office of Public/External Affairs, as well as to States. Chapter 6 stresses the importance of the team approach to managing community relations at enforcement-lead sites, and discusses the concepts of confidentiality in negotiations, public participation requirements under SARA, and community relations coordinator responsibilities regarding the administrative record.

Attachment

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OSWER DIRECTIVE 9836.0-1A
CHAPTER 6
COMMUNITY RELATIONS DURING ENFORCEMENT ACTIVITIES
AND DEVELOPMENT OF THE ADMINISTRATIVE RECORD

6.1 BACKGROUND AND INTRODUCTION

6.2 APPLICABILITY

6.3 OVERVIEW OF THE CERCLA ENFORCEMENT PROGRAM

6.4 COMMUNITY RELATIONS RELATED TO ENFORCEMENT ACTIVITIES AND ADMINISTRATIVE RECORDS

6.4.A Planning Community Interviews and Developing Community Relations Plans

1. Community Interviews
2. Community Relations Plans (CRPs)
3. Potentially Responsible Party (PRP) Involvement

6.4.B Enforcement Activities and Community Relations at Remedial Sites

1. Introduction
2. Notice to PRPs
3. Negotiations
4. Community Relations Following an RI/FS Order
5. Public Notice and Comment on Consent Decrees for RD/RA
6. Community Relations During PRP Remediation
7. Technical Discussions

6.4.C Community Relations During Removal Actions

6.4.D Community Relations During Specific Enforcement Actions and Settlements

1. Consent Decrees, De Minimis and Cost Recovery Settlements
2. Injunctive Litigation
3. Cost Recovery
4. Interaction with RCRA and other applicable Federal and state laws

6.4.E The Administrative Record as Part of Community Relations

1. Overview
2. Purpose of the Administrative Record
3. Community Relations Coordinator Responsibilities for the Administrative Record
4. Additional Community Relations Coordinator Responsibilities
5. Relationship Between the Administrative Record and Information Repositories

6.5 Appendix: Environmental Fact Sheet, "The Enforcement Process: How It Works"

OSWER DIRECTIVE 9836.0-1A

COMMUNITY RELATIONS DURING ENFORCEMENT ACTIVITIES AND DEVELOPMENT OF THE ADMINISTRATIVE RECORD*

6.1 BACKGROUND AND INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as amended, provides the U.S. Environmental Protection Agency (EPA) with the authority to respond directly or to compel potentially responsible parties (PRPs) to respond to releases or threatened releases of hazardous substances, pollutants or contaminants. CERCLA created two complementary programs aimed at achieving this goal.

Under the first program a trust fund, known as the Superfund, may be available for site remediation when no viable PRPs are found or when PRPs fail to take necessary response actions. PRPs are defined as parties identified as having owned or operated hazardous substance sites, or who transported or arranged for disposal or treatment of hazardous substances, pollutants or contaminants at such sites. The second program provides EPA with the authority to negotiate settlements, to issue orders to PRPs directing them to take necessary response actions, or to sue PRPs to repay the costs of such actions when the trust fund has been used for these purposes. The actions EPA takes to reach settlement or to compel responsible parties to pay for or undertake the remediation of sites are referred to as the Superfund enforcement process.

This chapter includes an overview of the CERCLA enforcement program, and a discussion of enforcement activities, community relations, and the administrative record. It provides specific discussions on community interview planning and development of community relations plans (CRPs) for enforcement-lead sites; enforcement activities requiring public participation; community relations during specific enforcement actions and settlements; and the relationship between the administrative record for response selection and community relations. The chapter is intended to discuss only how enforcement activities should be considered during overall community relations program planning and implementation. In developing this chapter, the Agency refrained from repeating information contained elsewhere in the Handbook.*

*This memorandum replaces current OSWER Directives 9836.0 and 9836.0-1a, and is the new Chapter 6 of the Community Relations in Superfund: A Handbook (hereinafter referred to as the Handbook).

6.2 APPLICABILITY

This policy applies to all Fund-financed, Federal enforcement, CERCLA-funded State enforcement, and PRP-lead removal and remedial actions, as defined in the National Contingency Plan (NCP). The information contained in this chapter is consistent with and serves to implement the NCP. It creates no rights and/or obligations of any party.

6.3 OVERVIEW OF THE CERCLA ENFORCEMENT PROGRAM

A primary goal of CERCLA is to compel PRPs to remediate sites that are releasing or threatening to release hazardous substances into the environment. The enforcement process may involve the following major efforts.

First, EPA attempts to identify PRPs as early as possible. Where practicable, EPA generally notifies these parties of their potential liability for response work when the site is scheduled for some action; EPA will then encourage PRPs to do the work.

If the PRPs are responsive and EPA believes the PRPs are willing and capable of doing the work, EPA will attempt to negotiate an enforcement agreement with the PRP(s). The enforcement agreement may be an agreement entered in court (e.g., a judicial consent decree) or it may be an agreement signed by EPA and the PRPs outside of court (an administrative order on consent). Both of these agreements are enforceable in a court of law, and are subject to EPA oversight of the work performed by PRPs.

If a settlement is not reached, EPA can use its authority to issue a unilateral administrative order, which directs PRPs to perform removal or remedial actions at a site. If the PRPs do not respond to an administrative order, EPA has the option of filing a law suit to compel performance.

Finally, if PRPs do not perform the response action and EPA undertakes the work, EPA may file suit against PRPs to recover money spent by EPA from the Superfund. This is known as cost recovery, and is a major priority under the CERCLA program.

The Appendix to this chapter, a fact sheet on the enforcement process, explains in simple terms the tools and authorities provided by CERCLA, and the methods EPA may use to negotiate settlements with PRPs.

EPA must strive to help communities understand Superfund program goals and activities, including enforcement actions. In this effort, the lead agency needs to consider the concerns of the local community. By identifying community concerns, the Agency can attempt to develop alternatives to response actions or

a variation to a remedial action plan that may better meet the needs of the local residents.

6.4 COMMUNITY RELATIONS RELATED TO ENFORCEMENT ACTIVITIES AND ADMINISTRATIVE RECORDS

In fostering community relations during enforcement actions, Community Relations Coordinators (CRCs) should follow the same essential steps as for Fund-financed actions. The planning steps that are critical to community relations are conducting community interviews and developing community relations plans (CRPs). Once the CRP has been developed, the CRC and other members of the site team should insure that implementation follows this CRP. The administrative record file can be used to insure that the public knows what is happening at the site, as well as how to get involved in determining what happens at the site. This chapter emphasizes the enforcement aspects of these activities and recognizes the possibility of PRP interest in participating in these and other activities.

6.4.A Planning Community Interviews and Developing Community Relations Plans (CRPs)

6.4.A-1 Community Interviews

In addition to general preparation for community interviews (see Chapter 3 of the Handbook), community relations staff should discuss the site with other Regional staff in order to identify what special precautions, if any, should be taken in the course of conducting the community interviews (e.g., sensitivity to pending litigation or the political climate of the community). By discussing the site with regional technical and legal staff in advance of the community interviews, community relations staff can be apprised of any situations that might impact on these interviews. With or without viable PRPs, the Remedial Project Manager (RPM) should participate in the community discussions.

The regional comunity relations staff, with the RPM or enforcement staff, conducts discussions with different groups before developing the CRP. It is important to note that some interviews may already have been conducted in the community as part of the listing process for the National Priorities List (NPL). These discussions, however, do not replace community discussions held during development of a CRP. The information sought during the CRP development covers specific areas that are not necessarily discussed - or asked - during the listing process. Also, CRCs are not, nor should they be, investigators of PRP actions at the site. During community discussions, if information is volunteered, the CRC should advise the resident that enforcement officers will follow up on this information.

To incorporate the full range of views, lead agency staff may consider interviewing PRPs in the community. Every site varies and so also do PRPs, their contribution to the site, and their standing in the community. In some cases, only the current owner or operator is contacted. The enforcement team for the site will determine who to interview. This team is comprised of a CRC, the on-scene coordinator, regional counsel, the RPM, the Enforcement Project Manager (EPM), as well as equivalents at the State level when the State has the lead.

6.4.A-2 Community Relations Plans

Using information obtained during the community interviews, the lead agency develops a community relations plan (CRP) that reflects consideration of the concerns and communication methods preferred by the community. The CRP format is fully described in Chapter 3 and Appendix B of the Handbook. In addition, the CRP includes two appendices; the first presents EPA's contact list of key community leaders and interested parties. Note that the list of community contacts will not be in the Appendix if it contains private citizens' addresses and phone numbers. On the other hand, public agencies, elected officials, and local groups' addresses can be included in the administrative record and information repositories. The second appendix outlines suggested locations of meetings, the administrative record and information repositories. These are all public information.

The CRP is a critical planning tool for lead agency staff and for the public, as it will likely reach and impact many people. CRPs prepared for sites with viable PRPs should receive input from all members of the enforcement team who are directly affected by the scheduled activities in the CRP. For example, attorneys should approve the accuracy of any legal information; the RPM or EPM should approve the accuracy of any technical information; and the CRC should approve the accuracy of the community relations techniques used in the CRP. The CRC is ultimately responsible for insuring that the community relations requirements of CERCLA/SARA are implemented. Therefore final approval of the CRP should be by the CRC, with concurrence on specific sections by members of the team.

Coordination activities among the CRC, on-scene coordinator, regional counsel, the RPM, and the EPM, depend on the site-specific situation. The key initially is to plan activities and establish procedures for reviewing information. Adequate planning should prevent the release of information that might be detrimental to the settlement and/or litigation process. Internal discussions with all team members during project planning may be a useful mechanism for guarding against such releases. This need for coordination is perhaps the most crucial message put forth in this guidance. Although EPA must share information about a site with the people directly affected by the

site, this information exchange should be technical and not legalistic, and should be coordinated so as not to jeopardize negotiations with PRPs.

Community relations activities outlined in a CRP for an enforcement site should be consistent with the settlement process and the likely schedule of enforcement actions. Techniques peculiar to enforcement sites (such as the technical discussions outlined in Section 6.4.B-7) may be identified in the CRP as community relations activities. [Within the various sections and appendices of a CRP, the CRC staff may wish to document EPA's approach to coordinating and sharing information with PRPs. However, any special conditions on Agency interaction with the PRPs should be spelled out in the administrative order or consent decree, not in the CRP. The public must be told early if PRPs are willing to participate in implementing the CRP. The CRC staff can do this by preparing a fact sheet or stating this at a public meeting.] Discussions about the PRPs prior to signing a consent agreement, however, can cause delays in the negotiations. It is preferrable to delay discussing details of PRP involvement with the site until some agreement is signed or action taken. If the PRPs are to be a part of the community relations program, early comments can cause tension and mistrust between Agency staff and the PRP.

Assuming a site has not been referred for litigation, the CRP only needs to inform the public of the possibility of litigation. CRC staff may choose to describe the litigation process, and discuss the potential effects of litigation on the scope of community relations activities. If the site is referred later for litigation, the CRP is to be modified to provide that statements about the litigation, other than public information that can be ascertained from court files, must be cleared with the Department of Justice before issuance. The regional counsel team member will be the focal point for that clearance, as well as for consulting with DOJ on statements concerning site status, such as investigations, risk assessments and response work. The plan will be amended to reflect any potential effects this could have on community relations activities. When referral for litigation is the initial enforcement action, the original community relations plan should specify the activities that are to be conducted during litigation, to the extent they can be determined at that time. Section 6.4.D-2 of this policy discusses the litigation process.

6.4.A-3 <u>Potentially Responsible Party (PRP) Involvement</u>

EPA is the lead agency for developing and implementing community relations activities at an EPA "PRP-lead" site. A PRP may assist in the implementation of community relations activities at the discretion of the Regional office. The Regional office, however, will oversee PRP community relations implementation. Specifically, PRPs may be involved in community

relations activities at sites where they are conducting either the remedial investigation/feasibility study (RI/FS), or the remedial design/remedial action (RD/RA), or both. If a PRP will be involved in community relations activities, the CRP should reflect that involvement. In these cases, the PRPs may wish to participate in public meetings, or in the preparation of fact sheets. EPA, however, will not "negotiate" the contents of press releases with PRPs.

When complete and final, the CRP should be provided to all interested parties, and placed in the administrative record file and information repository for the particular site. If the CRP is revised, the final revised copy should be made available to the public, and placed in the administrative record file and the information repository, as well.

6.4.B Enforcement Activities and Community Relations at Remedial Sites

The following subsections present an overview of the notice process leading to the initiation of RI/FS or RD/RA negotiations, community relations following an RI/FS order, public comment on RD/RA consent decrees, community relations during PRP remediation, and technical discussions.

6.4.B-1 Introduction

Community relations activities should be planned as early in the process as possible. Generally, this occurs before the RI/FS special notice, which is discussed below. Meetings with small groups of citizens, local officials and other interested parties are extremely helpful for sharing general information and resolving questions. These meetings also may serve to provide information on EPA's general enforcement process, perhaps through distribution of the fact sheet attached to this guidance. A discussion of how EPA encourages settlements may be appropriate at this time.

Litigation generally does not occur until after the remedy is selected (after the moratorium period that begins when the special notice for RD/RA ends, as discussed below). EPA staff, however, may need to explain early in the process that legal constraints may apply during negotiations or litigation with respect to community relations activities.

6.4.B-2 Notice to PRPs

Notice letters are used to inform PRPs of their potential liability and provide an opportunity for them to enter into negotiations, which are intended to result in PRPs conducting or financing response activities. The negotiation process may include "informal" and "formal" negotiations.

EPA has established a discretionary three-step notification process to facilitate and encourage settlements at remedial sites. First, well before the RI/FS starts, EPA usually sends a general notice to PRPs. Second, a special notice for the RI/FS may be sent in appropriate circumstances. Third, a special notice for the RD/RA may be sent, where appropriate.

The general notice advises PRPs of possible liability. The special notices initiate formal negotiations and invoke a moratorium on EPA conducting the RI/FS or response action, while encouraging PRP participation in response activities at a site. For remedial sites, RI/FS special notices should be issued at least 90 days before EPA plans to obligate Fund money for the RI/FS. For an RD/RA, the preferred approach is to issue special notices at the time the FS and proposed work plan are released for public comment, although notice may be issued after the Record of Decision (ROD) is signed. Once the special notice is sent, a 60-day moratorium on EPA's conduct of certain response activities is triggered. If a "good faith" offer is not received within 60 days, EPA may proceed with its own RI/FS or removal, or take enforcement action against the PRP. If a good faith offer is received, EPA's goal is to conclude RI/FS negotiations with an administrative order on consent within 90 days of the RI/FS special notice. RD/RA negotiations are targeted for conclusion with an RD/RA consent decree within 120 days of the RD/RA special notice. These are statutory moratorium periods. The timeframe for the RD/RA special notice moratorium may be extended for 30 days by the Regional Administrator and beyond that by the Assistant Administrator, OSWER. Special educational efforts should be conducted prior to negotiation/ moratorium to warn the public that little if any information will be available to the public during negotiations (see below).

Detailed guidance on issuance of notice letters is discussed fully in the "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987), 53 FR 5298 (OSWER Directive #9834.1).

6.4.B-3 Negotiations

Negotiations are generally conducted in confidential sessions between the PRPs and the Federal government. Neither the public, nor the technical advisor (if one has been hired by a community) may participate in negotiations between EPA, DOJ and the PRPs unless everyone agrees to allow such participation. Otherwise the ability of the parties to assert confidentiality at some later date may be affected.

The confidentiality of statements made during the course of negotiations is a well-established principle of our legal system. Its purpose is to promote a thorough and frank discussion of the issues between the parties in an effort to resolve differences.

Confidentiality not only limits what may be revealed publicly, but also ensures that offers and counter-offers made in the course of negotiations may not and will not be used by one party against the other in any ensuing litigation.

Potentially responsible parties may be unwilling to negotiate without the guarantee of confidentiality. They may fear public disclosure regarding issues of liability and other sensitive issues which may damage their potential litigation position or their standing with the public. This expectation of confidentiality necessarily restricts the type and amount of information that can be made public.

CRC staff should consult with and obtain the approval of other members of the technical enforcement and regional counsel team before releasing any information regarding negotiations. If the site has been referred or is in litigation, DOJ approval should also be obtained. In lieu of direct participation by the public in negotiation sessions, the CRC staff may wish to send out the fact sheet on the Superfund enforcement process attached to this guidance, along with the moratorium schedules for that specific site.

6.4.B-4 Community Relations Following an RI/FS Order

As discussed above, RI/FS settlements usually are resolved as administrative orders on consent. For remedial sites, an RI/FS workplan is a trigger for implementation of community relations activities. When the workplan is complete, a "kick-off" meeting with the public may be conducted in order to present the final workplan and explain the next steps. If held, CRC staff should make it clear that EPA approved the workplan; announce how the PRP will be performing the RI/FS; explain EPA's oversight role; discuss the enforcement process and confidentiality requirements; and explain where EPA's record files will be/or are located. As discussed in section 6.4.E, the administrative record file will be available at a central regional location, and at or near the site. Since it contains information which the lead Agency uses in selecting a final remedy, the administrative record file should be used as a tool to facilitate public involvement.

Once the RI/FS has been completed, the agency will issue the proposed remedial action plan, and publish a notice announcing a public comment period. At a minimum, the notice must be published in a major local newspaper of general circulation. A formal comment period of not less than 21 calendar days must be provided for the public to submit oral and written comments. Note that proposed revisions to the National Contingency Plan (NCP) suggest extending this to not less than 30 calendar days.

An opportunity for a public meeting is also required to be offered during the comment period, as well as a transcript of the

meeting on the proposed plan. The transcript must be made available to the public in the administrative record, and may be distributed in the information repositories and on request. See Chapter 4 of the Handbook for a complete outline of these specific public participation requirements.

Once the public comment period on the proposed plan has closed, a responsiveness summary is prepared which serves two purposes. First, it provides lead agency decision-makers with information about community preferences regarding both the remedial alternatives and general concerns about the site. Second, it demonstrates to members of the public how their comments were taken into account as an integral part of the decision-making process. A Record of Decision (ROD) is then issued by EPA as the final remedial action plan for a site. Both the ROD and the responsiveness summary will be placed in the administrative record file and other information repositories. In addition, the responsiveness summary may be distributed to all those who commented and to the entire site mailing list. See Chapter 4 of the Handbook for further information on requirements for public notice and availability of the ROD and responsiveness summary.

6.4.B-5 Public Notice and Comment on Consent Decrees for RD/RA

If a negotiated settlement for remedial action under CERCLA section 106 is reached, it will be embodied in a proposed consent decree (to be entered by a court). CERCLA section 122(d)(1) requires the use of consent decrees as the vehicle of agreement between the Federal Government and PRPs on remedial actions taken under section 106 of CERCLA. CERCLA section 122 contains specific public participation requirements. The Department of Justice lodges (provides a copy of) the consent decree with the court, publishes a notice of the proposed consent decree in the Federal Register, and offers an opportunity for non-signatories to the agreement to comment on the proposed consent decree before its entry by the court as a final judgment. The public comment period must not be less than 30 calendar days in length and may be extended if warranted. The proposed consent decree may be withdrawn or modified if comments demonstrate it to be inappropriate, improper or inadequate.

In order to ensure that public comment opportunities are extended to interested parties, EPA staff routinely prepare a press release to be issued after the consent decree has been lodged as a proposed judgment with the court. DOJ should notify the regional counsel for the particular site and provide a copy of the Federal Register notice of the decree. Regional counsel will assure that the RPM and CRC are informed of this event. CRC staff can then mail copies of the press release or copies of the Federal Register notice to persons on the site mailing list. The press release should indicate that copies of the consent decree document may be obtained, including its location and that of any

other relevant documents. The procedures for public comment on the consent decree, as well as a contact name for obtaining further information, should also be announced. The public notice and press release for the consent decree may be combined, if appropriate.

The ROD and responsiveness summary have usually been made public by this time. However, inasmuch as comments previously were requested on the proposed plan, comments are requested only on the consent decree. Communications with the public should focus on the remedial provisions of the settlement agreement. Details of the negotiations, such as the behavior, attitudes, or legal positions of PRPs, any compromises incorporated in the settlement agreement, and evidence or attorney work-product material developed during negotiations, must remain confidential.

If a negotiated settlement for RD/RA results in actions fundamentally different from those selected in the ROD, the ROD will have to be amended. An amendment to a ROD also requires a public comment period, which should coincide if possible, and be held jointly with, the comment period for the consent decree.

A public meeting may be held during the public comment period, at the site team's discretion. Regional staff must offer the opportunity for a public meeting when there are significant community issues or concerns, or for other reasons which are determined by and based upon the judgment of EPA regional staff. If held during the public comment period, these meetings need to be documented, and significant oral comments received during the meeting must be addressed in the responsiveness memorandum on the consent decree.

Once the public comment period on the proposed consent decree has closed, DOJ staff (in cooperation with EPA staff) must consider each significant comment and write a response. Assuming that EPA and DOJ continue to believe the decree should be entered, DOJ will then file a Motion to Enter with the court, the responsiveness memorandum, the comments received, and the consent decree itself. The responsiveness memorandum and motion to enter the consent decree are released to the public at the same time. The Regional team will use information repositories, administrative record files, and/or other means to make these documents available to the public.

6.4.B-6 Community Relations During PRP Remediation

EPA retains responsibility for community relations during a PRP-managed remedial action pursuant to a consent decree or any enforcement order. The scope and nature of community relations activities will be the same as for Fund-lead response actions. When PRPs participate in community relations activities at the site, EPA and PRP roles need to be determined and explicitly defined. Where a PRP has not been involved in the initial stages

of implementing the community relations plan, but shows sufficient interest, commitment and capability to warrant some level of participation, EPA should re-evaluate its role in conducting community relations activities. In that case, a new CRP may be developed at the discretion of the regional team. PRP roles in conducting community relations may also be addressed in the consent decree or other enforcement orders.

6.4.B-7 Technical Discussions

Technical meetings are considered informational, and provide orientation to the enforcement process. One of the objectives in holding technical meetings is to describe, instruct, and explain how the remedy may or will (depending on whether a ROD has been signed) address the conditions of the site. Workshops exploring the approach to the site and project status, can occur at any point up to and beyond remedy selection. If held during RI/FS or RD/RA negotiations, they should be separated from the legal discussions. The RPM may host a technical discussion without PRP concurrence; however, willingness by the PRPs to participate may facilitate a more open and honest dialogue with the community.

Technical information must be documented and available for the public in the administrative record file. Technical or factual information which comes up during negotiations should also be included in the administrative record file. Issues of liability, however, are appropriately discussed only during negotiations between EPA and PRPs, and should not be included in the administrative record file.

Technical assistance grants are authorized under section 117(e) of CERCLA, which allows EPA to make grants available to communities affected by a release or threatened release at an NPL site. Community groups may use these grants to obtain assistance in interpreting technical information on the nature of the hazard and recommended alternatives for investigation and cleanup.

6.4.C Community Relations During Removal Actions

EPA will encourage public participation during removal actions to the extent possible. However, there will be times when this participation may need to be constrained. The NCP, the Handbook, and Removal Procedures establish the requirements for removal actions, including administrative record requirements.

The enforcement program encourages PRPs to conduct or pay for removal actions. At any time, the Agency may arrive at an agreement with the PRPs to conduct a removal, which would usually be embodied in an administrative order on consent. EPA also may issue a unilateral administrative order to compel a PRP to undertake a removal or other action. In addition, under limited circumstances, the Agency may refer the action to DOJ, seeking a court order to secure the removal.

By their nature, the situations that require emergency removals do not allow for extensive public involvement. Adjustments to the community relations process must be made to accommodate necessary time constraints. It is proposed in the draft NCP that a public comment period of at least 30 days be required for removals with a planning period of at least 6 months before the initiation of on-site activity. For removals with a planning period of less than 6 months before the initiation of on-site activity, a public comment period may be held where appropriate. The public comment period, if held, begins when the record file is made available for public inspection.

A unilateral administrative order or administrative order on consent is a public document and should be made available to the affected community at a minimum, through the administrative record file. In addition, community relations staff should discuss the terms of the order with and describe the removal action to citizens, local officials, and the media. If the PRP subsequently fails to respond to the order, any public statements or information releases regarding the status of actions at the site or prospective EPA actions should first be cleared with appropriate Regional technical and legal enforcement personnel.

Community relations activities during removals conducted by PRPs should be the same as for Fund-financed removals. PRPs may participate in community relations, subject to the same considerations described previously in this guidance under Section 6.4.A-3.

6.4.D Community Relations During Specific Enforcement Actions and Settlements

6.4.D-1 Consent Decrees, De Minimis and Cost Recovery Settlements

Under section 122(d)(1) of CERCLA, settlements for remedial action are to be in the form of consent decrees filed in Federal court. Section 122(d)(2)(B) requires DOJ to provide an opportunity for public comment on proposed consent decrees. This concept is discussed in section 6.4.B-5.

Section 122(i) of CERCLA requires the lead Agency to publish a notice of proposed settlement, for both administrative orders on consent under section 122(g)(4) (de minimis settlements), and under section 122(h) (cost recovery settlements/arbitration). The notice published in the Federal Register must identify the facility concerned and the parties to the proposed settlement.

A public comment period of not less than 30 days is required for these agreements. Regional staff should provide notice (e.g., a press release, notice to persons on the site mailing list or an ad in the newspaper of local circulation) to supplement the Federal Register notice. The press release should

provide a contact for further information.

The lead agency with jurisdiction must consider any comments filed, and determine if the proposed settlement requires modification where comments demonstrate that the proposed agreement is inappropriate, improper or inadequate, or can become effective without change. The final settlement and the response to comments must be released at the same time and be made available to the public. This can be accomplished by placing both documents in the administrative record file. The response to comments document (responsiveness summary) should also be sent directly to those who commented. PRPs who are party to the settlement will receive notice from the Agency that the agreement will go into effect unchanged or that modifications are required. A statement that the responsiveness summary may be obtained from the administrative record file or upon request should be added to this notice.

6.4.D-2 Injunctive Litigation

At any point in the enforcement process, a case may be referred to DOJ for litigation, and community relations activities may change in scope. Referral is likely to occur most frequently for RD/RA after the moratorium has concluded. If litigation is initiated early in the enforcement process, the CRP for the site may need to be modified substantially. If litigation is initiated late in the process (e.g., after the conclusion of the RD/RA special notice moratorium), the plan will require only the addition of the litigative process.

When a case has been referred to DOJ, community relations activities at the site should be re-evaluated by the site team, and changes necessary to accommodate confidentiality should be agreed upon by the site team, including DOJ. While strong consideration should be given to implementing the plan as developed and previously approved, the litigation process may require changes in public disclosure. For example, the court may impose a gag order or place restrictions on information releases during negotiations or any meetings with the public to discuss potential site remedy. Under these circumstances, the DOJ attorney will advise the site team on how to proceed.

6.4.D-3 Cost Recovery

If a Fund-financed cleanup is conducted, EPA may initiate litigation to recover the costs of response. Since cost recovery generally follows removal actions or initiation of remedial action, community interest in the site usually will have lessened, unless other operable units remain to be addressed.

A spokesperson chosen by the site team, in coordination with DOJ, should take the lead in responding to inquiries regarding current site conditions. All inquiries regarding litigation

should be forwarded to the EPA cost-recovery team, which will prepare a response subject to the concurrence of DOJ.

6.4.D-4 Interaction with RCRA and other Federal and State Laws

On May 5, 1987, the Office of Solid Waste and Emergency Response issued guidance for public involvement in RCRA section 3008(h) actions (OSWER Directive #9901.3). This guidance establishes the process for public involvement in actions taken under section 3008(h) of RCRA.

Section 3008(h) of RCRA, the interim status corrective action authority, allows EPA to take enforcement action to require cleanup at a RCRA interim status facility when the Agency has information that there has been a release of hazardous waste or hazardous constituents. Two orders will frequently be used to implement the cleanup program. The first order requires the facility owner or operator to conduct a Corrective Measure Study/RCRA Facility Investigation (RFI/CMS), similar to the RI/FS. Once the remedy has been selected, a second order requires design, construction, and implementation of that remedy.

The RCRA guidance outlines both minimum public involvement requirements and expanded public involvement suggestions. In many ways the RCRA guidance uses procedures and ideas drawn from the Superfund community relations program. Thus, coordination between Superfund and RCRA personnel at sites where actions under both CERCLA and RCRA are anticipated is appropriate. Superfund CRCs may want to become familiar with this guidance and with the RCRA Public Involvement Coordinators to ensure that the Agency presents a coordinated approach.

Familiarity with other Federal or state laws such as the Clean Air Act, Clean Water Act, etc. will generally make the role of the CRC easier, for frequently many media are represented at a hazardous waste site. A general knowledge of Federal or state requirements may help the CRC in conversing with the public.

6.4.E The Administrative Record As Part of Community Relations

6.4.E-1 Overview

Section 113(k)(1) of CERCLA requires the establishment of an administrative record upon which the selection of a response action is based. It also requires that a copy of the administrative record be located at or near the site. Section 113(k)(2) of CERCLA requires that the Agency promulgate regulations outlining procedures for interested persons to participate in developing the administrative record. The Agency is addressing these statutory requirements through revisions to the NCP and through the development of a guidance document.

Throughout the decision-making process, from remedial

investigation to selection of remedy, the administrative record file will be available for public inspection at a central regional location and at or near the site. The information in the file is crucial to the public in that it contains the information upon which the lead Agency bases its decisions toward selecting a final remedy. Community relations staff should use the administrative record file as a tool for facilitating public involvement.

Publicly-available documents concerning response selection must be made available to all interested parties at the same time. EPA staff should avoid situations where local residents are provided opportunities to review and comment on site information and other members of the public are not provided the same opportunity. Similarly, if EPA requests PRPs to review a plan, EPA should enable other members of the public to review that plan as well. When a kick-off meeting is scheduled to explain the final workplan and obtain opinions, the public, including residents and PRPs, should be invited.

The administrative record file and CRP for a remedial action should be made available to the public no later than the time the remedial investigation phase begins, which is usually when the RI/FS workplan is approved. The timing for establishing the administrative record file for a removal action will depend on the nature of the removal. As proposed in the draft NCP, for removals with a planning period of at least six months before on-site activities will be initiated, the record file must be made available to the public when the engineering evaluation/cost analysis (EE/CA), or its equivalent, is available for public comment. For removals with a planning period of less than six months, the record file must be available to the public no later than 60 days after the initiation of on-site cleanup activity.

6.4.E-2 Purpose of the Administrative Record

The administrative record has a two-fold purpose. First, the record provides an opportunity for the public to be involved in the process of selecting a response action. During the selection of a response action, information is reviewed and made available in the publicly accessible administrative record file. Second, if the Agency is challenged concerning the adequacy of a response action, judicial review of a response action selection will be limited to the administrative record. By limiting judicial review to the record, a court's review is based upon the same information that was before the Agency at the time of its decision. The public should be advised that their comments must be submitted in a timely manner in order to be considered.

6.4.E-3 Community Relations Coordinator Responsibilities for the Administrative Record

The OSC/RPM and regional attorney, with the support of the administrative record coordinator, are responsible for deciding which documents are to be included in the administrative record, and ensuring its adequate compilation and maintenance. The Regional Administrator or his designee is responsible for the certification of the record for litigation. CRCs will have some general duties in developing the record file, but every region has defined different roles. In general, however, the CRC duties will center on the relationship of the administrative record file to the information repositories, public notices and public comments.

First, CRCs and administrative record staff must coordinate the location of the administrative record file and information repositories. The statute requires that the administrative record be available at or near the facility at issue, and that information be available for public inspection and copying. If the information repository does not contain a copying facility, the Region or State may want to make arrangements for copying the record file. EPA, however, is not required to copy the information for interested persons.

Second, the notice of availability for the administrative record must be published in a major local newspaper of general circulation. A copy of the public notice must also be placed in the administrative record file and may be made available to the public through the community relations mailing list. (See the Overview section above for a discussion of when the administrative record file must be made available to the public.) This notice may be combined with other notices of availability depending on the timing of activity at a site, e.g., a notice of availabilty of the information repository. Where appropriate, a notice of availability of the record file or of commencement of the public comment period may be published in the Federal Register. The public is not notified each time a document is added to the record file. These notices should be coordinated between the CRC and administrative record staff in order to use resources most efficiently. For a more complete discussion of the notice of availability, see the Guidance on Administrative Records for Selection of CERCLA Response Actions (OSWER Directive #9833.3A).

Third, the completed CRP must be placed in the administrative record file. Community Relations Coordinators must advise the Administrative Record Coordinator that the CRP is final and provide him/her with a copy.

Fourth, information contained in records of communication that were generated by the community relations staff and considered or relied on in selecting a response should be

included in the record file. In addition, Superfund CRCs should take appropriate steps to ensure that any community relations documents that are required to be placed in the administrative record file are provided to the Regional official responsible for the record file.

Fifth, the text of all comments, criticisms and new information submitted by the public, including PRPs, during the public comment period must be included in the record file. A response to all significant comments (i.e., the responsiveness summary) must also be placed in the administrative record file. The responses may be combined by subject or other category in the record file.

The record file should reflect the Agency's consideration of all significant public comments. The Agency has no duty to respond to comments it receives during a formal comment period until the close of that formal public comment period. If the Agency chooses to respond to a comment made prior to a formal public comment period, the response must be included in the record file. The Agency may suggest that comments submitted prior to a formal public comment period be resubmitted during the comment period if the commenter desires a response. Or the Agency may notify a commenter that the Agency will respond to the comment in a responsiveness summary prepared at a later date.

Comments which are received after the formal comment period closes and before the decision document is signed should be included in the record file but labeled "late comment." Since a responsiveness summary may already have been prepared at this point, the Agency must respond to late comments only if they contain significant new information not contained elsewhere in the administrative record which could not have been submitted during the public comment period, and which substantially support the need to significantly alter the response action.

Comments received after the decision document is signed should be placed in a post-decision document file. They may be added to the record file if: the documents concern issues relevant to the selection of the response action that the decision document does not address or reserves to be decided at a later date; or where there is a significant change in a response selection which is addressed either by an explanation of significant differences, or in an amended decision document. The Guidance on Administrative Records cited above gives additional information in this regard.

6.4.E-4 Additional Community Relations Coordinator Responsibilities

Because of regional differences CRCs may have additional, general responsibilities, including:

- Assessing the impact of the administrative record file on local information repositories by consulting with officials at the repositories. This must be done in coordination with the Administrative Record Coordinator. CRCs should advise the public where the administrative record file is located.

- Providing the Administrative Record Coordinator with information as to how to notify the public of the availability of the record file. This notification may be in addition to the newspaper notice.

- Making available the transcript of the local meeting on the proposed plan, as required under section 117(a) of CERCLA.

- Providing assistance to the Administrative Record Coordinator to ensure that final comments made by EPA on important documents generated by the State or a Federal facility are documented in writing and submitted to the State or Federal facility staff for inclusion in the administrative record file. States and Federal facility staff will compile and maintain the administrative record files for those sites.

All staff involved in Superfund activities must become familiar with the administrative record requirements.

6.4.E-5 Relationship Between the Administrative Record and Information Repositories

Section 113(k)(1) of CERCLA requires that "the administrative record shall be available to the public at or near the facility at issue." Duplicates of the administrative record may be placed at any other location. The original files concerning response action selection should be located at the EPA Regional office. A copy of these files must be located at or near the site. The draft NCP proposes that an exception be made for emergency removal actions where on-site activities cease within 30 days of initiation.

Section 117(d) of CERCLA requires that "each item developed, received, published, or made available to the public under section 117 shall be available for public inspection and copying at or near the facility at issue." These items are generally included in the information repository.

The administrative record file at or near the site at issue should be located at one of the information repositories that already may exist for community relations purposes. The information repository, maintained by the Community Relations Coordinator, may contain additional information of interest to the public, that is not necessarily part of the administrative

record file (e.g., press releases and newspaper articles). Documents in the administrative record file should be separated from the other materials in the information repository.

EPA typically uses local libraries, town halls, and public schools as locations for establishing repositories and administrative record files because they are publicly accessible. In some instances, the volume of information available for community relations and administrative record purposes may be larger than the capacity of these locations. Where the space of the information repository is inadequate for supporting the administrative record file, an alternate location for the administrative record file should be established. Administrative Record Coordinators should estimate the volume of information expected to be included in the repository and meet with appropriate local officials to discuss space requirements. In some situations, separate locations may have to be established. Administrative Record Coordinators and CRCs must inform one another of any additional information placed in these separate locations to ensure uniformity. CRCs should carefully review their responsibilities for the administrative record (Section 6.4.E-3).

Each administrative record file must be indexed. This index identifies all the documents which comprise the record file, and lists those documents which do not have to be present in the record file because of their voluminous nature (raw data for example), but which are considered part of the record. Their location must be provided. This index is part of the record file and must be available at each record file location.

Finally, interested parties should be able to easily find the document(s) they need. Documents in the administrative record file should be well organized. The CRC and administrative record staff should coordinate with the State in closing information repositories and record files at the end of operation and maintenance, and following a five-year review.

United States
Environmental Protection
Agency

Office of Solid Waste
and Emergency Response
Washington, D.C. 20460

Office of Waste Programs Enforcement

Summer 1988

Environmental Fact Sheet

The Superfund Enforcement Process: How It Works

INTRODUCTION

In 1980, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly called Superfund. This law provides the U.S. Environmental Protection Agency (EPA) with the authority and necessary tools to respond directly or to compel potentially responsible parties (PRPs) to respond to releases or threatened releases of hazardous substances, pollutants or contaminants. CERCLA created two parallel and complementary programs aimed at achieving this goal.

The first program involves the creation of a trust fund financed through a special tax on the chemical and petroleum industries. This trust fund, known as the Superfund, may be available for site remediation when no viable PRPs are found or when PRPs fail to take necessary response actions. PRPs are defined as parties identified as having owned or operated hazardous substance sites, or who have transported or arranged for disposal or treatment of hazardous substances, pollutants or contaminants at such sites. The second program provides EPA with the authority to negotiate settlements, to issue orders to PRPs directing them to take necessary response actions, or to sue PRPs to repay the costs of such actions when the Trust Fund has been used for these purposes. The actions EPA takes to reach settlement or to compel responsible parties to pay for or undertake the remediation of sites are referred to as the Superfund enforcement process. CERCLA was reauthorized and amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (SARA). SARA provides EPA with new authorities and tools that strengthen the enforcement program.

LIST OF ACRONYMS

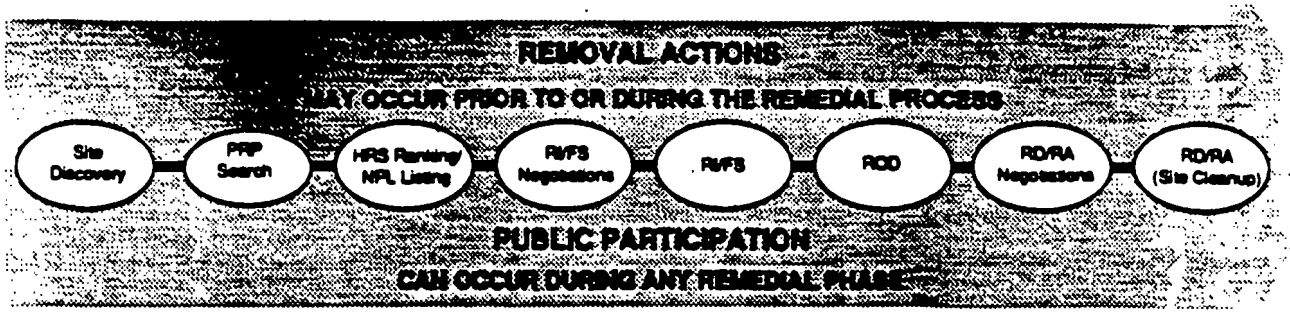
CERCLA:	Comprehensive Environmental Response, Compensation and Liability Act of 1980
IAG:	Interagency Agreement
NBAR:	Non-binding Allocation of Responsibility
NPL:	National Priorities List
PRP:	Potentially Responsible Party
RCRA:	Resource Conservation and Recovery Act, as Amended
RD/RA:	Remedial Design/Remedial Action
RI/FS:	Remedial Investigation/Feasibility Study
ROD:	Record of Decision
SARA:	Superfund Amendments and Reauthorization Act of 1986

This fact sheet describes the enforcement authorities and the process that is followed under the Superfund program. It describes the options available to EPA for remediating hazardous waste sites; the tools and mechanisms that EPA may use in negotiating settlements with PRPs, and describes the decision-making process at enforcement sites.

OVERVIEW OF THE ENFORCEMENT PROGRAM

A major goal of the Superfund program is to encourage PRPs to remediate hazardous waste sites. The enforcement process normally used by EPA to enlist PRP involvement may include five major efforts.

SUPERFUND REMEDIAL/ENFORCEMENT PROCESS



To understand the enforcement process, it is necessary to understand the Superfund remedial process. Under the remedial program, EPA takes long-term actions to stop or substantially reduce releases or threats of releases of hazardous substances that are serious but not immediately life-threatening. Removal actions, which are short-term, immediate actions intended to stabilize a hazardous incident or remove contaminants from a site that pose a threat to human health or welfare or the environment, may be taken at any point in the remedial process.

The Superfund process begins with a preliminary assessment/ site inspection (PA/SI). This usually is conducted by the State, to determine whether the site poses a significant enough potential hazard to warrant further study and investigation.

The site is then ranked using the Hazard Ranking System (HRS), a numerical ranking system used to identify the site's potential hazard to the environment and public health. Sites assigned an HRS score of 28.5 or above are added to the National Priorities List (NPL).

Next, a remedial investigation (RI) is conducted to assess the extent and nature of the contamination and the potential risks. A feasibility study (FS) is then prepared to examine and evaluate various remedial alternatives.

Following a public comment period on EPA's preferred alternative and the draft FS report, EPA chooses a specific remedial plan and outlines its selection in the Record of Decision (ROD).

Once the remedial design (RD) (which includes engineering plans and specifications) is completed, the actual site work, or remedial action (RA) can begin. After RD/RA activities have been completed, the site is monitored to ensure the effectiveness of the response. Certain measures require ongoing operation or periodic maintenance.

First, EPA attempts to identify PRPs as early in the Superfund process as possible. Once identified, EPA will notify these parties of their potential liability for response work when the site is scheduled for some action. Second, in the course of identifying response work to be done, EPA will encourage PRPs to do the work at a site.

Third, if EPA believes the PRP is willing and capable of doing the work, EPA will attempt to negotiate an enforcement agreement with the PRP(s). The enforcement agreement may be an agreement entered in court (such as a judicial consent decree) or it may be an administrative order (where EPA and the PRP(s) sign an agreement outside of court). Both of these agreements are enforceable in a court of law. Under both agreements EPA oversees the PRP.

Fourth, if a settlement is not reached, EPA can use its authority to issue a unilateral administrative order or directly file suit against the PRP(s). Under either course of action, PRPs are directed to perform removal or remedial actions at a site. If the PRPs do not respond to an administrative order, EPA has the option of filing a law suit to compel performance.

Fifth, if PRPs do not perform the response action and EPA undertakes the work, EPA will file suit against PRPs, when practicable, to recover money spent by EPA and deposit it in the Superfund Trust Fund. This is called cost recovery, and it is a major priority under the Superfund program.

THE ENFORCEMENT PROCESS FOR REMEDIAL ACTIONS

PRP Search and Notice

EPA is committed to strengthening efforts to reach settlements with PRPs. EPA believes that settlements are most likely to occur when EPA interacts frequently with PRPs.

ENFORCEMENT AUTHORITIES

The original Superfund program was reauthorized and expanded on October 17, 1986, when President Reagan signed into law the Superfund Amendments and Reauthorization Act of 1986 (SARA). These amendments increased the Superfund Trust Fund to $8.5 billion and clarified and expanded enforcement authorities:

- **Access and Information Gathering** - SARA strengthens EPA's ability to obtain access to investigate sites and to obtain information from parties with knowledge of the site.

- **Settlement Authorities** - CERCLA authorizes EPA to compel a PRP to undertake necessary actions to control the threat of imminent and substantial endangerment to human health or the environment. To accomplish this, EPA may either issue an administrative order or bring a civil action against the PRP in court. SARA outlines specific procedures for negotiating settlements with PRPs to conduct voluntary response actions at hazardous waste sites.

- **Cost Recovery** - Once a Fund-financed response has been undertaken, EPA can recover costs from the responsible parties. Past and present facility owners and operators, as well as hazardous substance generators and transporters, can all be liable under Superfund for response costs and for damage to natural resources. EPA may recover Federal response costs from any or all of the responsible parties involved in a remedial action. The monies recovered go back into the Fund for use in future response actions.

- **Criminal Authorities** - SARA increases criminal penalties for failure to provide notice of a release and makes submitting false information a criminal offense.

- **Citizen Suits** - SARA authorizes a citizen to sue any person, the United States, or an individual State for any violation of standards and requirements of the law, under certain conditions.

Federal Facilities

SARA also adds a section dealing with releases of hazardous substances at Federal facilities. This provision clarifies that Superfund applies to Federal agencies and that they must comply with its requirements. SARA clearly defines the process Federal agencies must follow in undertaking remedial responses. At NPL sites, EPA makes the final selection of the remedy if the Federal agency and EPA disagree. A Federal agency must remediate a Federal facility through an interagency agreement (IAG), except in emergency situations. IAGs are enforceable agreements between Federal agencies that are subject to the citizen suit provisions in SARA and to section 109 penalties, if the responding agency does not comply with the terms of the agreement.

SARA also provides a schedule for response actions at Federal facilities, including a schedule for preliminary assessments, listing on the National Priorities List, remedial investigations/feasibility studies, and remedial actions. State and local officials also must be given the opportunity to participate in the planning and selection of any remedy, including the review of all data. States are given a formal opportunity to review remedies to ensure that they incorporate State standards. Public participation in addressing releases at Federal facilities is enhanced by SARA, which establishes a Federal Agency Hazardous Waste Compliance Docket. This docket functions as a repository of information for the public and is available for public inspection. Every six months after establishment of the docket, EPA will publish in the Federal Register a list of the Federal facilities that have been included in the docket during the preceeding six-month period.

This interaction is important because it provides the opportunity to share information about the site and may reduce delays in conducting response actions.

The enforcement process begins with the search for PRPs, concurrent with NPL listing.

Once identified, PRPs are typically issued a general notice letter. The general notice informs PRPs of their potential liability. The general notice also may include a request for and a release of information on PRPs and the substances at the site. The overall purposes of the general notice are to provide PRPs and the public with advance notice of possible future negotiations with EPA, to open the lines of communication between EPA and PRPs, and to advise PRPs of potential liability.

In addition to the general notices, EPA may issue a "special notice," which invokes a temporary moratorium on certain EPA remedial and enforcement activities. An RI/FS special notice initiates a 90-day moratorium and an RD/RA special notice initiates a 120-day moratorium. The moratorium provides a period of time during which EPA and PRPs negotiate. The goal of negotiations is for EPA and PRPs to reach a settlement where the PRPs agree to conduct and/or finance response activities. Negotiations may be terminated after 60 days for either the RI/FS or RD/RA if PRPs do not provide EPA with a "good faith" settlement offer.

Negotiations for the RI/FS

The PRP may conduct the RI/FS if EPA determines the PRP is qualified to conduct the RI/FS and if the PRP agrees to reimburse EPA for the cost of oversight. The terms of this agreement to conduct the RI/FS are outlined in either an Administrative Order on Consent or a Consent Decree, both of which are enforceable in court. If negotiations do not result in an order or a decree, EPA may use Trust Fund monies to perform the RI/FS and seek reimbursement for its costs.

Negotiations for the RD/RA

Where a special notice is used, the moratorium for RD/RA may be extended to a total of 120 days. The terms of the agreement to conduct the RD/RA are outlined in a Consent Decree, which all parties sign and is entered in court. If negotiations do not result in a settlement, EPA may conduct the remedial activity using Trust Fund monies, and sue for reimbursement of its costs with the assistance of the Department of Justice (DOJ). Or EPA may issue a unilateral administrative order or directly file suit to force the PRPs to conduct the remedial activity.

Administrative Record

The information used by EPA to select a remedy at a site must be made available to the public. This information, including public comments, is compiled and maintained in the administrative record files. The administrative record serves two main purposes. First, it ensures an opportunity for public involvement in the selection of a remedy at a site. Second, it provides a basis for judicial review of the selection.

TOOLS FOR ENFORCEMENT

In addition to outlining the procedures for the enforcement *process*, CERCLA provides *tools* that are designed to help EPA achieve settlements. The CERCLA settlement authorities may be used by EPA to foster negotiations with PRPs instead of taking them to court. EPA believes that PRPs should be involved early in the Superfund process at a site. It is in the best interest of PRPs to negotiate with EPA and to conduct the RI/FS, as this can keep the process smooth and costs can be controlled. EPA actively promotes settlements with PRPs using tools in SARA and is continuing to work towards improvements in the settlement process itself. These new SARA tools include, but are not limited to:

Mixed Funding

CERCLA authorizes the use of "mixed funding." In mixed funding, settling PRPs and EPA share the costs of the response action and EPA pursues viable non-settlers for the costs EPA incurred. Through guidance, EPA discusses the use of three types of mixed funding arrangements. These are "preauthorization," where the PRPs conduct the remedial action and EPA agrees to reimburse the PRPs for a portion of their response costs "cash-outs," where PRPs pay for a portion of the remedial costs and EPA conducts the work; and "mixed work," where EPA and PRPs both agree to conduct and finance discrete portions of a remedial action. EPA prefers a "preauthorized" mixed-funding agreement, where PRPs conduct the work.

EPA encourages the use of mixed funding to promote settlement and site remediation, but will continue to seek 100 percent of response costs from PRPs where possible. Use of mixed funding does not change EPA's approach to determining liability. PRPs may be held jointly and severally liable and EPA will seek to recover EPA's mixed funding share from non-settling PRPs whenever possible.

De Minimis Settlements

De minimis settlements are smaller agreements separate from the larger settlement for the chosen remedy. Under de minimis settlements, relatively small contributors of waste to a site, or certain "innocent" landowners, may resolve their liability. Innocent landowners are parties who bought property without knowing that it was used for hazardous waste handling. Or EPA may enter into de minimis settlement agreements with a party where the settlement includes only a minor portion of the response costs and when the amount of waste represents a relatively minor amount and is not highly toxic, compared to other hazardous substances at the facility. De minimis settlements also may be used where the PRP is a site owner who did not conduct or permit waste management or contribute to the release of hazardous substances. De minimis settlements are typically used in conjunction with covenant not to sue agreements. These agreements generally will be in the form of administrative orders on consent and are available for public comment.

Covenants Not To Sue

A covenant not to sue may be used to limit the present and future liability of PRPs, thus encouraging them to reach a settlement early. However, agreements generally include "reopeners" that would allow EPA to hold parties liable for

conditions unknown at the time of settlement or for new information indicating that the remedial action is not protective of human health and the environment. In some cases, such as de minimis settlements, releases may be granted without reopeners. Covenants not to sue are likely to be used only in instances where the negotiating PRP is responsible for only a very small portion of a site, and, therefore, EPA is assured that any future problems with the site are not likely to be the result of that PRP's contribution

Non-binding Allocations of Responsibility (NBAR)

NBAR is a process for EPA to propose a way for PRPs to allocate costs among themselves. EPA may decide to prepare an NBAR when the Agency determines this allocation is likely to promote settlement. An NBAR does not bind the government or PRPs and cannot be admitted as evidence or reviewed in any judicial proceeding, including citizen suits. Since each PRP may be held liable for the entire cost of response, regardless of the size of its contribution to a site, knowing EPA's proposed allocation scheme may encourage the PRPs to settle out of court rather than run the risk of being held fully responsible.

STATE PARTICIPATION

The Superfund program allows for and encourages State participation in enforcement activities. First, EPA is required to notify the State of negotiations with PRPs and provide the opportunity for the State to participate. States may be a party to any settlement in which they participate. In addition, EPA is authorized to provide funds to States to allow State participation in enforcement activities and to finance certain State-lead enforcement actions.

PUBLIC PARTICIPATION/COMMUNITY RELATIONS

EPA policy and the Superfund law establish a strong program of public participation in the decision-making process at both Fund-lead and enforcement sites. The procedures and policy for public participation at enforcement sites are basically the same as for non-enforcement sites. This fact sheet is limited to those special differences in community relations when the Agency is negotiating with or pursuing litigation against PRPs. The contact listed below has numerous fact sheets on the Superfund program, including a fact sheet on Public Involvement.

Community relations at enforcement-lead sites may differ from community relations activities at Fund-lead sites because negotiations between EPA, DOJ and PRPs generally focus on the issue of liability. The negotiation process, thus, requires that some information be kept confidential and is not usually open to the public.

When these discussions deal with new technical information that changes or modifies remedial decisions, this information will be documented and placed in the administrative record files. This process provides the public with critical information and enables the Agency to move quickly towards settlement. Information on enforcement strategy; details of the negotiations, such as the behavior, attitudes, or legal positions of responsible parties; and evidence or attorney work product material developed during negotiations, must remain confidential.

FOR MORE INFORMATION:

Attachment

AFFIDAVIT OF SERVICE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I hereby certify that being a person over 18 years of age, I served a copy of the attached subpoena:

(check one) ( ) in person

( ) by registered mail

( ) by leaving the copy at the principal place of business, which is,

_____

_____

_____

( ) by other method:

_____

on the person named on the subpoena on _____.
[date]

_____
signature of server

_____
name of server

_____
title

Attachment

UNITED STATES DISTRICT COURT

FOR THE ____ DISTRICT OF _____

IN THE MATTER OF:	)	MISC. NO.
	)	
UNITED STATES of AMERICA, Petitioner	)	
	)	
v.	)	
	)	
_____,	)	
Respondent	)	
	)	
_____	)	

PETITION FOR ENFORCEMENT OF AN ADMINISTRATIVE SUBPOENA
ISSUED BY THE ENVIRONMENTAL PROTECTION AGENCY

The United States of America, through the Attorney General, and at the request of the Regional Administrator, United States Environmental Protection Agency (EPA) Region ___, hereby petitions the Court for an Order to Show Cause why the Respondent should not be ordered to comply forthwith with the administrative subpoena previously served upon him.

In support of this Petition, the Petitioner alleges as follows:

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and 1345, and 42 U.S.C. §9622(e)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

2. _____, the Regional Administrator of Region ___ of the EPA , [city], [state] has requested that the Attorney General commence this action.

[8. By letter dated _____, Petitioner denied Respondent's request and reaffirmed the subpoena date _____. Petitioner's letter is attached as Exhibit D.]

9. On _____, the return date specified in the subpoena, [Respondent failed to appear to testify; failed to answer certain questions put to him; failed to provide the information requested by subpoena.] [Note: Where a Respondent has failed to answer specific questions, or has not provided certain documents, those questions or documents should be specified.]

WHEREFORE, the Petitioner respectfully prays that:

1. This Court enter an Order to Show Cause directed to the Respondent, ordering the Respondent:

(a) to appear expeditiously and Show Cause why the subpoena should not be enforced against him, and

(b) to file expeditiously a written response to the allegations in the Petition by a date certain.

2. This Court enter an Order at the conclusion of these proceedings enforcing the EPA subpoena and requiring the Respondent to comply fully with the terms of the EPA subpoena.

3. This Court render such other and further relief as is just and proper.

Dated:

Respectfully submitted,

_____

Attorney for _____

3. The Respondent, _____, is [short description, e.g. "former owner of a waste transporting and disposal business." Be sure to identify as an owner or corporation.]

4. Section 122(e)(3)(B) of CERCLA, as amended, 42 U.S.C. 9622(e)(3)(B), grants the President the authority to issue administrative subpoenas to gather information necessary to implement §122 (Settlements). Such information includes, inter alia, the nature and extent of contamination at the site, possible remedies and the identities of potentially responsible parties.

5. The President delegated the authority to issue administrative subpoenas under CERCLA to the Administrator of the EPA on January 23, 1987 by Executive Order 12580 (52 Fed. Reg. 2923, January 29, 1987). This authority was, in turn, delegated from the Administrator to the Regional Administrators by Delegation 14-6, "Inspections, Sampling, Information Gathering, Subpoenas and Entry for Response," signed September 13, 1987. (Attached)

6. In conjunction with the investigation at [site], and pursuant to §122(e)(3)(B) of CERCLA, as amended, 42 U.S.C. 9622(e)(3)(B), Petitioner issued an administrative subpoena on [date], directing the Respondent to [provide certain information.] The subpoena is attached and incorporated herein as Exhibit A. An affidavit of service is attached as Exhibit B.

[7. By letter dated _____, Respondent requested Petitioner to extend the return date of the subpoena. Respondent's letter is attached as Exhibit C.]

OSWER # 9835.6

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

NOV 17 1988

MEMORANDUM

SUBJECT: Guidance on Premium Payments in CERCLA Settlements

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement
and Compliance Monitoring

J. Winston Porter
Assistant Administrator for Solid Waste
and Emergency Response

TO: Regional Administrators
Regional Counsels
Regional Waste Management Division Directors

I. BACKGROUND AND PURPOSE

Attempts to reach settlements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601 et seq., as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, pose difficult problems for both the regulated community and the Agency. Potentially responsible parties (PRPs) are often reluctant to settle hazardous waste enforcement cases because future cleanup costs are unknown; they seek broad covenants not to sue in an effort to provide a final determination of the extent of their liability. EPA, on the other hand, is reluctant to assume the risk that further site remediation will be required following

completion of the work contemplated in the settlement agreement or that the cost estimate is inaccurate.

One way to address these obstacles to settlement is for EPA to require, in appropriate situations, a "premium payment" from PRPs in exchange for the Agency assuming future remediation and financial risks. The term "premium payment" refers to a risk apportionment device, similar to an insurance premium, under which the risk taken by the government for providing PRPs with a release from liability not usually available (e.g., a covenant not to sue without the usual "reopeners" or a covenant not to sue for certain types of cost overruns) is offset by a payment in excess of the cost projected to complete the remedy. The premium should be sufficient to compensate EPA for taking the risks associated with the following types of contingent future costs: (1) cost overruns when the selected remedy costs more to complete than estimated; and (2) additional costs when more remedial work is required because the selected remedy is not adequately protective of human health and the environment.[1]

The purpose of this memorandum is to provide guidance on the use of premium payments in CERCLA settlements. It

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[1] As discussed in Section IV, <u>infra</u>, "Timing of Premium Payment Settlements," premium payment settlements will not usually occur until after the remedy has been selected. Thus, the permanence of the remedy chosen will not be affected by the existence of a premium payment and such settlements are not considered to be inconsistent with Section 122(c)(1) of CERCLA.

describes the key features of a premium payment settlement, considerations regarding timing of the settlement, and the factors to be considered in deciding if a premium should be accepted. Settlements with de minimis parties, as authorized by Section 122(g)(1)(A) of CERCLA, will usually include a premium payment if the de minimis parties seek a complete release from future liability. Use of premium payments in such settlements is discussed in the Agency's "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," 52 Fed. Reg. 24333 (June 30, 1987).

II. THE PREMIUM PAYMENT CONCEPT

A. Premiums Designed to Address Future Liability

Section 122(f)(1) of CERCLA authorizes EPA in certain circumstances to provide to PRPs covenants not to sue for liability, including future liability, resulting from a release or a threatened release of a hazardous substance addressed by a remedial action.[2] Typically, settlements[3] in which PRPs reimburse EPA for past costs and future oversight costs and undertake performance of the remedy include covenants not to sue for past costs and for present

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[2] This authority is discretionary, but in two circumstances, specified in Section 122(f)(2), EPA must grant a covenant not to sue for future liability if the PRP qualifies under Section 122(f)(1).

[3] SARA adopted in large part guidance on settlements set forth in the Agency's "Interim CERCLA Settlement Policy," 50 Fed. Reg. 5034 (Feb. 5, 1985).

liabilities (e.g., construction of the remedy). They may also include covenants not to sue for future liability,[4] usually with certain exceptions (i.e., reopeners). Under Section 122(f)(3), covenants not to sue for future liability may not take effect until EPA certifies that the remedial action is complete.

As to future liability, Section 122(f)(6) provides that in most situations, a covenant not to sue for future liability must include a "reopener" that allows EPA to pursue the settling PRPs concerning conditions that were unknown at the time EPA certified that the remedial action was complete. Agency policy also requires that settlements include a reopener to the covenant for future liability where new information reveals that the remedy is not protective of human health and the environment.[5]

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[4] In Section 122(f)(1) of CERCLA, Congress authorizes EPA to issue covenants not to sue for both present liability and future liability. In the context of covenants not to sue involving remedial action, "EPA interprets present liability as a responsible party's obligation to pay those response costs already incurred by the United States related to a site and to complete those remedial activities set forth in the Record of Decision for that site. Future liability refers to a responsible party's obligation to perform any additional response activities at the site which are necessary to protect public health and the environment." See EPA's "Interim Guidance on Covenants Not to Sue Under Section 122(f) of SARA," 52 Fed. Reg. 28038, 28040 (July 27, 1987).

[5] Id.

Under Section 122(f)(6), the Agency may exclude the "unknown conditions" reopener from the covenant not to sue for future liability if EPA determines that "extraordinary circumstances" exist.[6] For purposes of this memorandum, the "unknown conditions" and the "new information" reopeners will be treated together. In determining whether extraordinary circumstances exist, each case should be evaluated using the various factors specified in Section

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[6] However, under Section 122(f)(6)(B), even if extraordinary circumstances exist, the unknown conditions reopener may not be waived if the settlement does not otherwise provide reasonable assurance that public health and the environment will be protected from any future releases.

122(f)(6)(B).[7] The premium payment itself should be considered in the analysis as well.

If extraordinary circumstances exist, the Agency may waive the reopeners to the covenant not to sue for future liability in a premium payment settlement. Given the broad scope of the factors to be evaluated, the inclusion of a premium payment in a settlement cannot be the sole, or even the predominant, determinant of extraordinary circumstances. The presence of a premium should be one of several factors which, when taken together, lead the Agency to conclude that

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[7] Section 122(f)(6) refers to both the factors specified in Section 122(f)(4) and additional factors that reiterate the guidance set forth in the Interim CERCLA Settlement Policy. The additional factors relate to the volume and character of the substances at the site; to risks associated with the strength of the government's case on liability, ability to pay, precedential value, and inequities and aggravating considerations; and also to public interest considerations. The factors specified in Section 122(f)(4) relate primarily to the nature of the remedy. They include:

a. The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

b. The nature of the risks remaining at the facility.

c. The extent to which performance standards are included in the order or decree.

d. The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

e. The extent to which the technology used in the response action is demonstrated to be effective.

f. Whether the Superfund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

g. Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

What constitutes extraordinary circumstances must be based on the facts of each case.

the circumstances and terms of the settlement warrant the granting of a covenant not to sue without reopeners.[8]

B. Premiums Designed to Address Cost Overruns

In a settlement in which the PRPs agree to reimburse the government for cleanup costs associated with present liability, the issue of how to calculate as yet uncertain costs associated with the anticipated remedy must be addressed. Generally, the government desires that PRPs finance all response costs, and thus PRPs must await the completion of the remedial action before the extent of their present liability is established. However, if the PRPs would prefer to firmly establish the "price tag" for present liability before cleanup is completed, one option is to require PRPs to provide funds believed to be sufficient to cover projected cleanup costs, plus a premium to protect against cost overruns. Although the government as a matter of course seeks to avoid assuming risks associated with the uncertainties of cost projections, the payment of appropriate cost overrun premiums should ensure that, viewing the cost recovery program as a whole, the government is protected against those uncertainties. Settlements which include a premium for present liability, including cost

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[8] In certain situations, EPA may reach settlements where extraordinary circumstances exist without requiring a premium payment. For example, EPA may exclude the unknown conditions reopener without a premium payment in a settlement with a PRP who has invoked the protection of Chapter 7 bankruptcy laws.

overruns premiums, may be appropriate, but the traditional reopeners would be applied to future liability in such settlements.

III. AMOUNT OF THE PREMIUM PAYMENT

As noted above, premium payments may serve two purposes -- to provide funds to protect public health and the environment in the event that additional response work will be needed at the site or to protect against the risk that site remediation cost overruns may occur. In evaluating the offer, EPA must determine whether the amount of the premium is adequate given the risks assumed. The factors specified in Sections 122(f)(4) and 122(f)(6) of CERCLA, used to determine if extraordinary circumstances exist, should also be considered in determining the amount of the premium payment. The factors specified in Section 122(f)(4) that relate to the effectiveness, reliability, and permanence of the remedy are particularly important in determining the likelihood that additional response work may be necessary and the associated possible costs.

A. Future Liability Premiums

Despite best efforts by the Agency or PRPs to design and implement a satisfactory remedy, future problems may arise at the site due to remedy failure or mistaken assumptions about the effectiveness of the remedy. In addition, the discovery of new information about site conditions or new scientific determinations regarding what

levels of contaminants present a risk to humans or to the environment may make additional work necessary. One way such new information may become available is through the Section 121(c) five year review EPA is required to conduct for all remedial actions at sites where hazardous substances remain.

In determining the amount of a "future liability" premium, two general factors should be considered: the likelihood that future remediation will be required and the cost of such remediation. The resulting premium could be a percentage of the total estimated cost of the remedy.

1. The likelihood that further remediation will be required: The need for further work may depend on the effectiveness and reliability of the remedy. Factors such as whether the remedy selected has been demonstrated to be effective under similar conditions at other sites, whether the remedy selected involves treatment or incineration as opposed to containment, whether the settlement agreement includes specified performance standards, or the extent to which the remedy provides a comprehensive solution to site contamination, all bear on the level of the premium.

The risk that further work will be required also depends on the extent to which all relevant environmental conditions have been discovered and evaluated. For example, additional information about relevant conditions developed

during the remedial design phase may enhance the Agency's confidence in the selected remedy.

In addition, the time necessary to complete the remedy may affect the risk of further contamination occurring. For example, if a long period of temporary storage will precede disposal or treatment, the premium should be calculated so as to protect against releases during storage.

2. The cost of further remediation: Any premium payment must be based in part on an estimate of the cost of conducting additional remedial work should the chosen remedy fail to abate the hazards posed by the site. EPA's estimate should be based on a site-specific estimate of the most probable costs of the additional response action. Where the estimated cost of replacing, repairing, or otherwise supplementing the remedy is very high, the government should either retain the right to pursue the settling PRPs for additional work or costs, or require a premium payment commensurate with the cost and the risk that future remediation will be necessary.

B. Cost Overrun Premiums

The Agency also recognizes the possibility that a selected remedial action will cost more than originally estimated because, for example, (1) the cost estimate was inaccurate or (2) estimates concerning the amount or type of material to be treated or the length of time for treatment

were inaccurate.[9] EPA can guard against these cost overruns by reserving the right to seek reimbursement for any overruns or by requiring an up-front payment of a "cost overruns" premium. The amount of the premium should be based on the reliability of the Agency's cost estimate, taking into account such factors as the length of time needed to complete the remedy and any historical data on instances where actual costs of site remediation exceeded projected costs. The premium could be a percentage of the estimated cost of the remedy based on the risk of such cost overruns.

C. Settlement Amount

In determining the total settlement amount, the premium payment must be added to the total response costs. This base amount to which the premium is added should include past costs, indirect costs, prejudgment interest, the estimated cost of the remedy (unless performed by PRPs), oversight costs, operation and maintenance costs, and technical assistance grants. The total settlement amount would be the base amount plus the premium. Generally, the settlement agreement should specify which portion of the premium payment is allocated to present liability and which portion to future liability.

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[9] If estimates concerning the amount or type of material to be treated were inaccurate because of unknown conditions or new information, the resulting additional costs would be considered part of the responsible party's future liability.

IV. TIMING OF PREMIUM PAYMENT SETTLEMENTS

The Agency usually should not consider a premium payment settlement unless it has adequate information about the identity, waste contributions, and viability of PRPs for the site concerned, and about the costs of remediating site contamination. The Agency develops information about PRPs through PRP searches, the remedial investigation and feasibility study (RI/FS), and information-gathering activities under Sections 104(e) and 122(e) of CERCLA and Section 3007 of the Resource Conservation and Recovery Act. A Nonbinding Preliminary Allocation of Responsibility (NBAR), authorized by Section 122(e)(3) of CERCLA, if prepared, may also provide significant information for evaluating a premium payment settlement.[10]

- Premium payment settlements should not be pursued until the Agency is able to determine the likely remedial action and estimate, with a reasonable degree of confidence, the total cost of cleaning up the site, including oversight and operation and maintenance. The Agency usually will arrive at this level of confidence only after the RI/FS and a

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[10] See, EPA's "Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility (NBAR)," 52 Fed. Reg. 19919 (May 28, 1987). Section 122(e)(3) of CERCLA authorizes EPA, at its discretion, to prepare an NBAR which allocates 100 percent of response costs among PRPs in order to promote and expedite settlements.

Record of Decision (ROD) have been completed.[11] A premium payment settlement could be considered earlier if the Agency is relatively confident of its ability to estimate future response costs, and the premium payment amount reflects the increased level of uncertainty.[12]

V. USE OF THE PREMIUM

Normally, premium payments will be made to the Hazardous Substances Superfund. The Agency is exploring the circumstances under which it may be appropriate for settling PRPs to establish site-specific trust fund or escrow accounts. Further guidance on this issue will be provided by separate memorandum.

If the costs of the remedy exceed the recovery from settling PRPs (including the premium), EPA will generally seek to recover remaining costs from other PRPs. The Agency may also approve comprehensive settlements in which certain PRPs pay a premium to other PRPs who, in exchange, agree to accept the responsibility of those premium-paying PRPs regarding site liability, including any possible future liability.

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[11] Timing considerations for settlements with de minimis PRPs are discussed in greater detail in EPA's "Interim Guidance on Settlements with De Minimis Waste Contributors Under Section 122(g) of SARA," 52 Fed. Reg. 24333 (June 30, 1987).

[12] Early premium payment settlements may also be appropriate in exceptional cases, such as where bankruptcy exists.

Normally, both the base amount and the premium will reduce the government's claim for costs associated with performance of the remedy. However, in settlements involving a premium for future liability, EPA may segregate the portion of the premium paid for future liability. In certain cases, EPA may determine that it is appropriate to require PRPs to set aside the premium in a site-specific account established by the PRPs for use if the remedy fails. If such an account is established, future liability premiums would not reduce the amount owed by subsequent settlors or non-settlors for present liability (i.e., the present remedy). Rather, premiums for future liability will only reduce subsequent settlors' or non-settlors' future liability when and if additional cleanup is required to protect public health or the environment. Until then, the government will not have accepted the premium payment.[13]

Premium payments may be particularly useful in mixed funding or mixed work situations. For example, EPA may require a premium payment from PRPs to protect against cost overruns and remedy failure for EPA's portion of the work in a mixed funding or mixed work site.[14]

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[13] The settlement agreement also should specify how the premium payment is to be distributed if it is not used for remedial activities.

[14] Where a de minimis settlement precedes a mixed funding agreement, any premium payment obtained from de minimis parties would reduce the share to be contributed by the Fund as part of the subsequent settlement.

VI. PURPOSES AND USE OF THIS MEMORANDUM

This memorandum and any internal procedures adopted for its implementation, are intended solely as guidance for employees of the U. S. Environmental Protection Agency. They do not constitute rulemaking or final action by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OSWER Directive Number 9835.4-2A

NOV 18 1988

MEMORANDUM

SUBJECT: Initiation of PRP-financed Remedial Design in Advance of Consent Decree Entry

FROM: J. Winston Porter
Assistant Administrator for
Solid Waste and Emergency Response

Thomas L. Adams, Jr. by
Assistant Administrator for
Enforcement and Compliance Monitoring

TO: Regional Administrators

This memorandum addresses a process for expediting the initiation of response work by potentially responsible parties (PRPs) at sites where agreements with PRPs have been reached and where PRPs will agree to begin remedial design work promptly, but where a consent decree has not yet been entered by the court.

For PRP-financed remedial design/remedial action (RD/RA) activities, the initiation of response work, including the remedial design, has historically been dependent on the entry of a consent decree. This usually means a delay of at least several months between the time agreement is reached and when the consent decree is entered and work actually begins. Delays in initiating remedial designs and consequently remedial actions, are inconsistent with EPA's effort to expeditiously remediate sites and meet the statutory goal for remedial action starts. It is in the interest of both the government and PRPs to begin work as quickly as possible.

EPA's strategy is to encourage PRPs to agree to settlements wherein engineering design work can proceed upon the lodging of a consent decree by EPA, or where litigation is already pending, upon execution of a stipulation. Where PRPs have agreed to early initiation of a remedial design and a complaint has not been

filed prior to the lodging of a consent decree, the proposed consent decree should provide for conduct of the remedial design upon lodging. The consent decree should specify the obligations regarding design that start upon lodging. In addition, the consent decree should clarify that, following entry of the consent decree, these obligations concerning remedial design are subject to enforcement (including stipulated penalties) pursuant to the consent decree retroactive to lodging. Where a complaint has been filed, alternatively, a stipulation for conduct of the remedial design may be filed after the ROD is signed, if negotiations are sufficiently well along that EPA is confident that the PRPs will agree to commit to conduct the remedy. Such a stipulation should include schedules and be enforceable by the court.[1] The stipulation should specify that the obligations thereunder shall be obligatory until expressly superceded by any subsequently entered consent decree. Another way which is less preferred, but may be used to accomplish this same goal where PRPs have agreed to early initiation of a remedial design, is for EPA to issue an administrative order solely for the remedial design, leaving the remaining portions of the remedial action for a consent decree under Section 122 of CERCLA.[2] In determining whether to issue an order for a remedial design, Regions should consider the preference for a complete remedial design/remedial action settlement and whether it is likely that the PRPs will not agree to conduct the remedial action.

EPA recognizes that there are limited risks in requiring the remedial design to begin prior to the entry of a consent decree. First, it is conceivable that the settlement will not be agreed upon by the parties or ultimately approved by the court, which would require additional expenditures by the PRPs to modify the remedial design. In keeping with the public's right to review consent decrees, the Federal Register notice prepared by DOJ

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[1] Under either approach, remedial design work would not have to be delayed pending completion of CERCLA Section 122(d) procedures for public comment of proposed consent decrees. Consistent with established Agency policy, a remedial design is considered to be a removal action, and thus outside the scope of Section 122(d)(1), which covers proposed agreements concerning remedial action under Section 106. Thus, while the Agency may voluntarily agree to subject the terms of the remedial design portion of a proposed Section 106 remedial action consent decree to the procedures of Section 122(d), there is no legal requirement to do so.

[2] A Section 106 unilateral administrative order is not subject to Section 122(d) requirements, so that remedial design work could begin immediately.

ATTACHMENT

PRE-SETTLEMENT REMEDIAL DESIGN STIPULATION AND AGREED ORDER

UNITED STATES DISTRICT COURT
DISTRICT OF _____

_____
UNITED STATES OF AMERICA,

CIVIL ACTION

PLAINTIFF

NO. _____

v.

_____

_____,

DEFENDANTS.

_____

STIPULATION AND AGREED ORDER

Plaintiff, the United States of America, ("United States") has filed an action under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. Section 9606, 9607 et seq., (CERCLA) against_____, ("Settling Parties").

In order to expedite the commencement of the remedial action at the _____ site, which is the subject of this action, the United States and the Settling Parties, stipulate as follows:

[The following provisions of the stipulation are provided as examples. The provisions should be developed on a site-specific basis and reviewed for completeness by the Region. OSWER Directive No. 9350.0-4A "Superfund Remedial Design and Remedial Action Guidance" may be consulted for guidance on steps and deliverables. State and/or Regional Remedial Project Manager review requirements should be included as appropriate. Language in the stipulation should closely track that used in the workplan attached to the Consent Decree so as to eliminate any possibility of inconsistency].

should specify that certain actions are triggered by, and start upon, lodging a consent decree or filing a stipulation. Since the public will have already had the opportunity to comment on the remedy, where the remedial design is consistent with the remedy, no additional comment is required. Comments should, therefore, be directed toward the settlement itself and the risk of remedial design modification is minimal. Second, Regions should ensure that the PRP's remedial design, upon approval by EPA, is acceptable for implementation by EPA in the event that the PRPs do not agree to implement the remedial action. Notwithstanding these risks, the requirement for early initiation of remedial design work is important in the context of all RD/RA negotiations. Language requiring these actions should go to the PRPs as part of, or along with, the draft consent decree at the time special notice is issued. A model stipulation is attached.

The effect of this strategy will be to reduce the time involved prior to initiation of on-site response work in those cases where PRPs are committed to undertaking the remedial action and willing to begin early design. This will further the statutory and programmatic goal to facilitate remedial action starts. For more information please contact Brad Wright in OWPE at FTS 382-4837 or Janice Linett in OECM-Waste at FTS 475-8173.

Attachment

cc: Directors, Waste Management Division,
Regions I, IV, V, VII, VIII
Directors, Hazardous Waste Management Division,
Regions III, VI
Director, Emergency and Remedial Response Division,
Region II
Director, Toxics and Waste Management Division, Region IX
Director, Hazardous Waste Division, Region X
Regional Counsels, Regions I-X
Superfund Enforcement Branch Chiefs
RCRA/CERCLA ORC Branch Chiefs
David Buente, DOJ

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

NOV 28 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONS

MEMORANDUM

SUBJECT: Guidance on Applicability of EPA Order 3500.1 to CERCLA Staff

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

Henry L. Longest II, Director
Office of Emergency and Remedial Response

TO: Waste Management Division Directors
Regions I - X
Environmental Services Division Directors
Regions I - X

On June 29, 1988, EPA Order 3500.1 established training requirements for Compliance Inspectors/Field Investigators. This Order applies to all EPA personnel who lead or oversee the conduct of compliance inspection/field investigations on a full or part-time basis under any of EPA's statutes, including CERCLA.

However, since CERCLA staff do not perform classic compliance inspections, the Order allows the CERCLA program offices to define, through guidance to the Regional Administrators, which CERCLA staff shall be subject to the Order's requirements. It also indicates that a CERCLA-specific curriculum is being developed to address the required training.

Applicability

The following definition shall be used to determine the CERCLA staff subject to the Order's training requirements:

"All staff who collect samples, conduct field audits or oversee Potentially Responsible Party (PRP) projects for the purpose of ensuring PRP compliance or for obtaining evidence to use in potential enforcement actions."

This definition should include, at a minimum, On-Scene Coordinators (OSCs) and Remedial Project Managers (RPMs) involved in field activities. However, it is understood, per Section 9d(2) of the Order, that the Regional Administrator makes the final determination of who in the Region is subject to the Order and is responsible for reviewing and approving any exceptions to the training requirements.

Curriculum

In addition to the health and safety training currently required, the Order mandates a minimum of forty hours that cover:

- Legal fundamentals - introduction to enforcement of EPA statutes, overview of enforcement and compliance goals and strategies, administrative and judicial litigation processes, legal authority and EPA policies regarding gaining entry, use of information-gathering tools, and defining and documenting evidence

- Technical issues - roles and responsibilities of an inspector/investigator, violation detection and investigative techniques, records inspection, statistical sampling strategies, obtaining physical samples, QA/QC, and lab analysis

- Communication skills - notification, negotiation techniques, elements of an inspection plan, written documentation & reporting requirements

- Administrative - planning considerations, travel, records management, organizational structure, contract mechanisms

To meet these requirements, our offices will slightly modify the "OSC/RPM Basic Course". Additionally, the OSC/RPM Support Program developed by OERR calls for an OSC/RPM Academy to be piloted in April 1989 which will provide 41 days of required training for new OSCs and RPMs that will also meet, as part of its curriculum, the training requirements in EPA Order 3500.1.

At this time, it is not anticipated that any additional training courses or materials will need to be developed to meet the Order's requirements.

If you have any questions about or problems with the proposed definition of affected CERCLA staff or the curriculum, please feel free to contact either of us.

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

DEC 14 1988

OSWER DIR. #9841.0
OFFICE OF
SOLID WASTE AND EMERGENCY RESPONS

MEMORANDUM

SUBJECT: Interim Strategy for Enforcement of Title III and CERCLA §103 Notification Requirements

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

TO: Director, Waste Management Division
Regions IV, V, and VIII

Director, Emergency & Remedial Response Division
Region II

Director, Environmental Services Division
Regions I and VI

Director, Hazardous Waste Management Division
Region III

Director, Toxics and Waste Management Division
Region IX

Director, Hazardous Waste Division
Region X

Director, Congressional & Intergovernmental Liaison
Region VII

PURPOSE

The purpose of this memorandum is to provide interim guidance concerning enforcement of §§302, 303, 304, 311, 312, and 322 of the Emergency Planning and Community Right-To-Know Act (Title III of the Superfund Amendments and Reauthorization Act - SARA) and the §103 notification requirements of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The interim strategy will discuss the following subjects:

- Enforcement provisions under Title III (§§325 and 326), and CERCLA §109;
- General priorities for EPA enforcement;

- Enforcement of CERCLA §103 and Title III §304;
  - Relationship between CERCLA §103 and Title III §304;
  - The substance of §304 reports;
  - Identifying §103/§304 violations;
  - Priorities;
  - Enforcement response;
- Enforcement of §§302, 303, 311, and 312;
  - Identifying violators;
  - Enforcement response;
- Enforcement of §322;
- Coordination; and
- Delegations.

Central to the enforcement of Title III is the development of working relationships with the Regional Preparedness Coordinator, the §313 enforcement contact, the Office of Regional Counsel, enforcement personnel from other media offices, and most importantly, with the State Emergency Response Commissions (SERCs) for each State in the Region. This guidance provides a framework for implementing the enforcement program in the Regions.

STATUTORY STRUCTURE AND ENFORCEMENT PROVISIONS

Title III establishes requirements for emergency planning at the State and local level, and provides residents and local governments with information concerning potential chemical hazards present in their communities. The Act is divided into three subtitles. Subtitle A, Emergency Planning and Notification, establishes a framework for local emergency planning. Subtitle B, Reporting Requirements, promotes community awareness of hazardous chemicals present in the locality. Subtitle C, General Provisions, relates to enforcement, trade secret protection, and public availability of information.

The enforcement sections of Subtitle C (§325 and §326) authorize EPA, State and local governments, and citizens to take legal action against owners or operators of facilities who fail to comply with Title III. EPA has administrative and civil judicial authority to enforce Title III. The United States may also seek imprisonment and fines for violations of the §304 emergency notification requirements and violations of the §322 trade secret provisions. States, local governments and citizens

Table I. TITLE III ENFORCEMENT AUTHORITIES

A. SUBTITLE A EMERGENCY PLANNING AND NOTIFICATION

REQUIREMENT	FEDERAL	STATE & LOCAL	CITIZEN
§302(c) o/o with EHS>TPQ notify SERC by 5/17/87 that facility is subject to Act.	§325(a) Administr may order o/o to comply. USDC has authority to enforce + penalty ≤ $25k/day.	§326(a)(2)(A)(i) State & Local Gov. may file civil action for failure of o/o to notify SERC. Venue USDC.	No authority.
§303(d) o/o must appoint fac. rep. to participate in planning 9/17/87 & provide info for planning as needed.	§325(a) Administr. may order o/o to comply. USDC has authority to enforce + penalty ≤ $25k/day.	§326(a)(2)(B) SERC or LEPC may file civil action against o/o for failure to give information. Venue USDC.	No authority.
§304 o/o must notify SERC & LEPC immediately after release of EHS or CERCLA HS ≥ RQ.	§325(b)(1), (b)(2) Class I ≤ $25k/vio & Class II ≤ $25k/day penalties by AO or in USDC. Criminal penalty ≤$25k/day and/or 2 years.	No authority under §326(a)(2). See §326(a)(1).	§326(a)(1)(A)(i) any person can start civil action against o/o for failure to submit follow-up report. Venue USDC.

B. SUBTITLE B REPORTING REQUIREMENTS

REQUIREMENT	FEDERAL	STATE & LOCAL	CITIZEN
§311 o/o who must prepare MSDS for OSHA must submit MSDS/list to SERC, LEPC & fire dept. by 10/17/87	§325(c)(2),(4) Administr can assess penalty ≤ $10k/viol/day by AO or in USDC.	§326(a)(2)(A)(ii) & (iii) State & Local Gov. can file civil actions in USDC against o/o for failure to submit MSDS.	§326(a)(1)(A)(ii) any person can start civil action against o/o for failure to submit MSDS. Venue USDC.
§312(a) o/o that must prepare MSDS under OSHA must also submit Tier 1 information 3/1/88, then annually.	§325(c)(1),(4) Administr can assess penalty ≤ $25k/viol/day by AO or in USDC.	§326(a)(2)(A)(iv) State & Local Gov. can file civil action in USDC against o/o for failure to submit Tier 1 info.	§326(a)(1)(A)-(iii) any person can start civil action in USDC against o/o for failure to submit Tier 1 info.
§313 o/o of facil. that manuf., process or used a toxic chemical in previous year must submit TRI form annually starting 7/1/88.	§325(c)(1),(4) Administr can assess penalty ≤ $25k/viol/day by AO or in USDC.	No authority under §326(a)(2). See §326(a)(1).	§326(a)(1)(A)(iv) any person can file an action in USDC against an o/o for failure to submit a TRI form.

C. SUBTITLE C GENERAL PROVISIONS

REQUIREMENT	FEDERAL	STATE & LOCAL	CITIZEN
§322(a)(2) o/o must submit info to support trade secret claim	§325(c)(2) Administr may assess penalty ≤ $10k/viol/day by AO or in USDC.	No authority.	No authority.
§322(d) claim must not be frivolous.	§325(d)(1) Administr may assess penalty of $25k/claim for claim that is unsubstantiated or not a T.S. and frivolous by AO or in USDC.	No authority.	No authority.
§323(b) o/o must submit a MSDS, inventory form, and a TRI form to physician who requests info for emergency case.	§325(c)(2) Administr may assess penalty ≤ $10k/violation by AO or in USDC.	No authority.	§325(e) Health professional may file action in USDC to compel o/o to comply. USDC may issue order and enforce.

can take civil judicial actions to enforce against violators of various sections of the Act.

For each requirement in Title III, the enforcement authorities vary. In some instances, Federal authority is primarily administrative, in other instances it is judicial. For some, but not all, requirements there is express authority for State and local suits. For some, but not all, requirements there are citizen suits. Also, §109 of SARA amended CERCLA by providing civil administrative penalties for violations of specified provisions of CERCLA, including violations of §103 (relating to failure to report releases of CERCLA hazardous substances). Section 109 authorizes Class I and Class II administrative and judicial penalties for violations of §103.

Title III enforcement authorities are summarized in Table I (next page). Appendix A provides further details on facility reporting requirements and CERCLA §103/Title III enforcement authorities.

GENERAL PRIORITIES FOR EPA ENFORCEMENT

The Office of Solid Waste and Emergency Response (OSWER) and the Office of Pesticides and Toxic Substances (OPTS) share responsibility for developing the strategy for Title III enforcement. Within OSWER, the Office of Waste Programs Enforcement (OWPE) is responsible for developing the enforcement strategy for §§302 and 303 (Emergency Planning), §304 (Emergency Notification), §311 (Material Safety Data Sheet (MSDS) Submissions), and §312 (Emergency and Hazardous Inventory Submissions). OPTS issued a compliance monitoring strategy for §313 on July 15, 1988. Section 313 enforcement will not be discussed in detail in this interim strategy.

With the notable exception of §313, Congress intended that implementation of Title III be mainly a State and local function. The Title III enforcement strategy acknowledges that EPA, States, local governments and citizens share responsibility for enforcing Title III. Two approaches are planned for enforcing §§302-312. First, EPA will initiate enforcement actions against owners and operators who fail to provide emergency notice after a release as required under §304. In developing these cases, EPA will coordinate with the SERCs and Local Emergency Planning Committees (LEPCs) to ascertain the facilities' compliance with other sections of the Act. Second, Regional enforcement personnel will develop enforcement contacts in all the SERCs to coordinate activities for enforcement of violations of the planning provisions (§§302-303) and the community right-to-know reporting

Title III §304(b) specifically indicates to whom and what types of information should be provided. Notice is to be given immediately after a release by the owner or operator of a facility to the community emergency coordinator for any affected LEPCs and to the SERCs for all States likely to be affected by the release. Verbal notice to the LEPC and SERC must include the following information (to the extent it does not delay the response):

- Chemical name or identity of any substance involved in the release;
- Indication of whether the substance is on the §302(a) list;
- Estimate of the quantity released;
- Time and duration of the release;
- Medium or media into which the release occurred;
- Any known or anticipated acute or chronic health risks associated with the emergency;
- Proper precautions to take as a result of the release, including evacuation; and
- Name and telephone number of the person to contact for further information.

Title III §304(c) requires the owner or operator of a facility that had a release which required immediate notice under §304(a) to provide a written followup emergency notice setting forth and updating the information required under subsection (b) as soon as practicable after the release. This written report should update the verbal notice and include additional information with respect to:

- Actions taken to respond to and contain the release;
- Any known or anticipated acute or chronic health risks associated with the release; and
- Where appropriate, advice regarding medical attention necessary for exposed individuals.

The original Title III §302 EHS list can be found in 40 CFR Part 355, Appendices A and B. These appendices were recently amended (40 substances were deleted). The delisted chemicals

requirements (§§311-312). EPA regional personnel will also monitor §313 submissions for chemicals required to be reported under §302.

ENFORCEMENT OF CERCLA §103 AND TITLE III §304

Because the notice provisions of CERCLA and Title III overlap, EPA will combine enforcement of CERCLA §103 and Title III §304 where possible.

Relationship Between CERCLA §103 and Title III §304

CERCLA §103 and Title III §304 serve similar purposes. CERCLA §103 requires the person in charge of a vessel or facility to notify the National Response Center (NRC) immediately after a release of a CERCLA hazardous substance in an amount greater than or equal to its reportable quantity (RQ). In addition, Title III requires the owner or operator of a facility to notify the SERC and the LEPC for all releases that require CERCLA notification and for releases of extremely hazardous substances (EHSs) in amounts greater than or equal to their reportable quantities. Title III thereby expands upon the reporting system established under CERCLA and coordinates emergency response between Federal, State and local governments.

Currently, 134 of the 366 Title III EHSs are also CERCLA hazardous substances with established reportable quantities. EPA plans to propose a rule designating the remainder of the EHSs as CERCLA hazardous substances in the future.

Designation of EHSs as CERCLA hazardous substances will expand EPA's ability to use its authority under CERCLA §104 to access facilities, gather information, and respond consistent with the National Contingency Plan (NCP), to releases. CERCLA §106(a) gives EPA the authority to require any action necessary, including the issuance of enforcement orders, to abate any imminent and substantial endangerment resulting from the actual or threatened release of a CERCLA hazardous substance. Section 107 of CERCLA establishes the liability of responsible parties for the cost of a response action taken under §104.

Substance of CERCLA §103 and Title III §304 Reports

CERCLA §103(a) requires the person in charge of a vessel or facility to notify the NRC immediately when there is a release of a designated hazardous substance in an amount greater than or equal to its reportable quantity. For CERCLA hazardous substances without a designated RQ, a release of one pound or more triggers the notice requirement. The CERCLA hazardous substances are listed in Table 302.4, 40 CFR Part 302.

facility under CERCLA §104(e) with the sole purpose of enforcing Title III.

Priorities

In developing enforcement actions for violations of §103/§304, Regional enforcement personnel should try to target a cross section of the regulated community. Reporting of EPA enforcement actions in relevant publications, should help increase awareness of Title III and provide a deterrence.

The Regions should consider the following circumstances in assessing the priority to be given an enforcement action against a given violator:

- The volume and substance released;
- The nature, if any, of environmental or health threats resulting from the release;
- The efforts made by the facility to comply with the notification requirements;
- Aggravating or mitigating circumstances, such as the facility's compliance with other Title III requirements;
- The significance of the violation to the SERC and LEPC; and
- The effect on the overall enforcement program.

Enforcement personnel should communicate with the appropriate SERC during the development of any notification related enforcement action to check the violating facility's compliance with all other sections of Title III. If the SERC provides evidence that the facility in question has violated other sections of Title III, those violations should be included in the enforcement action.

Enforcement Response

Under CERCLA §109 and Title III §325(b), EPA can assess administratively either Class I or Class II civil penalties. EPA can also refer civil judicial or criminal actions to address violations. Administrative penalties can be assessed after the person accused of the violation has been notified and given the opportunity for a hearing. Procedures for assessing administrative penalties under CERCLA §109 and Title III §325 are

were published in the Federal Register on February 25, 1988. The current list of EHSs and the list of deleted chemicals can be seen in Appendix B.

Identifying §103/§304 Violators

Each Region should develop a simple information gathering system to identify potential violations. This information gathering effort should not be resource intensive. In many instances, State or local agencies will be able to provide the necessary information. EPA's information gathering efforts for identifying §103/§304 violations should include reviewing:

- Information from SERCs and LEPCs;
- NRC reports for third party notifications;
- News reports, including wire and clipping services; and
- Cases being developed by other media offices for violations that could include violations of the Title III and CERCLA §103 emergency notification provisions.

Additionally, Regions should use information requests under CERCLA §104(e)(2)(B) to determine whether or not there has been a violation of §103[1]. CERCLA §104(e)(2)(B) authorizes EPA, or any designated representative of a State under a contract or cooperative agreement, to require any person who has, or may have, information relevant to a release of a CERCLA hazardous substance, pollutant or contaminant to furnish information to EPA so that the Agency can determine the need for a response, choose or take a response action and enforce the provisions of CERCLA.

CERCLA §104(e) also provides authority for EPA to access and inspect facilities if there has been a release, a threat of a release, or if there is a reasonable basis to believe there may have been a release of a CERCLA hazardous substance, pollutant or contaminant. Section 104(e) authorizes inspections to determine the need for a response, to choose or take a response action and to enforce the provisions of CERCLA. Information gathered during the CERCLA inspection, if gathered for the CERCLA purposes mentioned above, can be used as evidence in prosecuting Title III violations. However, the Agency does not intend to enter a

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[1] Final guidance on use and enforcement of CERCLA §104 information requests and administrative subpoenas was issued by the Office of Enforcement and Compliance Monitoring (OECM) on August 25, 1988. The information sought should be tailored to CERCLA §103.

Regions should be in regular contact with SERCs to identify cases that they are interested in having EPA pursue. EPA enforcement personnel should establish a contact in each of the SERCs in their Region and coordinate with these contacts on the general approach of the SERC to enforcement, as well as their successes, concerns and needs for Federal enforcement assistance. At the very least, the Regional enforcement personnel need to keep abreast of State enforcement activities and consult with SERCs when initiating an enforcement action.

Identifying Violators

The ideal way to figure out who has violated §302 would be to compare reports submitted to the States with a master list of everyone who has those chemicals above threshold levels. Obviously no such list exists. However, there are some sources of information that can be used to help identify facilities required to report under §302.

OWPE is currently undertaking two projects to help the Regions, States and LEPCs identify producers and users of §302 chemicals. The first project will provide a list, by State, of the facilities that are producing §302 chemicals, which chemicals they produce, and production volumes for those chemicals. The list was developed using the Chemical Update System (CUS) and contains information submitted between 1984-86.

The second project is intended to provide LEPCs with a targeting tool to identify facilities that are potentially using §302 chemicals. Using the National Air Toxics Inventory Clearing House (NATICH) database, OWPE is developing Standard Industrial Classification (SIC) code/chemical crosswalks. The first crosswalk will list all the 4-digit SIC codes with the §302 chemicals that are typically used in them. The second crosswalk will list all the §302 chemicals with all the SIC codes in which they are found. These crosswalks are intended to be generic targeting tools that can be used in conjunction with data available through the State Commerce Departments. The Commerce Departments should be able to provide LEPCs with information on facilities that are active in their counties/localities, the SIC codes the facilities operate under and the number of employees or other business information. Together, the Commerce data and the chemical crosswalks should provide an indication of some of the facilities that are potentially required to report under Title III.

The list of facilities that reported under §313 can also be used to identify facilities that are required to comply with §302. There is a substantial overlap between the §302 EHS list and the §313 toxic chemical list (See Appendix C). Some Toxic

being developed by OECM. In the interim, Regions should follow the administrative procedures codified at 40 CFR Part 22.

Under CERCLA §109 and Title III §325, Class I penalties for §103/§304 violations are assessed per violation; Class II penalties for §103/§304 violations are assessed per violation per day. Penalties for violations of Title III §§311, 312, 313, 322(d) and 323(b) also can be assessed each day a violation continues.

For all unreported releases, possible criminal proceedings must be considered. Regional enforcement personnel should coordinate with Regional Counsel and the Special or Resident Agent in Charge (SAC or RAC) soon after discovery of the violation to decide whether criminal proceedings are in order. Except for criminal violations, Regional enforcement personnel should invoke the least resource consuming enforcement option that will adequately address the situation. Typically, administrative procedures should be effective.

During case development, the appropriate SERC should be contacted to determine the alleged violator's compliance with other sections of the statute and to find out if proceedings are already underway at the State level (under a provision of State law).

ENFORCEMENT OF §§302, 303, 311, AND 312

Title III §302(c) requires the owner or operator of a facility at which an EHS is present in an amount exceeding a threshold planning quantity (TPQ) to notify the SERC that the facility is subject to Title III. Section 303(d) requires owner/operators of facilities regulated under §302 to notify the LEPC of a facility representative who will participate in the planning process. EPA is authorized under Title III §325(a) to issue compliance orders for violations of §§302 and 303 and may seek judicial enforcement of the order and penalties for failure to comply with it.

Sections 311 and 312 require owners and operators of facilities that have EHSs or hazardous chemicals in excess of certain thresholds to submit MSDSs and chemical inventories to the SERC, LEPC and local fire department. Under §325(c), EPA has civil judicial and administrative penalty authority for violations of §§311 and 312.

Because the compliance information is maintained at the State and local level, enforcement personnel will need to coordinate with a SERC enforcement contact to prepare each case.

where the owner or operator's recalcitrance justifies a civil judicial enforcement action.

Violations of §§311 and 312 can be addressed through administrative procedures or judicial referrals. Regional enforcement personnel should consult with OWPE and OECM-Waste before deciding to refer cases to the Department of Justice. Again, enforcement personnel should discuss any potential enforcement action with the SERC and LEPC involved.

ENFORCEMENT OF SECTION 322

Title III §322 establishes the procedures for claims that information submitted under §§303, 311, 312, and 313 is trade secret. Claims will be processed and reviewed by OSWER and OPTS for completeness, sufficiency, and to make final determinations of validity. If errors and/or omissions are found during initial processing and review, OWPE will send the trade secret claimant a Notice of Noncompliance. The Notice will advise the claimant of the errors or omissions that were found and require the claimant to either amend or withdraw the claim within 30 days.

Penalties of up to $10,000/day can be assessed for failure to comply with the Notice. If the claimant fails to comply with the Notice, OWPE will forward the case to OECM for enforcement.

A penalty of $25,000/claim can be assessed for frivolous claims under §325(d). Section 325(d) authorizes the Administrator to assess this penalty if he determines that the trade secret claim is frivolous and the claim meets either of the following criteria: the claim is not sufficient (i.e, the claimant presents insufficient assertions to support a finding that a specific chemical is a trade secret), <u>or</u> that the claim is not a trade secret. Enforcement of frivolous claims will be done through EPA headquarters.

COORDINATION

Violations of other statutes resulting from a release may also be violations of the Title III/CERCLA notification requirements. Title III/CERCLA §103 enforcement personnel are urged to coordinate with other offices (Air, Water, RCRA, TSCA, etc.) to identify cases where violations of Title III/CERCLA notification could be consolidated with other enforcement actions. Release-related violations under other statutes will help identify facilities that have failed to comply with Title III reporting requirements.

Release Inventory submissions are likely to include reports for one or more of these EHSs. Therefore, this information would link the facility to the §§302-312 reporting requirements.

Past accidental spill data in the Emergency Release Notification System (ERNS) may lead to the identification of §302-303 violators. Spills of EHSs above their reportable quantities may indicate that a facility should have notified the State under §302 of Title III.

As for identifying violators of §§311 and 312, cross checking information in CUS with §§311-312 reports submitted to States should be productive. Although CUS contains a lot of Confidential Business Information (CBI) data, lists of facilities and the chemicals they manufacture or import can be generated without using the CBI data. Because the OSHA definition of hazardous chemical is so expansive (any chemical that presents a physical or health hazard), most if not all chemicals reported in CUS would be reportable under §§311 and 312[2].

Past accidental release information also will be useful in identifying §§311-312 violators. Releases of hazardous chemicals in excess of 10,000 pounds would indicate that the facility owner or operator should have submitted MSDSs or a list of MSDSs and a §312 inventory form.

The enforcement person may also want to establish contacts in the regional OSHA office to share information on potential §§311 and 312 violators. These relationships also should be helpful when you need interpretations of the OSHA MSDS requirement under their Hazard Communication Standard.

Finally, in the release incidents investigated thus far SERCs and LEPCs have identified violators of §§302-312 as a result of the release. SERCs and LEPCs will continue to be major sources of information for §§302-312 enforcement.

Enforcement Response

Enforcement response for violations of §§302 and 303 should be discussed with the SERC and LEPC. If the respondent cooperates and supplies the requested information, an enforcement action may not be warranted. There may be instances however,

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2 For a complete definition of what constitutes a hazardous chemical see the Department of Labor Hazard Communication Final Rule, 29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928. See also the Federal Register, Vol. 52, No. 163, August 24, 1987.

During preparation for TSCA §§5, 6, and 8 inspections, OPTS Regional enforcement personnel will screen the applicability of §313 to targeted facilities. If the facility is subject to §313, subsequent inspections will monitor compliance. OPTS enforcement personnel will check for compliance with the remainder of the Title III reporting requirements during these inspections and will refer possible violations to OSWER for enforcement action. OSWER enforcement personnel should cross check the alleged violation with the appropriate SERC to verify the violation and then take appropriate enforcement action.

Title III enforcement personnel also should coordinate with counterparts in the Regional office that handle criminal enforcement soon after the discovery of a §103/§304 notice violation. Significant violations should be reviewed for possible criminal violations by the Special or Resident Agent-in-Charge.

DELEGATIONS

Title III delegation 22-3 delegated the authority to take administrative penalty actions to the Assistant Administrator for OSWER (for §§302, 303, 304, 311, 312, 322, and 323) the Assistant Administrator for OPTS (§§313, 322, and 323), and to the Regional Administrators (for all sections) on September 13, 1987. OSWER Redelegation 22-3 (dated May 27, 1988) states that the Regional Administrators or their delegatees must consult with the Director OWPE or his designee before exercising their authority to take administrative penalty actions unless such consultation is waived by memorandum.

CERCLA delegation 14-31 delegated the authority to the Regional Administrators under §109 to make determinations of violations, to assess penalties, to issue notices, orders or complaints, to compile the administrative record upon which the violation was found or the penalty was imposed, and to negotiate and sign consent orders memorializing settlements under §109 between the Agency and respondents. OSWER Redelegation 14-31 states that the Regional Administrators, or their delegatees, must notify the Director OWPE or his designee when exercising any of these authorities.

USE OF THIS MEMORANDUM

This memorandum and internal office procedures adopted pursuant to this memorandum are intended solely for the guidance of employees of the Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to

create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its implementing procedures.

Stipulated by:

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[REGIONAL ADMINISTRATOR]
[Regional Address]

[ORC ATTORNEY]

It is so ordered this _____ day of _____ 19____.

United States District Judge

A. 1) Within thirty (30) days of the filing of this stipulation the Settling Parties shall retain qualified personnel to prepare detailed plans and specifications for implementation of each elemenet of the selected remedy described in the EPA Record of Decision ("ROD") for _____ site dated _____.

2) Within thirty (30) days of the filing of this stipulation the Settling Parties shall submit to the United States for its review and approval a detailed schedule for the completion of the Remedial Design including specific milestones for submissions of plans and specifications, set forth in the Workplan, dated _____ which is attached. [The stipulation should include a specific schedule for the preliminary 30, 60, 90, and the final 100 percent design completion milestones as well as any intermediate submissions that the Region deems necessary.]

3) The Settling Parties shall provide monthly reports to the United States in accordance with the schedule developed pursuant to paragraph A.2. above, together with all background data, analyses and other supporting information for review and written approval by EPA. In the event that the United States disapproves of any plan or portion thereof, it shall specify in writing the reasons why it believes such plan or portion thereof does not conform to the ROD or applicable law or regulation including the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300.

B. All plans and specifications shall be consistent with applicable requirements contained in the ROD and in accordance with CERCLA and the NCP.

[It is important to re-emphasize here that the above provisions should be used as a point of departure for framing those which will actually be included in the stipulation. Such a stipulation is valid only for Remedial Design work and will be entered into by the United States in conjunction with the lodging or anticipated lodging of a Consent Decree for RD/RA. Actual stipulations made should be consistent with this definition.]

C. The Parties to this stipulation acknowledge that this stipulation has been entered into in anticipation of settlement and may be affected by a consent decree expected to be entered subsequent to this filing. The Parties agree to comply with the terms of this stipulation unless the terms of any subsequently entered consent decree expressly supersede the terms of this stipulation.