Orphan Share Implementation Notebook:
A Reference Tool

Office of Site Remediation Enforcement
Orphan Share Assistance Team

August 1996

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

AUG 26 1996

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Orphan Share Reform Implementation Notebook

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Program and ORC Branch Chiefs

In October 1995, Administrator Browner announced an initiative to compensate parties performing work at sites for the shares of insolvent and defunct parties. At sites where parties agree to perform cleanup (either remedial action under a consent decree, or non-time critical removal activity under an agreement on consent), the Agency has committed to compensate a portion of the shares of insolvent and defunct parties. Administrator Browner has committed the Agency to offering up to $50 million in such compensation by the end of the fiscal year.

In order to facilitate Regional implementation of the orphan share reform, please find enclosed a notebook which brings together in one convenient reference, many of the documents needed to implement this reform. The notebook provides background materials, sample documents and informational documents . We are continuing to develop guidances or documents to assist you. A note to this effect (a placeholder) has been inserted, so that when the item is finalized, it can be sent to you for your insertion into this package. Finally, any sample documents included in the notebook are not meant to be mandatory "models," but rather are meant to assist in expediting orphan share offers and settlements.

Regions have raised questions regarding the implementation of the orphan share initiative. We have developed a Questions & Answers section found at Tab 9. For example, questions have been raised regarding the application of the reform to *de minimis* parties. In answer, the final guidance will clarify that Regions may provide orphan share compensation to *de minimis* parties who enter into a global or concurrent settlement under which other parties have agreed to perform the remedy at the site. We encourage Regions to include *de minimis* parties, where appropriate, in the orphan share reform.

We would greatly appreciate your making this notebook available in a central location for the convenience of your staff. In addition, RSD's orphan share team is ready to lend expertise and assistance at any step. One of the attachments (Tab 2) discusses in detail the set-up and role of the team, but for your convenience, we note here the contact for your Region, as well as DOJ designated contacts for your Region:

	EPA Contact	DOJ Contact
Region 1:	Maria Cintron, (202) 564-4227	Henry Friedman, (202) 514-5268
Region 2:	Maria Cintron, (202) 564-4227	Henry Friedman, (202) 514-5268
Region 3:	Kimberly Barr, (202) 564-4212	Lynn Dodge, (202) 514-4485
Region 4:	Melissa Ward, (202) 564-4282	Henry Friedman, (202) 514-5268
Region 5:	Victoria van Roden, (202) 564-4268	Lynn Dodge, (202) 514-4485
Region 6:	Kimberly Barr, (202) 564-4212	Mike McNulty, (202) 514-1210
Region 7:	Victoria van Roden, (202) 564-4268	Mike McNulty, (202) 514-1210
Region 8:	Melissa Ward, (202) 564-4282	Lynn Dodge, (202) 514-4485
Region 9:	David Clay, (202) 564-4228	Henry Friedman, (202) 514-5268
Region 10:	David Clay, (202) 564-4228	Mike McNulty, (202) 514-1210

If you have any questions 1) generally about implementation, please call Patricia Mott, at (202) 564-5133; 2) about the guidance, please call Susan Boushell, at (202) 564-5107 or Patricia Mott at (202) 564-5133; or 3) about allocation issues, please call Deniz Ergener, at (202) 564-4233.

If you have any questions regarding this package, regarding the reform generally, or regarding site-specific issues, please contact us.

cc: Bruce Gelber
Bicky Corman
Linda Boornazian
Orphan Share Workgroup Members
Steve Luftig
Earl Salo

United States
Environmental Protection Agency
August 1996

Superfund Reform: Orphan Share Implementation

NOTEBOOK TABLE OF CONTENTS

- OVER -

Tab 6: **Notice to PRPS (Suggested Sample Notice Letters)**

Tab 6-1) Revision to special notice -- suggested language to insert in special notice to PRPs at sites where reform is applicable

Tab 6-2) Sample letter -- suggested language for a letter notifying PRPs at ongoing negotiations or where special notice already issued to give notice to PRPs that reform may be applicable

Tab 7: **Pre-Approval Procedures** -- how to obtain pre-approval from HQ at sites where remedy exceeds $30 million

Tab 8: **Settlement Documents**

Tab 8-1: Model RD/RA language (oversight billing) [placeholder]

Tab 8-2: Sample Ten Point Settlement language

Tab 9: **Questions and Answers**

Tab 10: **Guidances Referenced in Orphan Share Guidance**

Tab 10-1 Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors (6/3/96)

Tab 10-2 Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily (9/22/95)

Tab 10-3 Final Policy Toward Owners of Property Containing Contaminated Aquifers (5/24/95)

Tab 10-4 Policy Towards Owners of Residential Property at Superfund Sites (7/3/91)

Tab 10-5 Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes (12/6/89)

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 1-1

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

June 3, 1996

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals

FROM: Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

TO: Regional Administrators, I-X

This memorandum transmits the "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals." This guidance provides Regions with further direction to address orphan share compensation in Superfund settlements.

On October 2, 1995, Administrator Browner announced the third in a series of reforms designed to fundamentally change the way EPA implements the Superfund program. This orphan share guidance is the latest installment in the Clinton Administration's commitment to reform Superfund and provide greater fairness, reduce litigation and promote faster cleanup of Superfund sites. One of the cornerstones of the October announcement is the Agency's initiative to exercise its enforcement discretion to provide orphan share compensation at sites where parties agree to perform the cleanup.

This guidance strikes a balance between the budgetary constraints of a lapse in Superfund taxing authority and the desire to provide meaningful reform consistent with the Administration's legislative proposals. In fiscal year 1996 alone, the Administration is prepared to offer over $50 million in orphan share compensation to potential settlement parties.

For further information concerning this guidance, please contact either Susan Boushell (202-564-5107) or Patricia Mott (202-564-5133) in the Office of Site Remediation Enforcement.

Attachment

cc: Elliott Laws, Assistant Administrator for Solid Waste and Emergency Response
Lois Schiffer, Assistant Attorney General, DOJ
Jerry Clifford, Director, Office of Site Remediation Enforcement
Steve Luftig, Director, Office of Emergency and Remedial Response
Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Regions III, IX
Director, Waste Management Division, Region IV
Director, Superfund Division, Regions V, VI, VII
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Environmental Cleanup Office, Region X
Regional Counsel, Regions I-X
Larry Starfield, Associate General Counsel, OGC
John Cruden, Deputy Assistant Attorney General, DOJ
Joel Gross, Chief, Environmental Enforcement Section, DOJ
Bruce Gelber, Principal Deputy Chief, Environmental Enforcement Section, DOJ

INTERIM GUIDANCE ON ORPHAN SHARE COMPENSATION FOR SETTLORS OF REMEDIAL DESIGN/ REMEDIAL ACTION AND NON-TIME-CRITICAL REMOVALS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20460

INTERIM GUIDANCE ON ORPHAN SHARE COMPENSATION FOR SETTLORS OF REMEDIAL DESIGN/REMEDIAL ACTION AND NON-TIME CRITICAL REMOVALS

Policy Statement and Purpose

On October 2, 1995, Administrator Browner announced the third in a series of reforms designed to fundamentally change the way EPA implements the Superfund program. Several of these Superfund Reforms are intended to provide greater fairness, reduce litigation and transaction costs, and promote private party cleanup of Superfund sites. One of the cornerstones of the October announcement was the Agency's initiative to exercise its enforcement discretion to provide orphan share compensation at sites where potentially responsible parties (PRPs) agree to perform the cleanup.

The purpose of this interim guidance is to provide Regions with further direction for providing orphan share compensation in settlements with PRPs. This guidance makes clear that, where EPA determines that there is a share which may be equitably attributed to parties who are insolvent or defunct (i.e., the "orphan share") and which would ordinarily be allocated to viable PRPs under principles of joint and several liability, EPA intends to consider this factor in its assessment of the federal compromise it provides in settlement.[1] EPA anticipates that its willingness to contribute to settlement, based in part upon an increased emphasis on the effect of an orphan share, will facilitate settlement with performing parties.

Of course, the Region's consideration of an "orphan share" is only one component of a Region's settlement analysis. Consistent with our historic practice, the total amount of federal compromise in settlement incorporates other factors in addition to the presence or absence of an orphan share, including: (1) litigation or other risks to recovery or performance; (2) cooperation of performing parties; and (3) the resources of parties. This guidance simply establishes limits upon the amounts the Regions may provide as orphan share compensation in light of current fiscal limitations. This policy preserves the application of common law tort principles of joint and several liability by recognizing the impact of joint and several liability in the settlement analysis factors where EPA determines that an orphan share at a given site may be greater than de minimis.

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[1] This guidance is intended for settlement purposes only and, therefore, orphan share compensation is appropriate only where settlement occurs. In the event that settlement does not occur, Regions should, as appropriate, pursue PRPs jointly and severally for their performance of cleanup and recovery of response costs. Courts have uniformly found that CERCLA liability is joint and several where the harm is indivisible, which ensures that the costs of cleanup are borne by the parties who contributed to the contamination, rather than the tax-paying public. This guidance does not apply where EPA determines or a court finds that PRPs have met their substantial burden of proving as a defense to joint and several liability that the harm is divisible and reasonably capable of apportionment.

Background

Under CERCLA's joint and several liability system, at sites where there are insolvent or defunct parties who cannot contribute to the cost of cleanup, viable PRPs are required to absorb the shares that may be attributable to such non-viable PRPs. In an effort to mitigate this effect and encourage PRPs to perform cleanup, EPA committed in the October 1995 announcement to compensate performing parties for a limited portion of the orphan share in future cleanup settlements. The Agency stated that this compensation might be accomplished through forgiveness of past costs and of projected oversight costs, and would necessarily be subject to the amount of funding available for the program.

Since the October announcement, however, Congress has not reauthorized Superfund, nor has it provided the Agency with a separate appropriation for orphan share compensation. In addition, Congress has not yet reinstated the Superfund taxing authority -- the principal source of revenue for the Superfund Trust Fund -- which expired at the end of 1995. Until these taxes are reinstated, the Trust Fund will continue to be depleted by costs expended to implement the program and achieve cleanups. Because of this lapse in taxing authority and absence of specific orphan share funding in the FY 96 appropriation, EPA examined ways to compensate a portion of the orphan share within existing appropriations.

EPA also determined that it was important to provide incentives for parties to voluntarily perform cleanups, provide the benefits of this reform to as many qualifying sites as possible, recognize cooperative parties, keep transaction costs low, and use readily available information. Finally, the Agency wants to provide appropriate balance between preserving the Trust Fund and providing meaningful implementation of this reform. Based on these considerations, EPA developed a process that would enable the Regions to implement this reform this fiscal year.

Applicability

This reform applies where: (1) EPA initiates or is engaged in on-going negotiations for a remedial design or remedial action (RD/RA) at a site or for a non-time-critical (NTC) removal at a National Priorities List (NPL) site under the Superfund Accelerated Cleanup Model (SACM); (2) a PRP or group of PRPs agrees to conduct the RD/RA or RA pursuant to a consent decree or the NTC removal pursuant to an administrative order on consent (AOC) or consent decree; and (3) an "orphan share" exists at the site.[2] For the purposes of this reform, the term "orphan share" refers to that share of responsibility which is specifically attributable to identified parties EPA has determined are: (1) potentially liable; (2) insolvent or defunct; and (3) unaffiliated with any party potentially liable for response costs at the site. This definition of orphan share does not include shares due to, for example: (1) unallocable waste; (2) the difference between a party's

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[2] This guidance is not intended to apply at sites where the only PRPs at the site currently or formerly owned or operated the facility or at federal facilities.

share and its ability to pay; or (3) those parties, such as "de micromis" contributors, municipal solid waste (MSW) contributors or certain lenders or residential homeowners, that EPA would not ordinarily pursue for cleanup costs. See "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" (Sept. 22, 1995); "Policy Toward Owners of Property Containing Contaminated Aquifers" (May 24, 1995); "Guidance on CERCLA Settlements with De Micromis Waste Contributors," OSWER Directive No. 9834.17 (July 30, 1993); "Policy Toward Owners of Residential Property" (July 3, 1991); "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (Dec. 6, 1989).

A party may be considered to be "insolvent" if EPA determines that a party has no ability to pay. A party may be considered to be "defunct" if: (1) the entity has ceased to exist or ceased operations; and (2) the entity has fully dissipated its assets such that the party has no ability to pay. For both the insolvent and the defunct determinations, EPA's investigation must indicate that there is no successor or other affiliated party that is potentially liable.

Methods for Determining Appropriate Orphan Share Component of Federal Compromise

Compensation for the orphan share component of the federal compromise in settlement may be provided through forgiveness of past costs and reduction of liability for future oversight costs.[3] At some sites, forgiveness of some portion of past costs already may have occurred in conjunction with a prior settlement with PRPs at the site. In such cases, those past costs which have been forgiven would not be available for use as compensation under this reform with respect to the same PRPs.

To determine the appropriate orphan share component of the federal compromise at a particular site, Regions should make a rough estimate of the size of the orphan share. At many sites, an estimated range will be sufficient to determine whether the share which may be equitably attributed to insolvent and defunct parties warrants federal compromise. Using total site costs,[4] Regions should estimate the orphan share based upon equitable factors, such as the

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[3] Although mixed funding might have been used as compensation under this reform, EPA did not receive a separate appropriation for orphan share compensation and, therefore, any mixed funding provided under this reform would have reduced the funds available for cleanups. As a result, compensation under this reform does not include mixed funding. However, this guidance is not intended to modify or alter EPA's enforcement discretion to enter into mixed funding agreements under Section 122(b) of CERCLA, 42 U.S.C. § 9622(b).

[4] "Total site costs" refer to outstanding past costs and future oversight costs at the site or operable unit that is the subject of the ROD or NTC removal and projected ROD or NTC removal costs.

Gore factors.[5] To ensure that implementation of this reform does not impede cleanup, cause a delay in statutory negotiation deadlines, or result in increased transaction costs, Regions should rely upon readily available or easily obtainable information in making this estimation.

Given current financial constraints, EPA is limiting the amount that Regions can offer in compensation for the orphan share component of the federal compromise to 25 percent of projected ROD remedy/NTC removal costs. First, EPA determined that such a limitation is necessary to moderate the impact on the Trust Fund in light of the expiration of the taxing authority and lack of separate orphan share appropriation. Second, EPA believes that a 25 percent limitation will minimize the incurrence of additional transaction costs and the delay in cleanup negotiations associated with calculation of the orphan share. Finally, a 25 percent limitation will ensure a fairer distribution among sites because it represents the amount at which most sites will have sufficient past costs and future oversight costs to provide compensation for the orphan share component of the federal compromise in settlement.

Accordingly, Regions should maximize compensation for the orphan share component of the federal compromise as long it does not exceed any of the following: (1) the orphan share; (2) the sum of all unreimbursed past costs and EPA's projected costs of overseeing the design and implementation of the Record of Decision (ROD) remedy or NTC removal costs; or (3) 25 percent of the projected ROD remedy or NTC removal costs at the site. This will be considered the maximum amount appropriate for compensating the orphan share component of the federal compromise under this policy.

There is a presumption that Regions will provide the maximum amount appropriate for the orphan share component of the federal compromise. However, in limited circumstances, Regions may, in their discretion, decide that compensation less than the maximum amount is appropriate after consideration of equitable factors, including: (1) PRP fairness to other PRPs, including small businesses, MSW parties, small volume waste contributors and certain lenders and homeowners; (2) PRP cooperation; and (3) size of the orphan share. Regions should give greater consideration to these factors when activities encompassed by the factors occur after issuance of this guidance.

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[5] The "Gore factors" are usually relied upon by courts in making equitable allocations in contribution actions. They include: (1) the amount of hazardous substances involved; (2) the degree of toxicity of the substances; (3) the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances; (4) the degree of care exercised by the parties with respect to the substances; and (5) the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment. See, e.g., Envtl. Transp. Servs. v. Ensco, Inc., 969 F.2d 503 (7th Cir. 1992).

Implementation

When providing notice of forthcoming negotiations to PRPs or during on-going negotiations, Regions should indicate whether the site is eligible for this reform and should share any available information about the maximum amount appropriate for compensation. Regions may request PRPs to submit information regarding the size of the orphan share at the site, including a basic rationale and supporting documentation.

Headquarters pre-approval will be required for any settlement at a site where the projected ROD remedy or NTC removal cost exceeds $30 million. To satisfy this pre-approval requirement, Regions should contact Headquarters, either orally or in writing, prior to conveying a formal settlement offer to a PRP or group of PRPs that includes an orphan share compensation component. Headquarters will then evaluate such proposed compensation in light of site-specific factors, state concerns and national priorities, including meaningful implementation of the reform and impact on the Trust Fund.

For all sites, an analysis of the proposed orphan share compensation provided through forgiveness of past costs and reduction of liability for future oversight costs should be included in the enforcement confidential ten-point settlement analysis submitted to Headquarters. This guidance is not intended to limit EPA's consideration of other settlement factors. The Regions may elect to compromise a greater or lesser amount than that described herein, based upon other factors they would consider in their routine settlement analyses, such as litigation or other risks to recovery or performance, cooperation of the performing parties, and the resources of parties.

Orphan Share Assistance Team

We have established an orphan share assistance team with the Department of Justice to assist Regions in implementation of this important reform. The team will be in contact with Regional staff to resolve issues to ensure results.

For further information concerning this guidance, please contact either Susan Boushell (202-564-5107) or Patricia Mott (202-564-5133) in the Office of Site Remediation Enforcement.

Purpose and Use of this Guidance

This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Environmental Protection Agency. This guidance is not a rule and does not create any legal obligations. Whether and how EPA applies the guidance to any particular site will depend on the facts at the site.

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August 1996

Superfund Reform:
Orphan Share Implementation

Tab 1-2

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August 1996

Superfund Reform:
Orphan Share Implementation

ORPHAN SHARE COMPENSATION SHORT SHEET

At sites where there is an orphan share component, compensation should be made to those PRPs that are willing to perform the cleanup of the site. Compensation can only be made in settlements – either the remedial RD/RA CD or non-time-critical removal AOC/CD.

Definition of Orphan Share: Share specifically attributable to parties that are 1) potentially liable; 2) insolvent or defunct; and 3) unaffiliated with any party potentially liable for response costs at the site.

Goal: For the Agency to OFFER $50M in compensation by September 30, 1996. Do not necessarily need to complete settlement by end of this fiscal year.

To Determine the Maximum Compensation, Calculate the Following:

a. **Orphan share % of total site costs** - total site costs include: 1) all unreimbursed past costs; 2) ROD costs***or removal costs and 3) future oversight costs for O.U./removal being negotiated;

b. **25% of ROD costs*** or removal costs** - this would be a cap applied to the costs of the remedy or removal being negotiated; or

c. **EPA's total unreimbursed past costs plus future oversight cost** - again, specific to the remedy or removal being negotiated.

>Maximum Compensation Equals the LOWEST Calculated Amount Listed in Either a., b. or c.

NOTE: The guidance presumes that Regions will offer the "maximum" compensation. However, in limited circumstances, Regions may use their discretion based on "equitable factors" (pg. 4 of guidance) to compensate less than the maximum amount.

Exclusion: **Orphan share compensation is not available at owner/operator only sites.** Specifically, there must be an outside generator(s) or transporter(s) involved at the site. This exclusion is consistent with the SRA language (see Senate Bill §129(a)(4)(c)). **Federal facilities are also excluded from the reform.**

Pre-Approval: Only need HQ approval if the ROD*** or removal costs are over $30M. This can be done either orally or in writing. Please call your HQ contact if you need this approval.

*** ROD costs = estimated costs associated with that particular O.U. being negotiated.

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 1-3

U. S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 17, 1996

Steven Herman, Esq.
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W., Room 3202
Mail Code 2201-A
Washington, D.C. 20044

Dear Steve:

Congratulations on issuing the "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996). This interim guidance instructs EPA's Regions to provide compensation, through forgiveness of past costs and future oversight claims, where EPA determines that a share of responsibility at a Superfund site may be equitably attributable to parties that are insolvent or defunct, and where PRPs agree to perform remedial or non-time-critical removal actions. The Department fully supports this policy because it will help achieve prompt settlements and promote fairness in the Superfund system.

Joint and several liability continues to be an essential part of the Superfund liability system. Use of mixed funding, such as provided expressly in the Orphan Share policy through the compromise of past and future oversight costs, helps make implementation of the joint and several liability system fairer when parties agree to settle with the United States.

The Department recognizes that, in light of the expiration of the Superfund taxing authority last December and EPA's resulting concern about funding cleanups in later years, it is reasonable to specify some limitations on funding in this interim guidance at this time.

I have assigned several contact attorneys in the Environmental Enforcement Section to assist EPA's Orphan Share Assistance Team with application of this interim guidance in settlement negotiations. I look forward to continuing to work

together to resolve cases quickly and fairly under the Superfund program. Please call me or my staff at any time if we can be of additional assistance.

Sincerely,

Lois J. Schiffer
Assistant Attorney General
Environment & Natural Resources
Division

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Tab 2

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

APR 30 1996

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Availability of Headquarters Contacts to Assist Regions in Implementing the Orphan Share Reform

FROM: Charles E. Breece
Acting Division Director
Regional Support Division

TO: Superfund Branch Chiefs

As you know, the Administrator announced on October 2, 1995 that we would seek to compensate performing parties for a limited portion of the known shares attributable to orphan parties (defined as insolvent or defunct) in future cleanup negotiations. This reform is *not* a pilot -- it is a change in the program and one which will assist us in demonstrating our continued efforts to recognize and address fairness issues.

The Agency must keep the commitment announced by Administrator Browner to offer orphan share compensation at the remainder of sites scheduled for negotiations this fiscal year. This means we must use every effort to fulfill this commitment and, at appropriate sites, provide some measure of fairness through compensation of a portion of orphan share. The reform must be implemented at every RD/RA site at which some portion of liability is attributable to insolvent or defunct parties. It is not an optional settlement tool, although we anticipate that providing some recognition of this orphan share may encourage settlors to agree to perform work.

In order to fully ensure that the orphan share reform is being implemented appropriately, the Office of Site Remediation has established a team that is charged with working toward implementing the orphan share reform at appropriate sites. This team consists of Regional Support Division staff.[1] The mission of the team is to help you and your staffs to implement the

[1] DOJ has indicated willingness to designate staffers for this effort.

orphan share reform in your Region, so that, by October, the Agency will have offered - and have provided, where possible - compensation at every site scheduled for RD/RA negotiations.

The first goal of the team has been to develop information on sites in the RD/RA "pipeline" this fiscal year which may have orphan parties. As you know, we have already started calling you and your staffs and have developed a list that reflects this universe of sites and background information regarding each site. Please find attached a list of sites developed through these calls. (You will find attached only those sites listed for your Region because of concern over giving wide circulation to potential enforcement sensitive information.)

The second primary goal of the team is to assist you in assessing the applicability of the reform at particular sites and determining the appropriate orphan share to compensate. The team will accumulate information and expertise from working with each Region to better assist you in individual cases.

To assist you, this team has designated a member responsible for specifically addressing the orphan share issues raised by each Region.[2] The designated team contact will be available to any staff in your Region calling with questions on orphan share. The team contact will also be calling Regional staffers assigned to sites to gather information and offer assistance. The team contact will also handle any pre-approval requirements required by the draft or final guidance. However, the RSD staffer assigned to all other aspects of the case is still responsible for issues other than orphan share compensation. For example, if a settlement package reaches Headquarters, it will be routed to the RSD staff assignee to the case. The team contacts for orphan share reform issues are as follows:

Region 1: Maria Cintron, (202) 564-4227
Region 2: Maria Cintron, (202) 564-4227
Region 3: Kimberly Barr, (202) 564-4212
Region 4: Melissa Ward, (202) 564-4282
Region 5: Victoria van Roden, (202) 564-4268
Region 6: Kimberly Barr, (202) 564-4212
Region 7: Victoria van Roden, (202) 564-4268
Region 8: Melissa Ward, (202) 564-4282
Region 9: David Clay, (202) 564-4228
Region 10: David Clay, (202) 564-4228

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[2] Regional staffers need not contact the RSD staffer assigned to the case if different from the RSD orphan share team member. Team members are responsible for coordinating with the RSD staffer assigned to a case.

For all Regions, the back-up member is Patricia Mott, (202) 564-5133.[3] Additionally, if you have questions regarding only the guidance, you may call Susan Boushell, (202)564-5107 or Patricia Mott, (202) 564-5133. For allocations issues generally, you may call Deniz Ergener, (202) 564-4233.

Additionally, each Region has designated the following staffers to participate on a workgroup drafting the orphan share guidance and resolving issues:

Region 1: Ruthann Sherman
Region 2: Paul Simon
Region 3: Kathy Hodgkiss, Joe Donovan
Region 4: Rick Leahy, Paul Schwartz
Region 5: Liz Murphy, Cynthia Kawakami
Region 6: Anne Foster, Carl Bolden, Pam Travis
Region 7: Cheryle Micinski
Region 8: Maureen O'Reilly, Matt Cohn
Region 9: Lois Green, Matt Strassburg
Region 10: Elizabeth McKenna, Ted Yackulic

Finally, the team will be taking on the role of pulling together information on this reform for reporting purposes (providing input to semi-annual reports, testimony, speeches, etc.). We believe that this will take a burden off your staffs and count on your support (and patience) as we monitor these cases.

If you have any questions regarding this memorandum or the role of this team, please contact Patricia Mott at (202) 564-5133.

cc: Orphan Share Workgroup (see addressees above)
Jerry Clifford
Linda Boornazian
Steve Luftig
Bruce Gelber, DOJ

[3] Should you have an emergency situation, and neither the team member nor the backup is available, you may, of course, call any team member, or the Team's Advisor, Nancy Browne, (202) 564-4219.

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Tab 3

United States
Environmental Protection Agency
August 1996

Superfund Reform: Orphan Share Implementation

TAB 5-5: ORPHAN SHARE HYPOTHETICAL NO. 2[1]

Since 1987 EPA has spent $6,500,000 in response costs at the Bayville Superfund Site. The recent ROD for the site chose an excavation and cap remedy to deal primarily with organics that will cost $17,000,000, with future oversight costs expected to be an additional $2,000,000.

The site is a former unlined landfill that received industrial waste under an agreement between the owner/operator, Dave Spozer, and O'Mara Transportation. It also received MSW from several municipalities and generators. Under the agreements, Mr. Spozer had a high degree of control over the disposals. O'Mara Transportation hauled industrial waste here from 1965 through 1986. Of the 13,050,000 cu. yds. of waste at the site, 60% are MSW; 40% are the industrial hazardous substances transported by O'Mara. Upper Downs, Lower Downs, Hugh Downs, Eider Downs, and Churchill Downs are the municipalities that sent the MSW. There are also 50 customers that generated 1,295 cu. yds. or less of MSW, in some cases with a few gallons of hazardous substances. There is 100,000 cu. yds. that is not attributed to known parties. Of the 11 other companies who arranged with O'Mara to take their industrial waste to the site, 3 (Corroad, Inc. Cezanne, Inc. and Wastemore, Inc.) have been adjudicated bankrupt and are out of business. There are recorded volumes for the 11 companies but some are illegible and might bear some additional investigation. Those volumes are:

1. Abyss Mill Co.---300,000 cu. yds. of ball mill tailings
2. Groh Smee Aut, Co.---840,000 cu. yds. of sail boat fiberglass
3. Corroad, Inc.---800,000 cu .yds. of "off-spec" shampoo containing NaOH
4. Cezanne, Inc.---390,000 cu. yds. of acrylics waste left from creating false impressions
5. Wastemore, Inc.---760,000 cu. yds. of "Lose-it-Forever", a cyanide-based rodenticide that didn't make it as a product (but which endangers rats in the vicinity of the site!)
6. Jephyr's Sons, Inc.---930,000 cu. yds. of scrap nickel
7. Righters, Inc.---400,000 cu. yds. of lead
8. Manna Tea, Ltd.---550,000 cu .yds. of phthlates from tea-bags
9. TerraSquirma Company---150,000 cu. yds. of asphalt
10. Bunns & Behrner, Inc.---50,000 cu. yds. of (equiv.) of benzene
11. Loplop, Inc.---50,000 cu. yds. of cereal contaminated with arsenic

O'Mara is presently reorganizing its debt under Chapter 11 of the Bankruptcy Act. Mr. Spozer went Chapter 7 and is trying to get back on his feet. Also, Mr. Spozer probably had knowledge of midnight dumping on his property and failed to prevent it.

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[1] Many thanks to Joe Donovan and Kathy Hodgkiss of Region III for originating this hypothetical.

ORPHAN SHARE HYPOTHETICAL NO. 2 ANSWER

1. *Is there an orphan party?*

Yes, the generator orphans are Corroad, Inc. (800,000 cu. yds.); Cezanne, Inc. (390,000 cu. yds.); and Wastemore, Inc. (760,000 cu. yds.). The owner/operator orphan is Mr. Spozer. (This assumes that there are no affiliates.) The Region determined that O'Mara is not an orphan party because it is not defunct and fails to meet the "no ability to pay" standard. Although it is in bankruptcy, it is merely reorganizing its debt.

2. *What is the size of the orphan share?*

Owner Portion - The Region's investigations reveal that the owner/operator had a high degree of control over the disposals and probably knew about midnight dumpings at the site. Thus, the Region has allocated a 70% share to Mr. Spozer, a relatively high share for an owner/operator.

Generator Portion - First, add the volumes of hazardous wastes contributed by the generator orphans 800,000+390,000+760,000 = 1.95M cu. yds. Next, determine the total amount of hazardous waste contributed by the other generators (either add the volumes of the 11 generator parties or multiply 40% times the total waste at the site minus the unallocated wastes) = 5,220,000 cu. yds.). Do not include MSW in the calculation.

Therefore 1.95M cu. yds. (amount attributable to generator orphan parties) divided by 5.22M cu. yds. (total hazardous waste) = 37% of generator liability is orphan.

Based on its analysis of the Gore factors, the Region assigned 20% to the generators and 10% to the transporter (with the other 70% allocated to the owner/operator as discussed above.)

Thus, the 70% owner share is orphan and
37% of the 20% generator share is orphan = 7.4%

> 70% (owner share) = 7.4% (generator share) = 77.4% Orphan Share.

In dollar figures: 77.4% (orphan share) times $25.5M (total site costs) = $19.73M

3. *What is the MAAC (Maximum Amount Appropriate for Compensation)?*

The lesser of:	25% ROD(17M) = 4.25M
or	Past costs plus future oversight costs = 8.5M
or	Orphan Share = 19.73M

Therefore the MAAC is 4.25M

United States
Environmental Protection Agency
August 1996

EPA

Superfund Reform:
Orphan Share Implementation

ORPHAN SHARE HYPOTHETICAL NO. 3

In 1976, Over Bearing Corp. (OBC), a manufacturer of ball bearings, contracted with a local farmer, I. Crop, to dispose of hazardous waste from OBC's processes at Mr. Crop's 40-acre farm located on Bear Wallow road in a remote part of the state. Three other companies, observing OBC's success in negotiating its contract with unusually favorable terms, rushed to negotiate their own arrangements with Mr. Crop for disposal of hazardous waste. One of the companies, the Gore-Onsdorrf Nickel Emporium (GONE) ceased to do business after a Chapter 7 bankruptcy discharge 5 years ago. No successors or assets remain. Additionally, a local army base disposed of a load of scrap metal in 1982 that was later discovered to contain PCBs. The president of OBC during the time of disposal, John Poorman, heavily participated in managing hazardous wastes at the time, and has been named as a PRP. Mr. Poorman is now 81, ill, retired, relies solely on social security, and was recently evicted when the bank foreclosed on his trailer.

According to the financial documents submitted by Mr. Crop, his only asset is the contaminated farm. He has no other source of income and lives with his adult children. The Region has learned that an amusement park developer has recently visited the rural site.

Responses to information requests indicate the following volumes of hazardous wastes are attributable to:

1.	OBC -	100,000 cu. yds.
2.	GONE -	50,000
3.	Lotsa Waste Inc.	25,000
4.	Jerry's Refuse	20,000
5.	Army base	5,000
		200,000 cu. yds.

Approximately 50,000 cu. yds. has not been attributable to any party. The Region has selected an estimated $20 million excavation of certain areas and cap and has $3 million in past costs. Estimated future oversight costs amount to $2 million.

OBC Corporation and the 2 other viable parties threatened to file contribution actions against several nearby residential homeowners whose property was contaminated when material was accidentally dumped across the property lines. EPA entered into *de micromis* settlements with the homeowners pursuant to the Agency policy toward residential property owners.

ORPHAN SHARE HYPOTHETICAL NO. 3 ANSWER

1. *Is there an orphan party?*

Three parties appear to be eligible "orphans":

Mr. Crop - His only asset is the contaminated farm; he has no other source of income and probably is dependent on his adult children. Based on its analysis of the facts, the Region has determined that Mr. Crop is "insolvent" for the purposes of the reform.

GONE - It is defunct (i.e., it has ceased to do business and fully dissipated its assets) and the Region's investigations has not revealed any affiliated successors or viable, potentially liable parties. Thus, it is an orphan.

Mr. Poorman - Although his financial situation is such that he is unable to contribute toward his share, the Region determined that he is not an orphan because he is affiliated with another viable, liable party (OBC).

> Orphan parties = 1 owner and 1 generator.

2. *What is the size of the orphan share?*

Owner Portion - In addition to due care and knowledge considerations, the Region considered two important facts: 1) the relative advantage of the disposal contracts for the companies indicates that Mr. Crop lacked business acumen and the sophistication to understand the consequences of the materials he was accepting and 2) the property value may increase upon its cleanup. While the first factor may reduce his relative share, the second factor may increase it. As a result, he was allocated a share of 30% as owner of the site.

Generator Portion - The total amount of hazardous wastes at the site (200,000 cu. yds.) divided by the amount of hazardous waste sent by GONE (50,000 cu. yds.) equals 25%. Thus, GONE's percentage of the total generator liability equals 25% BUT generator liability is only 70% of the total site (30% has been allocated to the owner). Thus, the orphan share of generator liabiliity is 25% of 70% , or 17.5%.

> 30% (owner portion) + 17.5% (generator portion) = 47.5% OS at site

3. *What is the MAAC?*

OS = 47.5% X $25 million (total site costs) = $11.875 million
25% of ROD costs ($20 million) = $ 5.0 million
Past costs and future oversight costs = $5.0 million

The maximum amount appropriate to offer at this site is $5.0 million.

However, since the parties initiated litigation against residential homeowners, the Region decided to reduce the orphan share compensation it would offer to all parties by 10% to $4.5 million. (Factor in guidance: PRP fairness to other PRPs, including ... homeowners)

Subsequently, the parties did not settle, so that they did not receive orphan share compensation in a settlement. However, at the end of the year, the Region took credit for making the offer by adding the amount of this offer to a total dollar amount representing the amount of compensation that it had offered to parties as part of the Superfund orphan share reform.

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Enforcement Confidential

TAB 3
OVERVIEW OF THE PROCESS FOR PROVIDING ORPHAN SHARE COMPENSATION

Step #1: Is It An Appropriate Site?

- Is the Region negotiating or will the Region negotiate with parties to perform RD/RA or a non-time critical removal at an NPL site?

- Are there parties who are insolvent or defunct and, therefore, unable to pay their share ("orphan share")?

Step #2: Are There Parties Eligible for Orphan Share?

- Who is **not** an "orphan" party?

  Parties who in the Agency's enforcement discretion are not liable parties:
  (1) *de micromis* contributors
  (2) municipal solid waste contributors
  (3) lenders
  (4) residential homeowners

- Definitions

  (1) A party is **insolvent** if:
  (a) it has no ability to pay; and
  (b) EPA's investigation indicates there is no successor or other viable affiliated party that is potentially liable.

  (2) A party is **defunct** if:
  (a) the entity has ceased to exist or ceased operations;
  (b) the entity has fully dissipated its assets such that the party has no ability to pay; and
  (c) EPA's investigation indicates there is no successor or other viable affiliated party that is potentially liable.

(3) Determining if a party is affiliated:

An affiliated party can include a successor corporation, a parent corporation, a subsidiary corporation or a corporate individual (e.g., officers, directors, shareholders, employees). If that affiliate is potentially liable under CERCLA, then the share attributable to the insolvent and defunct party cannot be counted as part of the orphan share. In other words, where an insolvent or defunct party is affiliated with another party which is viable, and EPA would hold both liable, then the insolvent or defunct party can't be an "orphan party" because of the relationship.

Step #3: Determining whether parties are insolvent or defunct

- **Level of analysis required determined on case by case basis**

Regions have the flexibility to determine the appropriate level of information gathering and analysis necessary to determine if a party is insolvent or defunct. In many situations, there will be information readily available that demonstrates a party is insolvent or defunct (e.g., a 104(e) response). In most cases, however, some additional information gathering will be necessary.

- **Using Ability to Pay Principles in determining orphan parties**

The soon-to-be-issued Superfund Ability to Pay (ATP) Guidance may assist you in making insolvent and defunct determinations for purposes of this reform. Although the ATP guidance focuses on a different end result -- determining the amount a party can pay (for an "ability to pay" settlement), as opposed to whether that party has no ability to pay (so that other parties at the site receive orphan share compensation) -- the methods and analysis are similar.

The standard for determining a party's ability to pay set out in Agency ATP guidance is whether a payment of the amount sought by the government is likely to create an extreme financial hardship.[1] This standard is applicable to the orphan share analysis, except that you would not seek any payment from an orphan party. Under ATP analysis, if EPA makes a finding that the satisfaction of an environmental claim will cause a PRP to be unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses, then the settlement amount proposed to that party should be reduced.

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[1] Superfund Ability to Pay Guidance: 1) "General Guidance on Superfund Ability to Pay Determinations; 2) "Guidance for Superfund Small Business Ability to Pay Determinations; 3) "Guidance for Superfund Individual Ability to Pay Determinations".

For the orphan share reform in general, if a party cannot make any payment at a site without extreme financial hardship, the party would be considered an "orphan" party, provided the Region has not identified a viable affiliate.

- **Specific methods of gathering and analyzing information**

For purposes of the reform, there are three levels of information gathering and analysis which may be considered in making orphan share determinations:

(1) An initial screening process which focuses on public information (e.g., Census information, Dun and Bradstreet reports, SEC filings) and limited financial submissions (e.g., five years of tax returns);

(2) Computer models, if the initial screening process indicates further analysis is required (presently, models assist in the analysis of for-profit business entities, although models for additional entities are being evaluated);

(3) Services of a financial analyst through contract support.

It is up to the Regions to determine the appropriate level of analysis. This overview document provides some ways in which to implement the initial screening process. For further information concerning initial screening, computer modeling, and the services of a financial analyst, consult with experts in these areas in the Regions, National Enforcement Investigation Center (NEIC), and Headquarters experts. (See also Tabs 4-3 and 4-4: respectively, List of Financial Analysts and Ability to Pay Contacts and Instructions for Requesting Financial Analysis Contract Support). In addition, NEIC training materials will be made available as subsequent supplements to this package on topics such as 1) electronic sources of information; 2) interpretation of Dun & Bradstreet business reports; and 3) obtaining information from the Internal Revenue Service and the Securities and Exchange Commission. These topics, among others, will be covered in an NEIC sponsored training class in Region VI on August 27, 1996 and may be offered subsequently in other Regions. The agenda may be found at Tab 4-4 and the NEIC contact for additional information is Gene Lubieniecki (303) 236-5111, ext. 539.

- **Initial Screening Process**

For many parties, information gathered during the initial screening process will be sufficient. Generally, the Agency should request federal income tax returns for the 5 most recent years. Similarly, it should request 5 years of audited financial information

and a completed financial questionnaire. Additionally, the party should be asked about the likelihood of certain recoveries to pay its share of liability.

- **Tips and Techniques**

  - To determine if a party is bankrupt:

    Call the Clerk of the Court of Bankruptcy to see if a bankruptcy petition has been filed and whether it was granted or denied in cases of suspected insolvency. Once the date of the filing and the bankruptcy docket number have been obtained, a copy of the petition, list of secured creditors, any other orders issued by the court granting or denying a petition may be reviewed. If the records are at the court, the court could arrange for information to be sent to a Regional office. If the case is closed, the records may be at a federal records center. Access to these records may be obtained from the Clerk of the Court.

    Check with Regional information managers for on-line systems, such as Information America and CDB "Infotech" among others, which provide access to the federal bankruptcy court records, dates of filings, etc. On-line access may vary on a region by region basis.

  - If the party is bankrupt:

    A bankruptcy petition that has been granted does not necessarily indicate that a party is insolvent for purposes of this reform. The type of bankruptcy claimed is important. If a claim of Chapter 7 bankruptcy (complete dissolution and discharge) was granted as opposed to a Chapter 11 bankruptcy (reorganization), then it may be more likely that the party may be found to be insolvent for purposes of this reform.

  - To determine if a party might have financial difficulties outside of bankruptcy:

    Check to see if the party has fallen behind in payments to creditors and the consequences of non-payment. For example, a case team may want to determine whether creditors have moved to take control of accounts receivable or secured property or whether a creditor has arranged to auction secured property. Some of this information may be found in Dun & Bradstreet reports. Other investigative actions may be required. Consult civil investigators or financial analyst for further investigative actions.

Check the Uniform Commercial Code (UCC) filings to determine if creditors have perfected liens against a party's property. UCC filings are available on-line and are filed with the Secretary of State.

- To determine if a corporation has ceased to exist or ceased operations:

  Check with the Secretary of State to determine whether a certificate of dissolution was filed in a case of a suspected defunct corporation. Check to see when last annual filing was made. If one has not been filed, this may be an indication that the corporation is going out of business or has ceased to operate and has dissolved. Also, states may revoke a corporate license if it is not in good standing.

- To determine if a municipality or other government entity has ceased to exist:

  Check on whether the entity has lost its status as a subdivision, public agency or instrumentality of a state.

- To determine if the party has additional resources:

  In 104(e) requests or financial questionnaires, ask the party to disclose its ability to recover expenses associated with the site. A potential "orphan" party, like an ability to pay candidate, may have an ability to recover expenses from other sources. This may include sources such as insurance recoveries, indemnification agreements, contribution actions, and increases in property values resulting from clean up activities. If these funds are significant and likely to be recovered, the recovered expenses should be considered recoverable to the United States, so that the party cannot be considered to be an "orphan" party.

Step #4: Allocating the Orphan Share

- **Level of analysis required determined on case by case basis**

The amount of information gathering and preciseness of the calculation necessary to approximate the orphan share at a site depends on the needs of the case. For example, if the Region is reasonably sure under the facts of the case that the orphan share is much larger than one of the limitations under the policy, then there is not a specific need to assess the size of the orphan share with precision.

- **The allocation process**

In order to determine the orphan share, in some cases, this may require considering shares of classes of parties (i.e., assess the share of the owner/operator class of parties and assess the share of the generator/transporter class of parties). In other cases, estimating the orphan share may require consideration of shares of individual parties (e.g., where there are successive owners, one of whom is defunct). While no guidance exists as to allocating shares between parties at a site (nor as to allocating the orphan share), many courts and writers have analyzed how an allocation is conducted and the factors to be applied. Please see attachments at tabs 5-4 and 5-5 for a chart of case law and citations to copyrighted trade press publications. Attachments at tabs 5-2 and 5-3 provide excerpts from copies of allocations training materials. Attachment 5-1 is a report by EPA on private party allocation procedures.

Based on the allocations tools, you should allocate a share of liability as a percentage to insolvent and defunct parties (i.e., the orphan share). and viable parties. Note that, for convenience, you do not include certain parties in the allocation, because EPA would not hold them liable (such as municipal solid waste contributors or residential homeowners). Waste which cannot be attributed to any identified party is "unallocable waste" and should be distributed on a pro rata basis to all identified parties (viable and insolvent and defunct parties). *See Hypothetical 3, attached to this document.*

Step #5: Estimating the orphan share

When the Region has determined the orphan party's or parties' share(s) as a percent of total liability, this percentage should be converted to a dollar figure. The percentage is applied to total site costs -- the sum of unreimbursed past costs and future oversight costs plus the projected ROD remedy or Non-Time Critical removal costs being negotiated. It does not include costs incurred by PRPs at a site.

- Orphan Share in dollars:

Orphan Share, as a percent (%) X Total Site Costs
(Unreimbursed past costs + future oversight costs + ROD or removal costs) = _____

Step #6: Determine the Maximum Amount Appropriate for Compensation ("MAAC")

It is presumed that you will offer the maximum amount appropriate for compensation, except that in limited circumstances, certain factors may reduce this amount. The maximum amount appropriate for compensation (MAAC) is the lesser of three figures:

1) 25% of the projected ROD remedy/NTC removal costs: = _____

2) the sum of all unreimbursed past costs and EPA's future oversight costs: = _____

OR

3) the orphan share in dollars from step #5 above = _____

The lesser of the three figures above is the MAAC = _____

Step #7: Determine Adjusted Compensation

In limited circumstances, at the Regions' discretion, the MAAC may be adjusted downward based on equitable factors. The guidance lists these factors:

1) PRP fairness to other PRPs, including small businesses, municipal solid waste parties, small volume waste contributors and certain lenders and homeowners;
2) PRP cooperation; and
3) Size of the orphan share

Regions should give greater consideration to these factors when activities encompassed by the factors occur after issuance of this guidance, so that PRPs are prospectively aware that their behavior may influence how much compensation they are given. Additionally, a discussion of the factors and the reduction taken should be included in the Region's documentation of its orphan share compensation analysis. *See Hypothetical 3 for a sample application.*

Step #8: Offering Compensation to PRPs

- Presumption of Offering Maximum Compensation

Regions should offer the maximum amount appropriate as soon as possible in the settlement process.[2] If possible, Regions should cite the maximum amount appropriate in special notice letters to PRPs. Not only do such early offers provide incentive for PRPs to settle with the Agency to conduct cleanup activities, but the Agency then is clearly meeting its commitment to increase fairness in the enforcement process. Samples are furnished, for the Region's convenience, setting out language for special notice letters and for a letter notifying PRPs in ongoing cases of the availability of the reform at their site at Tabs 6-1 and 6-2.

- Pre-approval requirement at sites where RODs exceed $30 million

Where ROD costs exceed $30 million, Regions must obtain pre-approval by Headquarters of offers of compensation prior to making an offer. See Tab 7.

- Tracking

Regions should also notify Headquarters, which will be tracking and reporting on offers of orphan share compensation, when an offer is made. (This information can be conveyed verbally to the Region's orphan share contact. See contact memo at Tab 2). The Region should convey sufficient information so that Headquarters understands the determination that the Region has made with respect to who the orphan share parties are, the size of the orphan share, and the amount offered. Such information might include: # PRPs, # orphan parties, cost of ROD or NTC removal, amount of unreimbursed past costs and future oversight costs; rationale behind determination of orphan parties and size of orphan share; other litigation risk at the site.

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[2] It is important to note that a federal compromise may include more than a compromise based on the orphan share. For example, an offer to forgive $6 million in past costs may consist of $2 million in orphan share compensation and $4 million based on litigative risk.

Step #9: Documenting Orphan Share

Once agreement has been achieved, Regions should document their analysis in their ten-point analysis for RD/RA settlements. A hypothetical discussion of such a settlement including orphan share compensation is attached at Tab 8-2. For settlements at removal sites, the Region should document their analysis similarly in a stand-alone document. Regions are requested to share these settlement-confidential documents with Headquarters.[3]

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[3] While these documentation requirements may seem burdensome, it is important such rationales are documented. Additionally, Regions are encouraged to furnish the information to Headquarters so that Headquarters can take the major share of tracking and reporting on orphan share compensation.

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Tab 4-1

Placeholder for:
General Policy on Superfund Ability to Pay Determinations

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 4-2

FINANCIAL ANALYSTS & ABILITY TO PAY CONTACTS FOR SUPERFUND CASES

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United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 4-3

Instructions for Requesting Financial Analysis Contract Support

OSRE/RSD has arranged for the services of financial analysts employed by Industrial Economics Incorporated (IEC), of Cambridge, Massachusetts, to support Superfund Cases. This contract support is intended to be available to case teams in situations where the Region does not have a financial analyst available, either on staff or through a Regional contract, or in situations where the financial issues are particularly complex and the case team wants a financial analyst with special expertise. **Case teams that may need financial analysis support should contact Deborah Roane (at 202-564-4279) or Tracy Gipson (at 202-564-4236)** by phone, as soon as they become aware that they may need such contract support.

To request financial analysis support, in addition to calling Tracy or Deborah, send them the following information about the case, in writing:

- CASE NAME, NPL SITE, SITE ID NO., AND SITE LOCATION (City, State, Region)

- TYPE OF CERCLA CASE: Removal? Remediation? Cost recovery?

- IS THIS AN ADMINISTRATIVE REFORM PILOT CASE?
  Expedited settlement? De minimis PRPs? Allocation Pilot?

- STATUS OF THE CASE

- CATEGORY OF PRP(S) THAT CLAIM INABILITY TO PAY
  Generator? Transporter? Owner &/or operator?
  Corporation? Individual? Small business? Municipal or other non-profit entity?
  De minimis PRP? Primary PRP?

  PLEASE IDENTIFY THE SPECIFIC PRP'S BY NAME, IF KNOWN.

- WHAT ARE THE FINANCIAL ISSUES IN THE CASE?
  WHAT ANALYSIS IS THE REGION LOOKING FOR?

- WHAT, IF ANY, FINANCIAL INFORMATION DOES THE REGION ALREADY HAVE FOR EACH PRP?

- WHAT, IF ANY, ANALYSIS HAS THE REGION ALREADY DONE?

- REGIONAL CONTACTS: [names & phone numbers]
  ORC:

  CIVIL INVESTIGATOR:

  REGIONAL FINANCIAL ANALYST:

Send the memo by pouch mail to **Deborah Roane or Tracy Gipson, OSRE/Regional Support Division (2272A)**, at Headquarters, or by **FAX to 202-564-0086 or 202-501-0269.**

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 4-4

Financial Analysis
Financial Information and Ability to Pay
Dallas, Texas, August 27, 1996

AGENDA

8:00 - 8:15 -	**Welcome & Introduction** Barbara Luke, Esquire Environmental Protection Agency, Region 6 **Course Overview** Kimberly A. Zanier, CPA Senior Financial Analyst National Enforcement Investigations Center (NEIC)
8:15 - 9:00	**General Steps in a Financial Analysis** Kimberly A. Zanier CPA Provides an overview of the steps a financial analyst will generally go through when conducting a financial analysis.
9:00 - 9:30	**Document Requests** Kimberly A. Zanier CPA Identification and description of the documents to be included in the initial request for the entity being evaluated. Focus is on corporate returns.
9:30 - 9:45	Break
9:45 - 10:15	**Electronic Sources of Information** Charlotte Resseguie CPA, Financial Analyst NEIC Identification of the electronic information available through the Region 6 library, NEIC, local libraries, the Internet and other sources including assistance from the NEIC civil investigators.
10:15 - 10:45	**Dun & Bradstreet Business Reports** Where does the information come from and how to interpret a D& B report. Teresa Rogers and Anne Ruttger, D&B Resource Consultants, Dallas, Texas
10:45 - 11:15	**Tax Related Information and Currency Transaction Reports** What information can you get from the Internal Revenue Service and how to get it. Charlotte Resseguie CPA, Financial Analyst
11:15 - 12:15	**The Securities and Exchange Commission (SEC)** The role of the SEC and documents available through them. Thomas J. Baudhuin, Special Counsel, U.S. SEC, Fort Worth District, Fort Worth, Texas

AGENDA (continued)

12:15 - 1:00	Lunch
1:00 - 2:00	**Overview Corporate Income Tax Returns** Kimberly A. Zanier CPA Provides an overview of the different components of the Form 1120 tax return, including the following: Income, Expense, Assets, Liabilities, and Owners Equity. Focuses on sources of funds which can be used to support penalty payments, clean-up costs and or purchases of capital equipment.
2:00 - 2:15	Break
2:15 - 3:30	**Overview Corporate Income Tax Returns (continued)** Kimberly A. Zanier CPA
3:30 - 5:00	**What If Session** Kimberly A. Zanier CPA Identification and discussion of common problem areas.

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 5-1

Developing Allocations Among Potentially Responsible Parties for the Costs of Superfund Site Cleanups

by

Leslie Kaschak & Denise Ergener
Office of Site Remediation Enforcement

September 1994

Table of Contents:

Developing Allocations Among Potentially Responsible Parties for the Costs of Superfund Site Cleanups

I. EXECUTIVE SUMMARY

The Office of Site Remediation Enforcement contacted nine entities experienced in administering, or participating in the allocation process to collect information regarding allocation methods used to apportion Superfund site costs under the Comprehensive Environmental Response, Compensation, and Liability Act. The information gathered serves to assist EPA and the parties paying these costs in examining settlement options that are fair and minimize transaction costs at Superfund sites. This report reflects the information that was gathered from the parties interviewed, and does not reflect the views of the EPA. The following highlights represent the primary findings of this research:

- it is important that the allocation process is flexible to accommodate the site-specific circumstances, and assist with the ultimate goal of reaching settlement and reducing transaction costs;

- the factors selected to apportion costs in any allocation are a function of site type, amount of information available, and the classes of parties participating in the allocation;

- the most critical factors in selecting an allocator for a successful allocation are the neutrality of the allocator and the PRPs' perception of fairness in the process.

II. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is often criticized for the high transaction costs that are incurred by potentially responsible parties (PRPs)[1] in reaching settlements for Superfund site

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[1] Section 107(a) of CERCLA defines four classes of parties who may be liable for the cleanup costs at Superfund sites: 1) present owners and operators of a site; 2) past owners and operators of a site; 3) parties which arrange for the disposal, treatment, or storage of the hazardous substance (generators);

cleanup and in litigating where settlement efforts are unsuccessful. Many believe that much of these transaction costs arise as a result of a retroactive, strict, joint and several liability scheme. One way PRPs may facilitate settlement at the site and reduce transaction costs is through the use of an allocator to apportion cleanup costs among PRPs at the site.

In April 1993, the EPA launched an effort to explore options by which the Agency could implement Superfund in a more fair and efficient manner. One of the initiatives that EPA identified focuses on the use of allocation tools as a way to address fairness concerns and reduce transaction costs in the enforcement of Superfund. As part of this initiative, the Agency committed to conducting information-gathering activities on allocation issues and distributing this information to the regulated community to further facilitate settlements. This report fulfills that commitment by providing information received in interviews on allocation practices from the perspective of both allocators and PRPs participating in allocations.

III. METHODOLOGY

The Office of Site Remediation Enforcement (OSRE) contacted three organizations experienced in leading and developing allocations (allocators), five firms experienced in representing PRPs in CERCLA settlements, three of which function as allocators when not representing parties at sites, and one in-house counsel, to discuss their allocation experiences. The nine parties interviewed are located in, and represent parties from, geographically diverse areas of the country. These interviews were conducted in order to identify allocation methods currently used to allocate costs at sites, and identify issues associated with the implementation of allocation processes. The information in this report is limited to the extent that the number of parties interviewed was limited.

IV. DEVELOPING ALLOCATIONS

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and 4) parties which transported the substances to the site (transporters). These parties may be pursued by the government under sections 104, 106 and 107 of CERCLA and/or by private parties.

The process by which PRPs organize to apportion site remediation costs with the goal of settling among themselves and collectively with the U.S., is commonly referred to as an allocation. PRPs often coalesce to allocate cost shares so that they may resolve potential liability with the United States, through negotiations with the EPA, to minimize transaction costs that might otherwise be associated with PRP settlement negotiations and litigation. To facilitate these processes (i.e., allocation and settlement), coalescing parties usually set up an allocation committee. The allocation committee may be responsible for developing a method to fairly allocate site costs among the parties and recommending a final allocation to an executive committee, or the group may hire a private consultant (an allocator) who would perform all or part of these functions. The latter arrangement is the focus of this report.

Once the PRPs select an allocator, the allocator's specific responsibilities are set forth in a contract between the PRPs and the allocator. The allocator's role may vary in scope from data collection and compilation activities to development of a cost allocation. Prior to beginning work, the allocator submits to the parties a scope of work for the project, including specific tasks and corresponding cost estimates. The scope of work assures the allocator that participants agree up front on the process used for allocation and provides the participants with necessary control over the allocator's activities and charges. The scope of work continues to operate as a master plan throughout the allocation process.

Some of those interviewed cite that a primary advantage of involving an allocator in the settlement process is the degree of confidentiality afforded contribution information and confidential business information. Participants are more forthcoming with information to an allocator with whom they have entered a confidentiality agreement than they are to an allocation steering committee with whom there is generally no such agreement.

Others interviewed report that, in some instances, especially for sites with few parties and relatively good contribution information, it is more appropriate for an internal committee, rather than an outside party, to make cost allocation

determinations. In these cases, an intermediary adds an unnecessary layer and cost to the allocation process; however, many interviewees observe that it is often necessary to hire an allocator for compilation of the database and to resolve intra-PRP group disputes.

Whether or not a PRP group hires an outside consultant, there are several well-recognized phases of an allocation: 1) development of procedures to govern the allocation (this step includes approval of the allocator's scope of work, where appropriate); 2) information identification and collection; 3) database development including resolution of participant disputes and corrections to the database; 4) submittal of advocacy briefs from PRPs to the allocator and the use of particular allocation factors and allocator's review of available information; 5) issuance of draft allocation report; 6) challenges to the allocation; 7) issuance of a final allocation report; and 8) facilitation of a settlement. When an allocator is hired by the PRP group, the allocator is primarily responsible for developing an allocation of cost, with support from technical and legal support where necessary.

A. Procedural Rules

It is usually during the first phase of the process that the participants develop rules and procedures regarding, for example, ex parte communications, dispute resolutions, and appeals. The allocator may assist in developing a balanced process that ensures both goals of fairness and of reaching an expeditious settlement. Some allocators caution against too much process; they report that the more the allocation process resembles a mini-trial, the higher the transaction costs. Some interviewees argued that procedures such as rights of cross-examination and the use of document production and interrogatory-like requests add substantially to transaction costs but do not significantly change the bottom-line allocation results.

Some of those interviewed noted that confidentiality of information is an issue which needs to be resolved early in the process, and noted that parties usually enter into extensive confidentiality agreements. Parties may agree to keep information confidential among the participants or with the allocator, where appropriate. These agreements help to ensure

that if a party shares information with the allocator that waste was sent to a particular site other than the site for which an allocation is being conducted, that information may not be used in future dealings with EPA or other parties. By identifying the ground rules as early in the process as possible, the likelihood of law suits resulting from inappropriate disclosures is minimized. This is particularly important to prevent parties from discontinuing participation and attempting to settle with EPA using information gathered from other allocation participants.

Opening statements provide an opportunity for parties to propose that certain facts and allocation factors be given consideration. Parties do not generally agree at the outset as to what factors the allocator should apply to apportion site costs. The allocator decides what factors are most relevant and documents these decisions and additional assumptions in the allocation report. Once a draft allocation report is issued, the parties have the opportunity to comment on factors used to allocate costs. Essentially, a dialogue takes place between parties and the allocator until a final allocation report is issued. At this point the parties may choose to accept the report as issued, or use it as a basis for negotiation, in order to reach settlement.

B. Information Collection and Data Compilation

Once the parties agree upon procedures to govern the allocation, the information collection can officially begin. In some cases that means continuing where earlier information gathering efforts ceased. Information-gathering activities vary depending on the site type and classification of parties. Sources typically used for waste contribution information include: responses to EPA's CERCLA section 104(e) information requests; disposal records; site records; interviews; and questionnaires.

The majority of those interviewed report that section 104(e) information is easily obtained as a result of EPA's recent information-sharing policy; however, one interviewee noted that 104(e) information was available only half of the time needed. The latter interviewee proposed that a more diligent use of 104(e) requests by EPA, including collection of penalties by EPA

for noncompliance, would result in better data and ultimately, more accurate cost allocations. Availability of 104(e) data becomes particularly relevant for cases in which parties identified by EPA as PRPs at the site do not participate in the allocation process. EPA's 104(e) requests may provide information to the allocator regarding volume of waste contributed by those parties not participating in the allocation.

Even though PRP responses to EPA 104(e) requests are readily available in most cases, allocators are frequently asked to draft and administer questionnaires. Questionnaires typically include questions regarding the waste-generation process, disposal methods, and waste haulers used, to provide the allocator with additional information on waste contributions and leads on transporters and pathways of contamination. Generally, employee statements relied upon for corporate information are required to be notarized, and corporate officer certification is required for verification that corporate records have been searched with diligence. One allocator observed that participant responses to allocator information requests are often more thorough than responses to EPA's 104(e) requests because of PRP-allocator confidentiality agreements.

Information gathering in the case of a generator landfill allocation initially focuses on obtaining available volumetric information or information which may be used to generate surrogate volumetric information. For periods in which volumetric information is absent, data is often extrapolated from waste production and disposal records for a given period to determine waste contribution for the non-recorded period. The yearly amount of waste produced and the number of years of operation are two factors frequently used during extrapolation in order to better calculate volumetric contributions absent records. Another example of how extrapolation is used is the case in which a party utilizes four recycling facilities for disposal annually. In the absence of other information, the allocator may, for example, use the assumption that the recycling facility at issue accepted one-fourth of the facility's waste during the annual period.

In addition, some allocators rely upon waste output models of a party's production facility for cases in which waste-disposal information is absent. For example, if a facility

manufactures 50 units in a given year and a corresponding byproduct of 2 gallons of hazardous materials, then, in the absence of other information, the allocator may assume the generation of 2 gallons of byproduct in a recordless year provided that manufacturing remains at 50 units. One interviewee objected to waste output models because models may inaccurately portray production during that period, or even worse, they may unjustly penalize a company for keeping detailed production or disposal records during other time periods. A model could attribute the generation of waste to a PRP in excess of the amount actually produce based on records.

In an effort to fill data gaps, economic issues are also considered in developing disposal assumptions. For example, an allocator may rely upon the assumption that the transporter hired by the generator used the disposal facility which was most cost effective for the transporter.

If volumetric contribution information is collected, the allocator develops a database to house the information. Many of those interviewed first classify parties by waste type disposed (e.g., solids verses liquids). Once waste type categories are developed, the allocator then ranks parties by volume of waste disposed. Some interviewees stressed that consistency of judgment throughout development of the database is critical in developing an accurate allocation; therefore, the fewer people directly involved in making interpretations, applying assumptions, and inputting data, the more reliable the data. PRPs are generally provided an opportunity to provide a quality control review of the database for clerical and technical errors. That review may result in challenges to data input, such as recording of duplicate transactions and purported misinterpretations of data.

For sites at which contamination is due to the historic operation of a manufacturing facility or facilities (non-landfill sites) or landfill sites at which the only PRPs are owners or operators, though the basic information collection process is similar, interviewees reported that a substantially different approach must be taken in developing and organizing a database. The ranking of parties in these situations is dependent upon site specific circumstances and generally does not lend to ranking parties in a purely quantitative manner. In contrast to many

landfill sites where volumetric data is available from disposal records, at non-landfill sites disposal data is not available since any disposal was generally a consequence of a manufacturing process which included undocumented discharges and inadvertent spills of hazardous substances. Therefore, surrogate data may be generated by an evaluation of: 1) typical manufacturing process discharges and spills; 2) production line practices; and 3) the environmental fate of contaminants.

Finally, those interviewed report that for sites at which an allocation is between PRPs which are owners and operators, information should be obtained regarding the practices and knowledge of the parties in order to determine relative responsibility. Information sought typically includes length of ownership, operational control, degree of control over disposal practices, knowledge of the hazardous nature of materials disposed, and financial or other benefit derived from allowing disposal. Once data is collected, the process of allocating cost shares may begin.

C. Application of Allocation Factors

The Gore Amendment[2], an unadopted amendment proposed to the original Superfund bill, contains the following factors to be considered when allocating site costs among PRPs: (1) the amount of hazardous substances involved; (2) the degree of toxicity or hazard of the materials involved; (3) the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances; (4) the degree of care exercised by the parties with respect to the substances involved; and (5) the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.

Since proposed, the Gore factors have been applied as relevant factors, in whole or in part, by allocators in private

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[2] See H.R. Rep. No. 99-253 (III), 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3042.

allocations and by courts in contribution actions.[3] In both contexts, a variety of additional factors have been applied depending on site circumstances and at the discretion of the judge or allocator. Those factors include: 1) years of ownership or operation/years of generation or transportation/years of manufacturing process; 2) consideration of the petroleum exclusion; 3) the ultimate environmental fate of wastes at the site; 4) the degree of care exercised in waste disposal or ownership and operation; 5) the degree of control over waste practices; 6) permit violations; 7) the degree to which a party is providing a public service; and 8) knowledge of waste disposal practices. One allocator reported using the degree of party cooperation as a factor since allocations only work in situations with cooperating PRPs.

Because the goal of the allocation process is settlement, all interviewees recommend that application of allocation factors should be flexible to accommodate site-specific situations and to increase the likelihood of settlement. None of the allocators interviewed rely on specific formulas or models to allocate cost shares. They all emphasized that factors applied are a function of site type, amount of information available, and classes of parties involved in the allocation. Generally, in generator/transporter allocations, the allocator primarily considers volume and contaminant fate in allocating cost shares. Some interviewees believe that the use of volumetric information alone is inappropriate to develop a cost allocation. In owner/operator allocations, the allocator's focus shifts to factors such as degree of care in, and years of, ownership and operation.

Of the allocation factors identified, those interviewed identified toxicity of waste as the factor generating the most controversy in its application. Interviewees reported that claims of toxicity often result in much time spent name-calling and little time addressing contribution. Although many of those interviewed indicate that the toxicity of waste contributed is

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[3] See "Allocating Contribution Shares in Superfund Cases," Chemical Waste Litigation Reporter; "Allocation of Response Costs in Private Superfund Actions," Chemical Waste Litigation Reporter, Vol. 17, No. , December 1988.

considered as a factor in a generator/transporter allocation, most parties believe that toxicity alone is not an appropriate modifier because it is a poor measure of site responsibility. More specifically, for allocations at landfill sites involving primarily generators, for example, the degree of toxicity of a party's waste is used to manipulate the raw volumetric data by either discounting or appreciating a party's contribution to the site. Interviewees report that many PRPs feel that toxicity should only be used to discount baseline volumetric information already determined (i.e., more weight is giving to more toxic waste when volumes are relatively equal). They state that some PRPs prefer developing a waste contribution table made up solely of volumetric contributions, and then providing an appeals process for parties to argue for adjustment of their contributions based on toxicity claims.

Rather than considering toxicity of a waste alone, many interviewees propose that toxicity be considered in relation to the contaminant's role in driving the cost of the remedy at the site. For example, if a generator disposed of a highly toxic chemical at a site, but that contaminant was not the primary contaminant of concern being addressed and resulting in the high cost of the remedy, then that party's share would not be increased because of its waste toxicity any more than the parties who contributed less toxic waste to the site. In addition, if the toxic materials disposed at the site are well contained (e.g., remained immobile and capped as part of landfill containment) and consequently represent a discernable component of the cleanup costs, the participant would not be responsible for a greater cost share associated with a groundwater pump and treat system simply because of the high toxicity of the material. This application focuses on the ultimate role of a contaminant in site remediation, rather than the toxicological characteristic of the waste.

Although litigative risk is not a factor of the actual contribution findings, it may be used to modify the ultimate settlement. Even after the allocator issues a final recommendation, the degree to which parties are motivated to settle may still be an issue. For example, litigation risk may be used as a floor to determine a minimum payment. If volumetric information does not exist but the party is presumed to have been a small volume contributor, then the minimum settlement cost for

that party may be set at the cost of litigation, and that amount may become the party's allocated share.

D. Allocations between Classes of Parties

None of the allocators interviewed identified specific formulas or reliance on any particular rule of thumb to determine shares in cases in which generators/transporters and owner/operators are both involved. Interviewees stated that allocations which include owners and operators pose a greater challenge in achieving a reliable allocation than generator/transporter allocations.

Unlike generator/transporter allocations, at which volumetric information or surrogates may be used to generate volumetric information, raw volumetric data is inapplicable in calculations of owner/operator allocations. Often, allocators utilize site-specific facts and court opinions with similar fact patterns to determine what factors are applicable for an owner/operator allocation. Most allocators interviewed rely on some or all of the following factors in determining owner/operator share: (1) degree of care exercised in ownership or operation; (2) years of ownership or operation; (3) degree of control over waste practices; (4) permit violations; (5) degree to which party is providing a public service; (6) knowledge of waste disposal practices; and (7) economic benefits from ownership and operation.

For generator/owner/operator allocations, often, the owner/operator is not part of the original group of coalescing parties. Generators/transporters commonly initiate and participate in an allocation without involving the owner/operator in order to allocate among themselves and adjust for cost shares depending on a determination of an orphan share. [4] Frequently it is futile for parties to invest much time in determining an

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[4] Depending on the allocation, there are different ways to define orphan share. An orphan share may defined as contamination attributed to defunct, bankrupt or financially nonviable parties. At other sites it may also be defined as contamination that cannot be attributed to an identifiable party.

owner/operator share because the owner/operators are often financially non-viable, and have little money to contribute to site cleanup. In cases where generator/transporters have developed an allocation scheme absent owner/operator participation, the generator/transporter participants may look first to financial viability of the owner/operator. Based on an ability-to-pay analysis (discussed in more detail below) of the owner/operator, the group often takes whatever payment the owner/operator can make, and uses that payment to offset the total settlement amount. In those cases, no percentage share is assigned to the owner/operator.

Where a generator and transporter are responsible for the same waste, interviewees identified a couple of ways to allocate the costs: (1) divide the cost of their allocated share between the two parties; or (2) if there is an orphan share, assign the costs associated with their allocated share to either the transporter or generator and allocate the orphan share or a portion thereof to the other party. Facts associated with the generators' and transporters' activities can affect the share allocated to those parties. Some factors often considered with generator/transporter divisions are whether the transporter had alternative disposal locations available, or by contract was required to dispose of waste at a particular location, and the respective parties' culpability and general practices.

E. Federal, State and Municipal Parties

Most allocators indicate little difference in their experience whether dealing with private, federal, or state parties as PRPs. Most interviewees indicate that allocators treat federal and state parties similarly to other parties; however, private parties in some cases indicate uneasiness about participating in allocations with federal parties because of confidentiality concerns. PRPs develop very extensive agreements to preserve confidentiality of information shared during the allocation process; generally these agreements are not entered into with Federal parties due to the dual role of the government as enforcer and PRP. With the exception of confidentiality issues, the interviewees did not identify additional issues which arise by virtue of federal and state participation in allocations. However, some of those interviewed identified unique issues which arise with allocations involving

municipalities.

Some interviewees observed that for cases in which PRPs perceive that EPA treats municipalities differently than the other parties at the site, the allocation process may deteriorate. Of those interviewed, some stated that not knowing the grounds upon which the EPA may settle with a municipal party may negatively affect the allocation. In addition, one allocator stated that when EPA contemplates settling with a municipality for an amount lower than the amount determined in the allocation proceeding, participants often feel slighted and the allocation effort may fail. That allocator suggested that the development of a cohesive municipal PRP policy by EPA would alleviate these concerns.

Another interviewee, stressed the significance of differences between municipalities and other parties which should be taken into consideration, on a site-specific basis, in allocations. The allocator observed that municipalities are not for profit organizations; therefore, economic benefit factors generally considered in allocations between private parties are inappropriate to use. The allocator also noted that determination of cost shares should be tempered by the fact that municipalities perform a public service. That factor should be weighed against any culpability a municipality might have demonstrated in the disposal, transportation, ownership of operation og hazardous waste.

F. Ability to Pay Determinations

Most sources indicate that, with the exception of owner/operator contribution determinations, ability-to-pay issues are not considered until the allocation recommendation is completed. At that time, inability-to-pay claims are presented, and where proven, the discounted amount is redistributed among the remaining parties. In some cases allocators may also be involved in structured settlements for parties with limited ability to pay (i.e., development of a payment schedule).

Determinations of ability to pay are reported as most difficult among municipalities. When allocator's assess a municipality's financial viability, they must consider issues not relevant to assessing private parties' viability. Indicators of

municipal health reportedly used include the following: overall net debt as percent of full market value of taxable property; bond rating; unemployment; median household income; property tax collection rate; and property tax revenues as a percent of full market value of taxable property. For assisting in assessment of municipality assets, one source recommends the article, "Assessing a Municipality's Ability to Pay Superfund Cleanup Costs," written by Tex Ann Reid, U.S. EPA, Region IV, and Edward M. Clark, Anthony M. Diecidue, and Mark F. Johnson, PRC Environmental Management, Inc. "Methodology for Analyzing a Municipality's Financial Capability," by the Economic Analysis Division, of EPA's Office of Policy, Planning and Evaluation (February 28, 1985) is also recommended by this person for assistance in determining municipal financial health.

G. Parent and Successor Corporation Issue

Whether parent and successors of a participating PRP should be allocated a cost share may be considered at some sites (e.g., in the case of an impending bankruptcy claim). In general, parent and successor corporation issues are treated in one of two ways. At some sites, these issues are not considered in the allocation; rather, the participants are responsible for seeking resolution on issues, such as whether the parent or successor may be liable under CERCLA, in side-bar negotiations without the allocator's assistance or through litigation. At other sites, a successor may be brought into the allocation if there has already been a finding of liability or an allocator is asked to undertake an analysis of whether a parent company is liable or successor liability would attach. Some of the interviewees expressed a reluctance to address issues of parent and successor liability.

V. ALLOCATOR EXPERTISE

All interviewees agreed that the most critical factors for a successful and accurate allocation are the neutrality of the allocator and the perception of fairness. One allocator noted that an allocation is perceived as fair when the participants have an opportunity to present their arguments, and they believe those arguments are taken into consideration and addressed rationally. Several interviewees noted that an allocator's neutrality and ethics are key elements to good faith participation by parties. Interviewees all agree that full

disclosure of current or prior relevant representation of interest by the allocator is an absolute necessity prior to commencing allocation efforts. Because of participant desires for neutrality, PRPs often disapprove of prescribed formulas or models. Preconceived models may indicate that an allocator is not beginning the process with a neutral view.

Most persons interviewed agreed that ideally allocators should possess extensive familiarity with CERCLA. One allocator noted that a PRP has greater confidence in the process if a person experienced in Superfund is allocating cost shares. That person stated that hands-on experience can not be substituted with academic experiences. Interviewees did not agree as to whether or not the allocator should be an attorney. None of the interviewees expressed interest or concern for an allocator certification program, nor felt that administrative law judges or arbitrators are better equipped to conduct Superfund allocations.

Other traits considered helpful to the allocator include: excellent interpersonal and communication skills (listening to other ideas and reconsidering when necessary), and problem-solving abilities. In addition, interviewees agreed that allocators should be team builders, steer the allocation process, and periodically update the PRPs on progress of the allocation. Allocators are also expected to introduce issues needing resolution, make recommendations as to the resolution of these issues, and ultimately keep the process moving towards settlement.

VI. TIME AND EXPENSE CONSIDERATIONS

The time and expenses associated with an allocation varies greatly from site to site, but are primarily influenced by the number of parties at a site and the cost of remediation. Generally, an allocation at an average site may take six months. At some sites, however, allocations have been completed within two months. Complicated sites may require up to two years for resolution. A generally accepted range of time involved for allocating at sites is six months to two years.

For cases in which remediation is most costly, more time is required to develop an acceptable allocation. In addition, a correlation exists between the amount of documentation available

and the amount of time invested in negotiating an allocation: for cases in which ample information is available, less time is required for an allocation. Allocations are more expensive now than they were in the 1970s and 1980s in part because volumetric information is not now as readily available.

The expense of an allocation (e.g., costs of retaining allocation professional services) depends largely on the number of parties participating or being allocated shares. Generally, allocation costs for a small site range from $25,000 to $100,000. The expense for complex sites, however, may exceed $200,000, with a likely maximum of $500,000. For generator/transporter allocations, a significant portion of the cost is associated with development of the database.

The internal expense of participating in an allocation process must also be considered. PRPs represented by internal counsel report that the expense of participating in an allocation are minimized because their representative counsel are salaried employees, costing less than counsel retained on a project-specific basis.

VII. PURPOSE AND USE OF THIS DOCUMENT

This report reflects the information that was gathered from entities involved with administering or have participated in an allocation process to apportion the costs of Superfund remediation. This report does not constitute the views of EPA or policy by the Agency and may not be relied upon to create any specific rights or privileges, substantive or procedural, enforceable at law or in equity.

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Environmental Protection Agency

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Superfund Reform:
Orphan Share Implementation

Tab 5-2

INFORMATION GATHERING APPROACHES IN THE ALLOCATION PROCESS

Any allocation is based on facts. Therefore, every allocation must include an information gathering phase. The parties and the allocator must be able to work from the same information base concerning the nature of the parties, their operations, and the types and volumes of materials sent to or disposed of at the site. Absent a shared description of the facts, the allocator will not have the information needed to prepare an allocation, and the parties will not have enough confidence in the allocator's work product to use it as an equitable division of site responsibility.

At most sites, the information that is collected and assessed falls into two basic categories: quantitative and qualitative data. "Quantitative data" is typical waste-in information -- gallons, drums, cubic yards and other numerically-based descriptions of the materials contributed by an individual party or group of parties. "Qualitative data" consists of all of the other information that describes a party, its material, or its relationship to a site, and can range from a substance name (i.e., waste oil or trash), to the nature of a transaction (a sale versus a manifested disposal), to issues of responsible party status (for example, a contract confirming that a party conveyed property with knowledge of contamination). A fundamental rule of allocation is that the information gathering process must be tailored to every site, because not every site has all (or even most) types of information available to the PRPs or the allocator.

On the whole, sites subject to allocation efforts generally can be divided into three categories, based on the types of PRPs present:

A. Owner/operator sites;

B. Generator[1] sites; and

C. Sites with a mixture of owners, operators, generators and transporters.

At owner/operator sites, an allocation likely will be based primarily on qualitative information: in a dispute between present and/or successive owners and operators, waste or volume numbers usually are not available, and are not as relevant to a distribution of liability as are contractual terms, knowledge of disposal or housekeeping practices, financial benefit derived from the contaminating activity, and similar narrative facts.

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[1] For the purposes of this discussion, the term "generators" refers to those parties subject to potential liability under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq. ("any person who by contract, agreement or otherwise arranged for disposal or treatment . . ."). Generators also is used to refer to those parties may be liable because they brokered or the transfer or disposal of hazardous substances.

For most generator sites, the allocation efforts will focus on quantitative information: either waste or volume numbers (including waste-in, waste-out or waste-remaining, depending on the circumstances), or narrative descriptions that can be converted into numbers. In allocations generally, the goal is to provide each party with a percentage share of the site. These percentages then often are adjusted by qualitative information such as the presence of a remedy-driving chemical in a party's wastestream.

Sites with a mixture of owners, operators, generators and transporters present a twofold challenge to the information gathering process. First, the allocation methodology must define the areas of inquiry in such a way that the allocator collects both qualitative and quantitative information from all parties, so that the necessary information comes into the process from each type of party. Second, the allocation methodology also must restrict the areas of inquiry so that the allocator is not deluged with irrelevant data. It is just as possible to destroy an allocation with too much information as it is with too little: the allocator and the parties exhaust themselves on information gathering and assessment, and have no time, money or patience left to translate the allocation process into a settlement.

No matter which types of PRPs present at a site, however, the allocation process will proceed through a number of informational steps before the allocator can proceed with his or her job of producing relative share numbers for each party.

I. Information Collection.

An allocation process may seek information from a variety of sources, including:

A. Information from regulators.

Governmental agencies and departments often are storehouses of relevant information for an allocation, including such items as:

- A waste-in list[2] or NBAR;

[2] *See* Krickenberger, Kit R., & Berman, Eugene, *Allocation of Superfund Site Costs Through Mediation,* 12-15 (Alexandria, Virginia: Clean Sites, Inc., 1987). EPA often provides an initial waste-in list or a Non-Binding Allocation of Responsibility (NBAR), based on documents available to the agency from site owners and operators, and occasionally transporters and generator PRPs. The waste-in list or NBAR may, but usually does not, adjust raw volume numbers with discounts or multipliers to account

- responses to information request letters sent out under the authority of Section 104(e) of CERCLA or a counterpart state superfund-type law;
- regulatory agency files, such as
    - federal hazardous waste, water and air permits;
    - similar state permits, and transporter manifests or waste hauling records; and
    - local information from health departments, planning and zoning commissions, public works agencies (building permits, sewer/waste line plans and approvals), and fire and police departments.

B. Information from PRPs and other private sources.

The search for relevant allocation information does not end with the regulators' files. Older or illegal disposal sites, owner/operator disputes, and Aceto-type[3] cases frequently do not have a wealth of regulatory files, because they were not subject to a regulator's authority. For most other sites, if the regulatory files contained enough information to create an allocation, the parties would not pay for a private allocator. The next place to search for information thus becomes private party documents and recollections, including:

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for differences in toxicity, litigation risk, and other common allocation factors. Although a waste-in list frequently is the first step in an allocation, a completed allocation will take much more information into account than just the waste-in numbers.

[3] In U.S. v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989), the court denied defendant's motion to dismiss, holding that the "otherwise arranged for" language of CERCLA Section 107(a)(3) is sufficiently broad to justify the imposition of liability on manufacturers who retain ownership of a product that is processed at a site for the manufacturers' benefit and at their direction, and which site later is found to be contaminated with the manufacturers' substances. The court further justified its opinion with the fact that waste generation was inherent in the formulation process. The Aceto theory of toll processor/formulator liability continued with the Ninth Circuit decision in Jones-Hamilton Co. v. Beazer Materials & Services, Inc., 959 F.2d 126 (9th Cir. 1992).

- business records
    - of owner/operators, such as
        - invoices, accounting ledgers, customer cards or lists, call notebooks, hauling slips, and gatekeeper logs;
        - internal memoranda describing material handling practices that might reveal information about spills or overfills;
        - correspondence with regulatory agencies;
    - of generators and owner/operators, such as
        - raw material purchases;
        - waste disposal transactions;
        - production records and sales figures;
        - equipment maintenance, construction and disposal records;
        - technical studies, including site acquisition studies such as Phase I and Phase II reports, Preliminary Assessments and Site Investigations;
        - operation receipts, ledgers and invoices;
        - supplemental responses to Section 104(e) requests;
    - of generators and transporters, such as
        - manifests, spill reports, hazardous waste storage reports, disposal facility permits and permit applications, state and local transporter reports and monitoring records;
        - customer lists and ledgers;
- interviews with and/or depositions of past and present principals and employees about customers, materials, handling and disposal practices;

- allocation questionnaire responses, posed to the parties as part of the allocation methodology or protocol; and

- relevant litigation files, including proceedings to obtain site access, insurance coverage and toxic tort cases, as well as any preexisting or ongoing cost recovery and contribution actions.

During the information collection process, the parties and/or the allocator will inventory the known sources of information (such as those described above), determine the best method for acquiring data from each source, and proceed with acquiring the relevant information.

The amount of available information often varies among parties, ranging from those with full documentation and knowledgeable employees able to provide corroborating testimony, to those with limited or no records or testimonial information. For parties with little or no readily-available information, the allocation must use other collection methods, including private investigations and allocation questionnaires. Private investigation firms can provide valuable data by interviewing witnesses (for example, site operators or haulers), uncovering additional records, developing testimonial evidence, or filling in information gaps for missing time periods. In some cases, the allocator can serve a similar role. With the consent of the interviewed party, the allocation participants may preserve an interview by tape or video recording and transcription. The use of allocation questionnaires, often with authentication or certification, is a reasonably common tool for seeking allocation information.

II. Information Assessment.

After the allocator and the parties collect information, the allocator must analyze it to begin sorting relevant from irrelevant data, and preparing the framework for the ultimate allocation. An allocation is more than a waste-in list, and the allocator may present his or her assessment of the facts and their importance to the allocation through one or all of the following:

- a report on the status and history of the facility, including

    - the owners, operators, and historical users of the site;

    - the types of operations and activities conducted at the site;

- the kinds of permitted and unpermitted processes, operations and activities that went on at the site, and the consequences of those acts;
- a general description of the nature and chemical composition of the materials sent to the site;
- a description of the nature and chemical composition of the contaminants present at the site; and
- a synopsis or analysis of the contractual agreements and relationships currently existing or which existed in the past between the parties;

- a report for each participating party, summarizing the available information pertaining to that party, including
  - PRP name and address;
  - facility name and address for each plant or location involved in the site being allocated;
  - individual transactions that are or may be linked to the site, including date, quantity, type of material, source of information, method of transport, manufacturing process involved, type of transaction (i.e., sale or purchase), method of disposal (i.e., leak, spill, landfill, incineration), location of disposal, and cross-referenced corroborating or contradictory information available to the allocator;
  - potential affiliated or co-liable entities (i.e., a generator or broker);
  - eligibility for any discount and/or multiplier factors;
  - other information relevant to liability or allocation (i.e., owner/operator contractual or deed provisions); and
  - applicable defenses;

- an allocation report, which
    - presents individual party volumes in a common unit or units of measurement;
    - suggests the discounts, multipliers, exclusions and defenses that the allocator believes are appropriate for the site;
    - adjusts the individual party volumes by these discounts, multipliers and exclusions intended to account for differences in toxicity or contribution to the contamination being addressed at the site, defenses and litigation risks; and
    - derives a numerical total volume for the site, against which individual party numerical assignments are compared to assign percentage shares.

When the parties at a site consist only of owners and operators, the allocator may be able to assess their relative contributions by the amount and type of waste each disposed of at the site. If production and disposal figures are unavailable, the allocator may use tenure at the site as a surrogate for waste disposal, particularly if the processes used at the site did not vary over time. What initially appears to be a simple allocation, however, often becomes much more difficult because of different historical facts, such as process or housekeeping changes, relocation of process areas to different sections of the site, equipment decommissioning and/or updating, and selective operation or occupation of separate areas of the site by successive owner/operators. In such cases, the allocator must use qualitative information other than volume or tenure to evaluate an equitable distribution of shares.

When a site's PRPs include not only owners and operators but also generators and transporters, the information assessment is both easier and more complex. It is easier to compare generators and transporters to each other, because the available information tends towards the numerical -- loads, gallons, pounds, drums -- which is easier to attribute on a volumetric basis than the more narrative information associated with owners and operators -- contract and deed terms, dates of installation of pollution control equipment, etc. The allocation as a whole becomes more complex, though, because the allocator must engage in an "apples to oranges" comparison; he or she must apportion site shares among parties who may be liable for the exact same cleanup costs under different theories of liability.

For example, at a recycling site, factors such as the history of the site, the degree of care exhibited by the owner/operator and the length of time each owner or operator controlled the site may affect the owner/operator relative shares. Generator and transporter shares may be based on the volume and type of material sent to the site by each of them. When it comes time for the allocator to assign total allocation shares to all parties, however, there may be a generator, a transporter, and an owner/operator who all have or could have liability for the same gallon or pound of material. The allocator must exercise creativity and judgment in determining how a court might divide that gallon's or pound's site share between the generator, transporter, owner and operator.

Finally, the allocators' initial information assessment also may include some indication of likely orphan shares, including insolvent, absent, or financially shaky owners, operators, generators and transporters.

III. Quantitative Information.

Quantitative information gives a numerical basis for dividing responsibility among parties. Quantitative data permits the allocator to develop an allocation share which directly correlates with the amount of material contributed by each party.

After culling numerical information from a party's records, allocation questionnaire responses, interviews, briefs and depositions, the allocation consultant will transfer this quantitative information into a summary format, such as a chart, graph, report, or computer spreadsheet or database. There are many sources of quantitative information. Some of the most common are presented below.

A. Owner/operator records.

When available, owner and operator records often provide the most comprehensive picture of transactions at a site. Documents related to the daily operation of the site are especially helpful and include:

- shipment logs;
- daily activity sheets;
- batch reports and analytical test records;
- hauling slips and transportation records, including receipts;

- disposal records;
- worker notebooks, status and problem reports;
- laboratory reports on samples of material; and
- storage locations for handled items.

When an owner/operator's financial records survive, they often contain the amounts and dates of customer invoices and payments, and serve both as a primary source of information and a secondary source of conversion rates, so that a customer's "one load at $5.00" record can be translated to an appropriate volume. If the allocator can access the owner/operator's rate structure (charges to or payments from customers), he or she can infer the volume of material that is the subject of the financial record at issue.

Site financial records may be in the form of:

- accounts payable and receivable ledgers;
- copies of incoming and outgoing invoices and checks;
- deposit slips; and
- statements of customers' accounts.

Owners and operators now are, and in the last twenty or so years have been, required by regulators to file various permits and reports with local, state, and/or federal agencies. These permits and reports may contain references to the quantity and nature of waste and other material, and include:

- permit applications;
- operation reports;
- deeds and leases; and
- spill notifications.

Even if owners or operators are insolvent or financially unable to pay for an allocation or for ultimate site cleanup costs, it is often advisable to allow them to participate in the allocation process, if only to obtain access to the types of information listed above.

B. Generator and broker records.

Generator responses to state or federal information requests may provide documentation on the nature and quantity of material sent to the site. Such information can clarify or supplement site records. Generator business records can supply details about the nature of that generator's material, or cover periods of time missing from the operator's records. In some cases with missing or absent site records, generator documents may provide enough information to reconstruct the site operations. Brokers, in turn, often hold financial records such as invoices and sales agreements, or documents confirming the transportation of brokered material to a site. Although a generator's or broker's records may include copies of reports sent to regulatory agencies, they more commonly concern finances and the transportation of material, such as:

- ledgers of accounts payable;
- invoices;
- cancelled checks;
- sales agreements with brokers;
- pick-up slips;
- delivery orders;
- freight bills and bills of lading; and
- waste manifests.

Generators also sometimes have internal memoranda summarizing use of a facility, or production or waste generation rates from a particular plant. Even if the underlying records supporting these memoranda have been lost over time, the memoranda themselves can be important source documents for an allocation.

C. Transporter records.

Transporter records often refer to many different generators and site owners and operators, and thus can be useful when parties search for additional PRPs. Responses from transporters to government information requests can supply documentary evidence demonstrating the volume or weight of material picked up from generators or brokers and taken to a site. This information may consist of:

- ledgers;
- invoices to customers;
- photocopies of payments from customers;
- invoices from or payments to a landfill or disposal location;
- customer logs, notebooks or other call records;
- drivers' logs;
- trip tickets;
- delivery orders and receipts;
- weigh tickets; and
- confirmation slips issued by the plant gate attendants where the transporter picked up or disposed of material.

Again, transporters may have internal memoranda or copies of letters sent to current or prospective clients that also may provide quantitative information about the volume and nature of their transactions with a site.

D. Other sources.

State, federal, and local agencies may also be sources of quantitative information. Data may include permit applications and permit-related documents, spill notices, waste manifests, or documents associated with cleanup actions that have already taken place, including inventories of drums or other items removed from a site.

IV. Qualitative Information.

When the information gathered does not provide adequate quantitative data to perform an allocation, as is often the case, the allocator must rely upon qualitative data. This qualitative data can serve different purposes. First, it may act as a surrogate for quantitative data, and thus be used to estimate volume for a particular party. For example, a transporter might recall that he picked up "about 4 drums a week for 3 years," from a particular PRP and took this material to the site. Clearly, the allocator can translate this testimony into a numerical entry for the PRP.

Second, qualitative data also can provide non-numerical litigation risk and allocation factor information, such as, for example, a description of a generator's material as being sold to an owner/operator for incorporation into a product, rather than for disposal. Another example of such qualitative information and its effect on an allocation is information describing the nature of the contaminants at the site which require remediation, so that the allocator can attribute specific remedial costs to specific contributors or wastestreams.

Finally, an allocation can take into account qualitative information about an entire industry or process, such as standard operating procedures in use during a given time for the manufacture of a certain product. These "SOPs" can include information allowing the allocator to make assumptions about the generation of wastes inherent in the production process. Alternatively, such qualitative information may confirm that a party did not contribute a specific substance to a site. If, for example, a specified commercial solvent was not used for general degreasing until five years after the site closed, a manufacturing PRP who sent cleaning rags to the site is not likely to have contaminated those rags with that particular solvent.

Such qualitative information can influence the allocator's characterization of the entire share of a party. The allocator's analysis of this sometimes anecdotal and almost always narrative type of information is crucial, however, because if a party's arguments regarding qualitative information are not addressed, that party will not accept the ultimate allocation. The best way to ensure the acceptability of an allocation that incorporates qualitative information is to agree about the uses of such data at the beginning of the process.

A. Qualitative data sources.

Qualitative data may be found in an almost infinite variety of sources, including:

- deposition transcripts and/or interviews of generators, transporters or former employees of the site;
- statements from other individuals who may have had knowledge of operations at the site;
- records from court cases involving the site;
- correspondence between site operators and state, federal, or local agencies; and
- site investigations by regulatory agencies.

Sources of less specific data may be:

- license and permit applications;
- manufacturing information for a particular facility or industrial process;
- non-site-specific waste generation information for a particular company or industry;
- effluent reports from wastewater treatment plants;
- news articles;
- standard chemical or manufacturing reference manuals and texts;
- correspondence or records from community action groups; and
- Material Safety Data Sheets.

V. Allocations Incorporating Qualitative and Quantitative Data.

A fully manifested treatment, storage and disposal location, with complete records, few or no process changes over time, and which accepted standard compounds for disposal does not need an allocation -- it needs a comprehensive waste-in or waste-out list. The parties can reach settlement using their numerical percentage shares, and reserve their energy for addressing cleanup concerns. Few sites currently in the Superfund pipeline meet this criterion.

An allocation combines numerical data with narrative data to produce an equitable division of responsibility among the parties. The product of an allocation is a "rough justice" assignment of percentage shares. Most sites combine quantitative with qualitative data.

The allocator who proposes an initial division of responsibility must explain to the parties his or her reason for including each piece of information in the allocation process. The allocator must be able to satisfy all of the PRPs' questions. To assist the parties in reaching an ultimate settlement under the allocation, the parties and/or the allocator must develop "ground rules" for handling both qualitative and quantitative data, and obtain agreement on these rules before beginning the allocation. The rules can include guidelines for included and excluded documents, and provide direction on making assumptions or extrapolations to account for sketchy or missing information.

Within the guidelines and rules established by the parties, allocation approaches that allow the allocator to incorporate both numerical and narrative information can produce allocations for otherwise unallocable sites, including sites with:

- partial quantitative information (i.e., 4 out of 10 years' worth of operation records), but with witness statements for some companies during some or all of the missing years;
- narrative, non-numerical admissions from a party regarding its use of the site, which can be combined with a regulator's inventory of drums and material removed from the site during closure and cleanup; and
- available volume information, but at which the nature of the wastes and the substances requiring remediation differ significantly, so that an equitable allocation must include a factor for substances which drive the remedy.

It is almost always necessary for an allocator to consider both narrative and numerical information in mixed multi-party sites because:

- generators who contributed high volume, low toxicity substances argue for a decrease in their volumetric share;
- a certain percentage of the PRPs will be insolvent or have difficulties with payment, and their shares must be redistributed appropriately; and

- various of the participants will rely upon the Gore factors as part of the allocation risk analysis, which requires the allocator to consider such non-numerical topics as the degree of care or the degree of involvement of certain PRPs in the activities that produced or cleaned up the contamination.

The use of the Gore factors in the courts is discussed elsewhere.

Finally, no matter the source or type of data, the parties will argue, and the allocator will decide, questions about the reliability of the data that is the basis of the allocation. Different types of information deserve more or less deference, in allocations as in litigation, and both the allocator and the parties must incorporate those differentials into an acceptable allocation.

VI. Participating in the Information Gathering Allocation Stage.

An allocation is only as good as the information upon which it is based. If the allocation participants do not provide the allocator with information, or arrange for him or her to have access to documents and knowledgeable persons, then the allocation cannot succeed, because neither the allocator nor the parties will believe that the allocation product reflects a just division of responsibility.

Accordingly, an allocation participant must plan for the information gathering stage of an allocation process, so that the participant can supply the allocator with timely and complete information.

A typical allocation contains several information gathering steps. First, the parties may send the allocator basic site documents, including

- the RI/FS report;
- the ROD and any ROD amendments or ESD records;
- available RD/RA documents such as cost estimates, treatment plant specifications and cap criteria;
- Section 104(e) requests and responses;
- any other PRP investigatory files, including private investigator reports and transcripts or notes of witness interviews; and

- transporter or owner/operator records, including ledgers, trip tickets and hauling or disposal receipts.

If the parties or EPA compiled a waste-in list for the site, the participants also may submit it to the allocator at this time. It is not unusual, however, for the parties to withhold a waste-in list or interim allocation from the allocator, so that the allocator is not tainted by the earlier and presumably unacceptable distribution of shares.

Contemporaneous with or immediately after the initial "data dump" to the allocator, the parties may tender initial position papers or opening briefs. The intent of these documents is to allow the parties an open forum to tell the allocator whatever the party believes he or she should know at the beginning of the process, before the allocator begins to make decisions. Initial position papers frequently have page limits of under five pages.

Most allocation processes incorporate a discovery or allocation questionnaire stage. If the parties use an allocation questionnaire, they may agree on its scope and wording before retaining an allocator, or may work with the allocator to design the questionnaire. Allocation questionnaires generally seek the following information:

- PRP name, address and type of business;
- The reason the PRP is alleged to be involved with the site;
- Any information in the PRPs' possession concerning actual or possible use of the site;
- Any information in the PRPs' possession contradicting the actual or possible use of the site (i.e., records confirming that the plant at issue sent the alleged wastestream to another disposal site);
- Copies of any documents used to confirm or rebut a connection to the site;
- Narrative summaries of testimonial information used to confirm or rebut a connection to the site, with the names of the people who provided such information and a description of their knowledge base;
- Actual or estimated volumes of

- the material allegedly linked to the site that was produced by the disposing plant;
- the material that went to the site; and
- the material that went to other disposal locations;

- The scope of the PRP's inquiry, including who it asked about the site, where it looked for documents, and why it chose those people and places for the inquiry.

The scope of an allocation questionnaire generally is much broader than either a Section 104(e) request for information or even a discovery request. Either the allocation questionnaire itself or the parties' allocation or participation agreement should specify that all information produced to the allocator is confidential, and is protected from discovery or disclosure in any existing or subsequent litigation proceedings. As a result, a party may not respond to an allocation questionnaire with an objection, or withhold any documents other than attorney/client communications.

Parties may give themselves anywhere from thirty to 180 days to respond to an allocation questionnaire, depending on the complexity of the site. Preparing adequate answers to an allocation questionnaire consumes a significant amount of time and money. Failing to prepare a complete and thorough answer to an allocation questionnaire also will cost time and money, because the allocator and the parties review the questionnaire responses, and an improper response will not provide a basis for settlement.

An allocator generally is free to pose additional or supplemental questions to a party during the allocation process. Similarly, the allocator often can ask to interview or depose witnesses. An allocation is not a litigation proceeding. If the allocator wishes to interview or depose a witness, he or she generally will pose the questions outside the presence of the allocation participants. The allocation process may allow the participants to supply the allocator with questions for the witness. The allocator's interview with a witness may or may not be tape recorded, transcribed, or conducted before a court reporter.

Finally, the parties may opt to use a discovery process, rather than an allocation questionnaire format, to obtain information for the allocation. In such event, the rules of the process likely will follow the federal rules of civil procedure. If the parties are not engaged in litigation, they may tender discovery disputes to the

allocator. Alternatively, they may retain a separate ADR professional to resolve discovery issues. If the allocation is proceeding under court order or court supervision, then the court also may be available to hear discovery disputes.

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Superfund Reform:
Orphan Share Implementation

Tab 5-3

COURT OPINIONS ON ALLOCATION FACTORS: THE GORE FACTORS AND OTHERS

An allocation is supposed to reflect the relative contributions of the different PRPs to the costs of site cleanup. The allocator's evaluation of many different facts and party arguments combine to form an allocation. These interrelationships between the site facts and the various theories of liability and defense are most often represented by a "factor" approach to allocation. A PRP's volumetric number is adjusted by discount and multiplier factors to produce an equitable distribution of responsibility.

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, does not specify a mechanism for courts or parties to use in determining relative responsibility for site costs. CERCLA Section 107(a) imposes the recovery of response costs on liable parties. Prior to enactment of the 1986 Superfund Amendments and Reauthorization Act ("SARA"), then-Congressman Albert Gore offered an amendment which would have specified the factors to be applied in allocating relative responsibility among Superfund PRPs. This amendment was included in the bill that passed the House,[1] but did not appear in the Senate version which became the final law. Instead, the new Section 113(f)(1)[2] provides that courts may allocate such response costs in contribution claims "using such equitable factors as the court determines are appropriate." Although not mandated by the statute itself, the "Gore factors," as they have come to be called, frequently are referenced by courts when reviewing allocation issues.

I. Statutory Contribution

Courts interpret the phrase in Section 113(f)(1), "using such equitable factors as the court deems appropriate," as providing enormous judicial discretion to balance whatever factors the court believes will lead to a reasonable contribution result. In the leading case of *U.S. v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991), defendant argued that the word "contribution" in Section 113(f)(1) should be considered the same way it would be in common law contribution. In other words, a party's contribution share should be limited to the percentage of the harm caused by the party's improper disposal of toxic wastes at the site. The court disagreed, holding:

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[1] See H.R. Rep. No 99-253 (III), 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3042.

[2] The Superfund Amendments and Reauthorization Act of 1986 ("SARA") added Section 113(f)(1) to Superfund for the express purpose of allowing federal courts to develop a federal common law of contribution, rather than following state contribution laws and cases.

> [o]n the contrary, by using the term 'equitable factors' Congress intended to invoke the tradition of equity under which the court must construct a flexible decree balancing all the equities in the light of the totality of the circumstances.

932 F.2d at 572.

The *R.W. Meyer* court also quoted what it felt was pertinent legislative history:

> New subsection 113(g)(1) of CERCLA was also amended by the Committee to ratify current judicial decisions that the courts may use their equitable powers to apportion the costs of cleanup among the various responsible parties involved with the site. The Committee emphasizes that courts are to resolve claims for apportionment on a case-by-case basis pursuant to Federal common law, taking relevant equitable considerations into account. Thus, after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment.

Id., *citing* H.R. 253 (III), 99th Cong., 2d Sess. 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038, 3041-42.

Finally, the court noted that:

> Congress [in passing new section 113(f)(1),] reemphasized that the trial court should invoke its moral as well as its legal sense by providing that the court use not just 'equitable factors' which phrase already implies a large degree of discretion, but 'such equitable factors as the court determines are appropriate.' This language broadens the trial court's scope of discretion even further . . . Thus, under §9613(f)(1) the court may consider any factor it deems in the interest of justice in allocating contribution recovery. . . No exhaustive list of criteria need or should be formulated.

Other courts agree with the *R.W. Meyer* interpretation of Section 113(f)(1). *See, e.g.*, *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 37 Env't. Rep. Cas. (BNA) 1043, 1047 (10th Cir. 1993); *Amoco Oil Co. v. Borden*, 889 F.2d 664, 672 (5th Cir. 1989); *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268 (7th Cir. 1994).

One of the most recent allocation opinions, and surely one of the most factually comprehensive, is *U.S. v. Atlas Minerals & Chemicals, Inc.*, 41 Env't. Rep. Cas. (BNA)

1417 (E.D. Pa., Aug. 25, 1995). In *Atlas Minerals*, the court determined that the "allocation of response costs in this case should consider each party's relative responsibility for (1) the need for remediation at the Site, (2) the selection of the particular remedy, and (3) the cost of the selected remedy." *Id.* at 1489. The court went on to state:

> However, the allocation of costs must be decided based on equitable factors that the court deems appropriate in light of the facts of the individual case. Section 113(f)(1) provides courts with broad discretion in making allocation decisions; the language contained in that section does not constitute an invitation to courts to create allocation 'rules.' Another trial court allocating response costs connected with cleaning up another site may consider a completely different set of equitable factors to be relevant to that site. Thus, any method this court employs in this case will likely have limited precedential value.

Id. at 1490. The *Atlas Minerals* court ultimately used a combined volume and toxicity analysis as its "equitable factors," further discussed in Section II, below.

In spite of the judicial ability to consider any relevant factors, the complex nature of CERCLA cases makes it difficult for a court to address a large number of such factors. A typical CERCLA case involves a site where many persons or companies released multiple hazardous substances over an extended period of years. Recognizing this and the limited nature of judicial resources, the courts expend their efforts in simplifying and attempting to bring rationality to enormously complex factual situations by using a relatively small number of factors. Numerous courts begin their equitable analysis with the Gore factors (see Section II below), and only supplement the Gore analysis with other factors (see Section III below).

II. The Gore Factors

The Gore factors consist of the following:

- the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous can be distinguished;
- the amount of hazardous waste involved at the site;
- the degree of toxicity of the hazardous waste involved at the site;

- the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.[3]

Each of these factors appears in court opinions in a variety of guises and with varying results.

A. Distinguishable Costs

In some cases, certain cleanup costs can be attributed to specific wastes or types of wastes. These distinguishable costs may be allocated solely to the PRPs responsible for these wastes. The courts have treated divisible costs in a variety of ways.

In *Central Maine Power Co. v. F.J. O'Connor Co.*, 838 F. Supp. 641, 38 Env't. Rep. Cas. (BNA) 1323 (D. Me. 1993), a dispute between site owners and generators, the court engaged in a separate liability apportionment for one chemical, lead, finding one party 67 percent liable, another party 33 percent liable, and a third party 0 percent liable. Because the non-liable party, a generator, demonstrated that its waste stream contained no lead, the court held that the generator should not be required to pay to clean up lead.

The court in *Hatco v. W.R. Grace & Co.-Connecticut*, 836 F. Supp. 1049 (D.N.J. 1993), used several methods to separate the costs of cleanup. The court began its inquiry by analyzing the parties' exclusive use of certain chemicals. However, the court refused to use an "exclusive use" analysis for all site cleanup costs, because such an analysis alone would not show which party was responsible for the precise distribution of contamination. The court in *Hatco* also further defined costs in areas that contained "hot spots" of contamination by developing overall percentages of responsibility for each category of contaminant.

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[3] H.R. 7020, §3071(a)(3)(B), 97th Cong., 2d Sess. 2 (1985), *reprinted in A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)*, at 440.

Sometimes, physical characteristics may be used as a surrogate for cleanup costs. As one commentator has noted,[4] the court in *U.S. v. Ottati & Goss*, 24 Env't. Rep. Cas. (BNA) 1152 (D.N.H. 1986), issued an early order holding that the liability for the surface cleanup would be apportioned according to the number of drums each generator contributed to the site and thus, once the cost of the surface cleanup was later determined, each party would pay its proportional percentage of that cost.

Finally, parties occasionally convince a court to distinguish costs using a surrogate such as geography. In *U.S. v. Broderick Investment Co.*, 862 F. Supp. 272 (D. Colo. 1994), the court approved a divisibility analysis based on geography, and found the defendant responsible for only one of two district areas of pentachlorophenol contamination in soil and groundwater at a facility.

B. Volume or Amount of Hazardous Waste

The most common factor considered in cost allocations is the volume of waste that each responsible party contributed to the site, without regard to its toxicity or other characteristics. Volume is perhaps of greatest significance in distinguishing initial cost shares among generators.

Because determining the volume or amount of waste generally comes at an early stage in a Superfund case, and because volume rarely is the factor of greatest controversy, detailed discussions of volume do not appear often in court decisions. EPA guidance provides information about developing a "waste-in" list, but the courts seldom reference this guidance.[5] Volume is often used to identify *de minimis* parties in settlements with EPA. *De minimis* settlements are expressly provided for in CERCLA. *See* Section 122(g) of CERCLA, 42 U.S.C. § 9622(g). In sites with many generators, a *de minimis* category reduces the complexity of a settlement while recognizing the much more limited liability of certain parties. *See U.S. v. Cannons Engineering Corp.*, 899 F.2d 79, 31 Env't. Rep. Cas. (BNA) 1049, 1055 (1st Cir. 1990).

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[4] *See Issue Analysis - Allocating Cleanup Costs Under CERCLA, The Information Network for Superfund Settlements* (Morgan Lewis & Bockius) at A-9 (April 1, 1993) *(Information Network Cost Analysis)*. See also Singh & Hinerman, *Superfund Cost Allocation: Equitable Techniques and Principles*, 9 Toxics L. Rep. 531 (Oct. 12, 1994); Butler, *et al., Allocating Superfund Costs: Cleaning Up the Controversy*, 23 Envtl. L. Rep. 10133 (1993).

[5] *Information Network Cost Analysis* at A-4.

In *EPA v. Sequa Corp.* (In re *Bell Petroleum Services*), 3 F.3d 889 (5th Cir. 1993), the Fifth Circuit found that only one hazardous substance, chromium, had entered the ground water. In addition, only three parties had operated the site and each had operated it at mutually exclusive times. The court found it reasonable to assume that the harm done by each party was proportionate to the volume of chromium-contaminated water each discharged into the environment. The Fifth Circuit remanded the case to the district court so that one of the three operators, Sequa, could attempt to show, through volume or surrogates for volume, the divisibility of the harm at the site.

Perhaps one of the greatest problems with volume as a cost apportionment method is illustrated by *B.F. Goodrich v. Murtha*, 958 F.2d 1192 (2d Cir. 1992), *aff'g*, 745 F. Supp. 960 (D. Conn. 1991). In *Murtha* the Second Circuit found that a municipality should not necessarily be required to pay its share solely on the basis of volume when that material is high in quantity but low in relative toxicity.

Another example of the difficulty created by mixed municipal and industrial waste materials is *Atlas Minerals*, 41 Env't. Rep. Cas. (BNA) 1417. The site, a mixed co-disposal facility that accepted both municipal and industrial materials, covers 27 acres and operated for twenty years. An EPA-selected remedy calls for construction of a multi-layer cap over the landfill, fencing, deed restrictions, groundwater monitoring, private adjoining well-head treatment units, and wetlands replacement.

In a third party cost recovery action, both plaintiffs and defendants offered the court competing allocation models, one focussed primarily on volume (offered by the industrial PRPs), and the other concentrating on toxicity (presented by the municipal waste generators). The *Atlas Minerals* court declined to follow either model, and instead created its own:

The following principles will guide the court's allocation:

> (1) It is impossible to calculate, with mathematical precision, the extent to which volume and toxicity each contributed to the incurrence and extent of response costs at the Site. However, the court is convinced that both volume and toxicity contributed substantially to the harm:
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> > (a) The presence of 'high waste strength' waste streams heavily influenced the Site's placement on the NPL and probably also influenced EPA's selection of a multi-layer cap as the permanent remedy for the Site;

(b)(sic) Assuming that a multi-layer cap is the permanent remedy, its total cost is driven by volume;

(3) Each waste stream contributed some hazardous substances and some volume to the Site;

(4) Similar waste streams should be treated the same;

5) One ton of waste with a high waste strength should bear a larger share of responsibility than one ton of low waste strength waste."

Id. at 1496-97. The court then assigned each party's relative share by the following method:

> The court will isolate those waste streams that have low waste strength or, in Third Party Defendants' parlance, are nonhazardous. Half of the costs will be allocated among those waste streams, which are likely to have affected response costs primarily because of their volume. . . . The other half of the costs will be allocated among those waste streams that have high waste strength and are more likely to have affected response costs because of their toxicity. . . . Given the substantial impact of both volume and toxicity on the environmental harm that precipitated the response costs at the Site, a 50/50 distribution between these two factors is equitable.
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> Each waste stream's toxicity and volume will be accounted for once. The court will multiply each waste stream's volume by its KPC score [a waste strength assignment method] to arrive at a 'weighted volume' figure. The 50% share assigned to each class will be allocated within that class in proportion to the waste streams' relative weighted volume.
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> . . .
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> Each party's share will be determined by aggregating the shares assigned to its various waste streams.

Id. at 1496-97. For the majority of mixed municipal and industrial waste sites, an *Atlas Minerals* approach (combining volume and toxicity factors for an allocation) may be appropriate.

C. Toxicity

Toxicity is an obvious consideration to take into account in a hazardous waste disposal site allocation. After all, if the wastes were not "toxic" or "hazardous," the site would not be within CERCLA's ambit and there would be little concern about cleaning up the site.

As discussed above in *Murtha* and *Atlas Minerals,* a typical municipal landfill will contain a lot of low toxicity material, which causes problems in evaluating each municipal generator's share. Comparative hazardousness or toxicity between particular substances, while obviously a significant factor, does not often appear in reported court decisions.

In *U.S. v. Acton*, 749 F. Supp. 616, 32 Env't. Rep. Cas. (BNA) 1629, 1632 (D.N.J. 1990), the court held that "toxicity is an important factor that EPA may consider in entering into consent decrees. This case involved the Lone Pine Landfill in New Jersey, at which EPA proposed entering into a consent decree with 116 defendants. Under court supervision, the parties entered into an alternative dispute resolution (ADR) process for the largest waste contributors. The ADR consultant could consider the volume of waste sent to the site by the party; the toxicity, mobility, persistence, ignitability, corrosivity, reactivity, volatility and flammability of the party's waste; and any other factor that the arbitrator found fair and reasonable. *Id.* at 1632 n.2. (Emphasis added.)

In contrast, in *Hatco, 836 F. Supp. at 1063,* the court found that absent a risk assessment detailing and determining the risk of exposure posed by each chemical detected at the site, the relative toxicity of chemicals at the site was not a relevant factor in dividing responsibility for contamination.

D. Degree of Involvement

Degree of involvement, similar to degree of care and degree of cooperation (two other qualitative and subjective Gore factors), is a characteristic of a potentially responsible party, and often is more useful for allocating among categories of parties (for example, between generators and the owner/operator or between owners and operators), than among the members of a single class. The degree of involvement in, or the extent to which a person is or was active in, the management or operation of a particular site is key to an evaluation of the actual (*i.e.* factual or "moral") responsibility of a party. Vagueness can be the fatal flaw of this factor.

Given the courts' wide allocation discretion, judges need not develop detailed rationales describing how they derive a precise number associated with "degree of involvement." Accordingly, most cases are silent on this issue. In the few opinions addressing this Gore factor's rationale, the courts appear to use this factor as a private party would in settlement negotiations: focus on the party's use of the site, the time of use, the manufacturing activities, and production rates, and decide whether or not these facts justify a reduction or increase in responsibility. *See Hatco* at 1059.

When the allocation controversy occurs between two operators of a facility, the courts have found that one equitable factor to consider is the number of years each operator was at the facility. The court in In re *Allegheny International, Inc.*, 158 Bankr. 361, 383 (Bankr. W.D. Pa. 1993), held that the actual years of ownership and operation combine into a significant factor for consideration in a final decision.

In *U.S. v. R.W. Meyer,* 932 F.2d at 571, the court had no quantifiable measure to use as a surrogate for degree of involvement. Nevertheless, the court found that the lessee was the primary actor who allowed the site to become contaminated, and further found the landowner liable based on owner status and because he constructed a defective sewer that contributed to the contamination. The court divided liability into thirds, assigning an equal share to the lessee, its principal shareholder and the owner.

In *Amoco Oil v. Dingwell (Dingwell),* 690 F. Supp. 78 (D. Me. 1988), *aff'd. sub nom., Travelers Indemnity Co. v. Dingwell,* 884 F.2d 629 (1st Cir. 1989), Dingwell owned and operated a landfill. Fifteen generators filed suit against him for response costs. Several of the generators paid most of the cleanup costs, and Dingwell agreed to join them in signing a consent decree and contributing 65 percent of the cleanup costs after they agreed to seek recovery only from his insurance policies and not his personal assets. The district court in *Dingwell* decided that the degree of involvement by the parties was equally proportionate: the generators were fully involved in the generation of hazardous waste and Dingwell was fully involved in the treatment, storage, and disposal of waste. Accordingly, Dingwell deserved his 65 percent.

E. Degree of Care

The degree of care factor considers the measures a party took to prevent or minimize environmental contamination. In theory, if the party had taken adequate care in the first instance, the cleanup costs would be lower or non-existent. As discussed earlier, however, it is not always easy to transform a qualitative concept, such as degree of care, into a quantifiable amount.

Virtually an archetype of the considerations involved in the degree of care factor, the decision in *Versatile Metals, Inc., v. Union Corp.,* 693 F. Supp. 1563 (E.D. Pa. 1988), a seller/purchaser dispute, demonstrates how not to show due care for potential contamination at a site. The original contract between the parties provided that the site was free of any contamination. Later, PCBs were found at the site. The court decided that the contamination came from both preexisting conditions and from the mishandling of hazardous waste left at the site by the previous owner.

The purchase contract provided that if the purchaser discovered contamination, it would give prompt notice to the seller, act in a reasonable manner to prevent leakage and contamination, and keep the former owner's assets segregated from its own. When the release of hazardous substances occurred, the purchaser failed to take any of the measures spelled out in the contract.

The court found the purchaser responsible for all contamination that had occurred during its tenancy and denied contribution from the seller, because the purchaser failed to abide by the terms of the sale contract. The court noted that the contract had required no more than what a reasonable person would have been expected to do under the circumstances.

The case of *U.S. v. Tyson*, slip op., Civ. 84-2663, 1989 U.S. Dist. LEXIS 15,761 (E.D. Pa. Dec. 29, 1989), also illustrates a lack of due care and its costly consequences. In *Tyson*, the United States and the State entered into a consent decree with the four identified generators at the site. The principal generator agreed to perform the cleanup even if any other settling generator failed to pay its respective share. The principal generator then moved for summary judgment against the owner of the waste disposal site, seeking a 50 percent contribution to the cleanup costs.

The court found that the owner was an active participant at the site who had failed to exercise due care, and who repeatedly failed to cooperate with federal and state officials. Therefore, the court held the site owner liable for the requested 50 percent contribution share.

In reviewing the six Gore factors, the court in *Dingwell*, 690 F. Supp. at 86, found that the last three Gore factors -- degree of involvement, care exhibited and cooperation -- were the most important in a dispute between operators and generators. However, the court's assessment might have been colored by the specific circumstances of the case: the generators admitted liability and paid for the cleanup, and neither the amount nor the toxicity of each generator's contribution to the on-site hazardous wastes remained relevant. Perhaps just as important, Dingwell raised neither volume nor toxicity as issues. The court accepted Dingwell's 65 percent

liability, and noted that the only case brought to its attention concerning apportioning costs between generators and owner/operator had held the owner/operator 70 percent liable. *Id.* at 87, *citing Advance Circuits, Inc. v. Carriers Properties*, No. 84-3316 (Minn. D. Ct., Hennepin County, Feb. 18, 1987), *aff'd*, No. C8-87-1436 (Minn. Ct. App., Feb. 9, 1988)(unpublished).

Finally, in *Folino v. Hampden Color & Chemical Co.,* 832 F. Supp. 757, 37 Env't. Rep. Cas. (BNA) 1838 (D.Vt. 1993), the court found an owner/operator and a lessee/operator equally liable; they used the same chemicals and both had poor handling practices. In *BCW Associates Ltd. v. Occidental Chemical Corp. (BCW)*, slip op., No. 86-5947, 1988 U.S. Dist. LEXIS 11,275 (E.D. Pa. September 29, 1988), the court reviewed the relative care of the parties and noted that one of the previous owners exercised due care in its manufacturing practices. The court released that owner from liability. The court also found, however, that an earlier owner did not use adequate care in its manufacturing practices and caused the contamination. The court assessed this earlier owner one-third of the response costs.

F. Degree of Cooperation

The degree of cooperation with government officials appears to have a significant influence on the perception of a court. It is used more often with site owners than with generators.

In *U.S. v. R.W. Meyer,* 932 F.2d 568, the court stated that neither the lessee nor the landowner cooperated with or assisted EPA during the investigation and eventual cleanup. Inferentially, the court found all of the parties equally recalcitrant and thus assessed to each equal shares of the response costs.

In *U.S. v. Tyson*, 1989 U.S. Dist. LEXIS 15,761, EPA ordered a waste disposal site owner to clean up the site. The owner refused, forcing EPA to contain the contamination. EPA filed suit to recover its response costs. The generators, particularly the largest one, admitted liability and agreed to conduct a feasibility study. The site owner denied all responsibility. Although initially identified as a PRP only because of its landowner status, testimony at trial showed that the owner actively participated in the business of transporting and disposing of waste. The court required the owner to pay 50 percent of the cleanup costs.

In *Amoco v. Dingwell*, 690 F. Supp. 78, the court found that, with regard to the degree of cooperation, Dingwell had not cooperated with EPA and the state, while the generators, on the other hand, provided million of dollars for the cleanup and

negotiated a consent decree. Use of the cooperation factor required Dingwell to pay a higher portion of the costs.

Lastly, the court in *Central Maine Power*, 838 F. Supp. 641, determined that Central Maine Power sent substantially more waste to the site than the other generator, Westinghouse, but that Westinghouse did not cooperate with government officials to the same extent as Central Maine Power or the site owner. The court found Central Maine Power 46.5 percent liable, Westinghouse 41 percent liable, and site owner 12.5 percent liable.

III. Other Factors

Because of the enormous discretion granted to the courts by CERCLA Section 113(f)(1), the courts have developed various other factors for use in CERCLA apportionment decisions.

A. The Innocent Landowner Defense

This concept, included within the statute itself,[6] permits an owner and/or a purchaser of property to avoid liability altogether by showing that it exercised due care itself and used all appropriate precautions to prevent third parties from causing any contamination. It is very difficult to prove.

The court decision discussed here is typical of the many cases where the innocent landowner defense failed. In the case of *In re Sterling Treating, Inc.*, 94 Bankr. 924 (Bankr. E.D. Mich. 1989), the court held that where the purchaser of the debtor's heat treating steel business had business dealings with the debtor before the sale and was aware of the industrial use of the property, the innocent landowner defense was not available to the purchaser because the purchaser failed to inspect the property before the sale. *Id.* at 930.

B. Fault

Courts are often called upon to consider the relative fault or culpability of the PRPs.

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[6] *See* Section 107(b)(3)(a) and (3)(b) of CERCLA, 42 U.S.C. § 9607(b)(3)(a) and (b)(3)(b).

In *Environmental Transportation Systems (ETS) v. ENSCO*, 969 F.2d 503, 35 Env't. Rep. Cas. (BNA) 1209 (7th Cir. 1992), a case involving a transporter, the court thoroughly discussed the question of fault. In this case a truck overturned carrying used transformers that contained PCBs. The accident was the ETS truck driver's fault, because he was going too fast. In spite of efforts by ETS to argue that the generator should be required to pay some of the cleanup costs because it shipped the transformers without draining their PCB-laden liquid, ETS provided no expert testimony that improper loading of the transformers caused the accident. *Id.* at 1211. As a consequence, ETS had to pay all costs.

As noted earlier, some courts have considered the entire process of cost allocation to be one addressing relative fault or culpability. In *U.S. v. Stringfellow*, 1993 U.S. Dist. LEXIS 19,113 *300 (C.D. Cal. November 30, 1993), a Special Master opined that the primary equitable allocation factors were the interrelated concepts of relative fault and causation. To the Special Master, the case evidence revealed "a vast disparity in relative fault among the parties." *Id.* at *308. Using the relative fault and causation concepts, the Special Master found the State 65 percent liable for the CERCLA claims asserted against it. *Id.* at *329.

C. Degree of Knowledge

Related to the concept of involvement, the degree of knowledge of the contamination at a site arises most often between categories of parties, such as between generators and transporters or among owners as a class, particularly for sites at which one owner is the purchaser and one is the seller.

When the courts consider degree of knowledge, they tend to view it as a significant factor in allocating costs. In *Danella Southwest, Inc. v. Southwestern Bell Telephone Co.*, 775 F. Supp. 1227, *sum. aff'd*, 978 F.2d 1263 (8th Cir. 1992), the court did not require a transporter to pay any costs, and ultimately held it not liable, when the transporter took dioxin-contaminated soil to a disposal site, but performed his duties in a professional manner and did not know that the soil was contaminated. Moreover, upon learning of the contamination the transporter immediately ceased operations. *Id.* at 1234-35.

In the cost allocation phase of *Folino v. Hampden Color & Chemical Co.*, 832 F.Supp. 757, 37 Env't. Rep. Cas. (BNA) 1838, Hampden, as the successor operator of the chemical distribution business at the site, sought response costs from the previous operator and the owner, Folino. The court found that before Hampden purchased the site, Hampden received an environmental assessment of the site that showed contamination, but Hampden concealed this information from Folino and leased the

site anyway. Based largely on Hampden's concealment, the court refused to require response costs from Folino. *Id.* at 1844. Hampden's knowledge of the contamination weighed heavily against him.

In allocating costs of cleanup in *Weyerhauser v. Koppers*, 771 F. Supp. 1420, 1426, 33 Env't. Rep. Cas. (BNA) 1919, 1924 (D. Md. 1991), the court considered two primary factors -- the knowledge and/or acquiescence of the parties in the contaminating activities, and the economic benefits the parties received from the contaminating activities. Weyerhauser owned property in Baltimore where it sold and distributed forest products, including treated and untreated lumber. Koppers and its predecessor leased a part of Weyerhauser's property where they operated a wood treatment plant.

In arriving at an allocation of responsibility, the *Weyerhauser* court used the reasoning in two cases cited by both parties -- *South Florida Water Management District v. Montalvo* (*Montalvo*), No. 88-8038, 1989 U.S. Dist. LEXIS 17,555 (S.D. Fla. Feb. 15, 1989), and *BCW*, 1988 U.S. Dist. LEXIS 11,275. The *Weyerhauser* court noted that in *Montalvo* the owner of the property had knowledge of the contaminating activity but received no financial benefit, and yet was assessed 25 percent of the cleanup costs. The *Weyerhauser* court also noted that in *BCW*, the court assessed the new owner 33 percent of the cleanup costs, in part because the new owner had at least some sense that something was wrong with the dusty warehouse he purchased at a discount and in an "as is" condition. *Id.* at 1426-27.

In *Weyerhauser* the court held that the owner of the property not only knew of and acquiesced in his lessee's wood treatment plant, but required its construction as part of the lease. The court, using a knowledge factor as one of the principal issues to be considered, assessed the owner 40 percent of the cleanup costs.

D. Financial Capability

Courts often consider the financial capability of an individual party to pay for the cleanup of a particular site.

While mentioned in *Murtha*, 958 F.2d 1192, this factor was considered in somewhat greater detail in *Central Maine Power*, 836 F. Supp. 641. In that case the court noted that both Central Maine Power and Westinghouse had greater financial resources than the site owner and thus could pay greater proportionate shares. Similarly, in *Emergency Technical Services Corp. v. Morton International*, slip op. No. 92-C-3376, 1994 U.S. Dist. LEXIS 899 (N.D. Ill. Jan. 31, 1994), the court deemed it

appropriate to consider available financial resources, as well as benefits received from and knowledge of contamination, as appropriate allocation factors.

E. Financial Benefits Derived From Waste-Producing Activity

The financial benefits derived from the waste-producing activity is occasionally considered by the courts.

For example, the court in *Weyerhauser v. Koppers*, 771 F. Supp. at 1426, used "knowledge of the contaminating activity" with "financial benefits received" to arrive at an allocation. The case of *U.S. v. Mexico Feed & Seed Co.*, 980 F.2d 478, 483, 490 (8th Cir. 1992), involved the sale of a waste oil business that the purchaser did not continue, and for which the landowner received "no" financial benefit. Because of the lack of financial reward and the fact that the landowner was "unhappy" with the contamination on his land, the court required the lessee to pay the landowner's attorney's fees and assigned the landowner a zero allocation share.

In *Central Maine Power*, 836 F. Supp 641, the court determined that all of the parties received a financial benefit from the waste-producing activity, but it appears that the court considered the relative size of that benefit to be of little relevance. The owner of the scrap business, who was the site owner, paid one generator $60,000 and the other $250,000 and the court did not indicate the size of the financial benefit to the site owner.

F. Financial Benefits Derived From Remediation

The courts occasionally evaluate the financial benefit to the party after cleanup of a previously contaminated site. Courts also consider this concept in the slightly different context of a discounted sales price for a contaminated site.

In *BCW*, 1988 U.S. Dist. LEXIS 11,275, the court discussed the financial benefits derived from remediation. The case concerned the sale and reuse of a warehouse. The court found that BCW had purchased a dusty warehouse at a discounted price and after clean-up had a clean warehouse. Knoll, the tenant/lessee who had been using the warehouse to store furniture, now had a clean storage location. Thus Knoll and BCW each benefited financially from the remediation, and so each had to pay 33 percent of the clean-up costs. The original owner who had caused the contamination, Firestone, also paid a one-third share.

The court in *PVO International v. Drew Chemical Corp.*, CA No. 87-3921 (D.N.J. June 27, 1988)(unpublished), denied summary judgment to a current owner

and a the past owner because neither addressed "one of the relevant equitable considerations in allocating liability between the parties: the increase in the value of the property which will result if it is rid of hazardous wastes." The court stated that "responsibility for contamination is not the only factor to be considered in allocating response costs."

G. Land Sales and The Discounted Purchase Price

Sales of known contaminated sites usually occur at a much lower price than that of an equivalent uncontaminated site. When the sale of contaminated land occurs, the question that arises is whether or not the purchaser paid a discounted price for the land. If the answer to the question is yes, then the purchaser cannot avail him or her self of the innocent landowner exception to Superfund liability and escape all liability, because he or she acquired the property with knowledge of contamination. If the answer to the question is no (the purchaser did, indeed, pay full price), then the purchaser may be able to show that he or she did not know about the contamination. Even if the purchaser is unable to use the full benefit of the defense, if he or she can show payment of an undiscounted purchase price, the seller may have to pay more for cleaning up any contamination.

In *Smith Land Improvement Co. v. Celotex*, 851 F.2d 86, 90, 28 Env't. Rep. Cas. (BNA) 1083 (3d Cir. 1988), concerning a sale of industrial land from Celotex to Smith Land, the court held: Smith Land inspected the property it purchased from Celotex on five occasions, knew of its past use, and recognized that the pile of waste at the site was a "negative" factor. Based on these facts, the court believed Smith Land to be a sophisticated purchaser, and that the price it paid for the property "reflected the possibility of environmental risks." 28 ERC 1083, at 1084 (3d Cir. 1988). Thus the court considered the price Smith Land paid to be a discounted one. As a result of this discounted price, the court refused to compel the seller, Celotex, to pay as much as it otherwise would in the final cost allocation.

In another case, In re *Allegheny International, Inc.*, 158 Bankr. at 383, the court considered a discounted steel plant purchase price the most compelling and dispositive allocation factor in the case. Allegheny Ludlum sold several steel plants to Allegheny International (AI). After a number of intervening property transfers, a third party acquired the plants with full knowledge of the contamination. The third party subtracted environmental costs from the acquisition price dollar for dollar, until the sales price reached $1.00. When the purchaser/seller AI sought contribution from the original seller Allegheny Ludlum's bankruptcy estate, the court found that because the purchase price had already been completely discounted, AI's claim against Allegheny Ludlum's bankrupt estate would be calculated as zero. AI knew when it sold the

plants that they were contaminated, and transferred the properties with knowledge of their contamination. It would receive no contribution from Allegheny Ludlum in the cost allocation between the current owner and AI.

H. Relevant Contracts

Contracts between PRPs generally do not protect parties from all liability under CERCLA, but may offer substantial and sometimes complete contractual protection in a contribution action. Passing liability to another through indemnification or insurance can be a significant factor in reducing responsibility in a cost allocation under CERCLA.

The first, second, third, fifth, seventh, ninth, and tenth circuits all recognize the enforceability of indemnification clauses or other contractual provisions to shift CERCLA liability as between private parties. *See Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206 (3d Cir. 1994); *Joslyn Manufacturing Co. v. Koppers Co.*, 40 F.3d 750 (5th Cir. 1994), and *Harley-Davidson, Inc. v. Ministar, Inc.*, 41 F.3d 341 (7th Cir. 1994).

The two cases described below are examples of the many cases discussing contracts that can change a cost allocation despite the existence of statutory liability.

In *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir. 1994), Lefton Iron purchased a 40-acre site from Kerr-McGee's predecessor in interest. Kerr-McGee's predecessor actually caused most of pollution. The contract transferring ownership of site to Lefton provided: "[Lefton] expressly agrees to indemnify and to defend and hold [predecessor] harmless from and against any and all claims, damages, . . . however the same shall be caused . . . arising out of or resulting from . . .the maintenance of any action, claim or order concerning pollution or nuisance." The Seventh Circuit reversed a district court decision limiting the effect of this contract, finding fault irrelevant because of the wording of the contract. As a result, the $1.5 million Kerr-McGee had already spent was to be reimbursed by Lefton, and Lefton was held responsible for all future costs, estimated as likely to exceed $5 million.

In *Village of Fox River Grove, Ill. v. Grayhill, Inc.*, 806 F. Supp. 785, 794-95 (N.D. Ill. 1992), the court held that the village's lessee, an aluminum anodizing business, was not liable for contribution under CERCLA because the village had released its lessee in a court settlement. The court found that although the release was a general one and usually inapplicable to unknown claims, the village was well aware of the possible contamination of water discharged by its lessee.

Conclusion

The cases presented here concerning the Gore factors and other factors are not exhaustive but rather are designed to provide examples of how courts use their equitable discretion.

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 5-4

ALLOCATION CASE CHART
July 18, 1995

Court	Case	Parties/ Allocation Facility type	Factors	Comments
App. Ct. 1994 1st Cir.	U.S. v. Charles George Trucking, Inc. 39 ERC 1690	Owners/ Operators Generators/ transporters Hazardous waste site Consent decrees	(1) Ability to pay should not influence the amount of assessment. (2) Compare the proportion of total projected costs to be paid by the settlers with the proportion of liability attributable to them, then factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified.	Federal District Ct. did not abuse its discretion in approving consent decrees. Endorses, in general, EPA's practice of negotiating with a representative group of PRP's and then permitting the group members to divide the burden of the settlement among themselves. Ct. stressed the importance of good records, as bad records make allocation difficult to determine.
D. Maine 1993 1st Cir.	Central Maine Power Co. v. F.J. O'Connor Co. 838 F.Supp. 641	Former owner= 12.5% Generators (disposed of electrical scrap equipment) #1= 46.5% #2= 41% Scrap equipment site	(1) 6 Gore factors as outlined in United States v. A & F Materials Co., 578 F.Supp. 1249, 1256 (S.D. Ill. 1984). (2) Financial resources of the parties involved (3) Benefits received by the parties from contaminating activities (4) Knowledge and/or acquiescence of the parties in the contaminating activities. (5) Circumstances and conditions involved in the property's conveyance, including price paid and discounts granted.	In a dispute between waste generators and the site operator, the last 3 Gore factors are most important. Court looked heavily at: (1) cooperation with the government. (2) financial resources (3) conveyance of the property

D. Maine 1988 1st Cir.	Amoco Oil Co. v. Dingwell 690 F.Supp. 78	owner/ operators = 65% generators = 35% Landfill	(1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.	The court emphasized that factors 4, 5, and 6 are most important in a dispute between generators and operators.
D. N.H. 1985 1st Cir.	United States v. Ottati & Goss, Inc. 630 F.Supp. 1361	Owners of property Generators of waste contained in drums Drum reconditioning facility	Each party is subject to liability only for the portion of the total harm that he has himself caused.	Burden of proof on Defendant to establish that a reasonable basis exists for apportioning the harm.
App. Ct. 1992 2nd Cir.	B.F. Goodrich Co. v. Murtha 958 F.2d 1192	Owners Operators Municipality Landfills	(1) Relative volume and toxicity of the substances (2) Relative cleanup costs incurred (3) The degree of care exercised by each party with respect to the hazardous substances (4) Financial resources of the parties involved	The amount of liability imposed will not necessarily be a function solely of the total volume of municipal waste disposed of in the landfills, but rather will be a function of the extent to which municipal dumping of hazardous substances both engendered the necessity, and contributed to the costs, of cleanup.

W.D. N.Y. 1991 2nd Cir.	Purolator Products Corp. v. Allied-Signal, Inc. 772 F.Supp. 124	Purchaser Seller Automotive parts factory	The court stated that the Gore factors could be used to allocate costs among parties. However, further factual developments were necessary in this case before these factors could be evaluated. The precise apportionment of damages, therefore, must await further proof concerning the amount of damages, the nature and source of the hazardous waste as well as the other circumstances relevant to an equitable apportionment of response costs.	
N.D. NY 1991 2nd Cir.	U.S. v. Alcan Aluminum Corp. 34 ERC 1744	Generators Cornell= 6% Alcan= 94% Landfill	(1) The Gore factors (2) The Court examined the recklessness of the parties. (3) Court did not consider the fact that defendant is Cornell University and the other defendants billion dollar companies relevant. (4) Toxicity of waste is of little significance here	The equitable factors to be applied by the courts should be case specific and not etched in stone. Court looked favorable on Cornell and unfavorably on Alcan for their degree of care in treatment of waste and cooperation with the Gov't.
D. NJ 1993 3rd Cir.	Hatco Corp. v. W.R. Grace & Co.-Conn. 836 F.Supp. 1049	current owner: PCBs = 3.84% BNs = 9.74% VOCs = 15.48% former owner: PCBs = 96.16% BNs = 90.26% VOCs = 84.52% Chemical plant	(1) the knowledge of the parties; (2) the degree of care exercised by the parties, taking into account the relevant statutes and regulations; (3) the degree of cooperation with federal, state and local officials exhibited by the parties to prevent harm to public health or the environment, without regard to periods of ownership; (4) any financial benefit to the parties arising from remediation; (5) the extent to which the parties undertook reasonable efforts to mitigate the environmental damage; and (6) any benefits the parties received from the activities that lead to the environmental damage.	These percentage allocations are only for areas of joint use. For areas of use by only one of the parties, the court allocated 100%. The court simply applied the equitable factors to the facts of the case without treating any one particular factor as more important than another. This is an interim allocation awaiting the determination of response costs. If remediation of PCBs are the driving cost, then Grace would be allocated a greater share due to its greater share of PCB contamination.
E.D. Pa. 1991 3rd Cir.	Ellman v. Woo 34 ERC 1969	Owner/ Landlord= 50% Operator/ Tenant= 50% Dry cleaning facility	(1) Owner's awareness of the existence of hazardous waste (2) Indication that defendants engaged in conduct that they knew to be violative of environmental regulations. (3) Amount of contamination attributable to each party.	Court found that each party was responsible for one of the contaminants. As cleanup of one would necessarily cleanup the other, equity requires that neither party escape liability, and they share costs evenly.

E.D. Pa. 1989 3rd Cir.	U.S. v. Tyson 1989 U.S. Dist. LEXIS 15761	owner/ operator = 50% generator = 50% Cesspool, industrial, and chemical waste disposal business	(1) the amount of hazardous substances involved; (2) the degree of toxicity or hazard of the materials involved. (3) the degree of involvement by parties in the generation, transportation, treatment, storage or disposal of the substances; (4) the degree of care exercised by the parties with respect to the substances involved; and (5) the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.	In support of its 50% apportionment to the owner, the court noted that it was an "active participant"--not an "innocent landowner." The court spent little time on factors #1 and #2--only noting that the wastes were highly toxic. The court emphasized that the owner "knew or should have known of the human health hazards." The court also added that the owner repeatedly refused to cooperate with the authorities and failed to exercise due care in handling the hazardous substances.
E.D. Pa. 1988 3rd. Cir.	BCW Assocs. v. Occidental Chem. Corp. 1988 U.S. Dist. LEXIS 11275	former owner/ operator = 1/3 current owner and current operator = 2/3 jointly warehouse	(1) knowledge of the environmental harm; (2) responsibility for the environmental harm; and (3) benefits, if any, received because of the clean up.	The court stated that the most important factor it considered was that the present owner would receive substantial collateral benefits from the clean up of the property because it had originally purchased the property "as is."
App. Ct. 1988 3rd Cir.	Smith Land & Imp. Corp. v. Celotex Corp. 851 F.2d 86	Current and Former owners Large pile of manufacturing waste containing asbestos found on property Industrial facility	If land was sold at a discount because of contamination, then when resolving contribution suits between the former and current landowners, the court can consider (1) the amount of the discount; (2) the cost of response; and (3) other considerations.	No record of case on remand. Parties must have settled.

D.N.J. 1987 3d Cir.	Jersey City Redevelopment Authority v. PPG Indus., Inc. 1987 WL 54410	Owner = 0% Generators = 100% jointly construction site: fill dirt contained chromium.	Court notes it may use any equitable factors it determines appropriate, but finds trend in common law is toward use of comparative fault. Court focuses on who had or should have had knowledge that the fill dirt was contaminated.	While all parties are subject to the allocation, one party was not found liable under CERCLA, but rather was liable under common law. In a footnote the court states that if feels CERCLA does not prevent allocation among liable and non-liable parties. Even if CERCLA did prevent such allocation, it could be upheld under the common law.
E.D. Va. 1994 4th Cir.	North-western Mutual Life v. Atlantic Research 847 F.Supp. 389	Past & current owners Mortgage holder Chem waste storage site	Gore factors (but no mention of "degree of involvement" factor). "Weyerhaeuser v. Koppers factors" (but no mention of parties' relative degree of fault).	Contribution stage of proceeding appropriate for consideration of allocation of responsibility.
Dist. Ct. Md. 1991 4th Cir.	Weyer-haeuser Co. v. Koppers Co., Inc. 771 F.Supp. 1420	owner = 40% generator = 60% wood treatment plant	(1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment; (7) the parties' relative degree of fault; (8) the benefits received by the parties from the contaminating activities; and (9) the knowledge and/or acquiescence of the parties in the contaminating activities.	The court emphasized factor #4 as to the degree of involvement in generation, which gave the generator the "lion's share" of the costs. Factors #8 and #9 were determinative in the owner's allocation. The court noted that it was not limited to any specific equitable factors but may consider those factors relevant to the circumstances of the case.

App. Ct. 1993 5th Cir.	Matter of Bell Petroleum Services 3 F.3d 889	Current/ Former Owners Cleanup of aquifer contaminated with chromium from a chrome-plating facility	(1) Apportionment may be based on the volume of waste the parties discharged. (2) The court, in dicta, stated that the "Gore Factors" as outlined in United States v. A & F Materials may be used to "soften" the modern common law approach to joint and several liability.	The question whether there is a reasonable basis for apportionment depends on whether there is sufficient evidence from which the court can determine the amount of harm caused by each defendant.
App. Ct. 1989 5th Cir.	Amoco Oil v. Borden, Inc. 889 F.2d 664	Former and current owners Fertilizer Plant (incl. radioactive)	5 Gore factors as outlined in the Amendments Report, pt. III (Reprinted in U.S. Code Cong. & Admin. News at 3042). "Smith Land v. Celotex factors" should be weighed (incl. price paid and discounts granted) [when applicable].	Indicates § 9613(f) provision provides court with considerable latitude in determining parties' shares. Court's citation of "degree of cooperation" factor reads "to prevent any harm to public health or the environment."
W.D. Mich. 1992 6th Cir.	Hastings Bldg. Prods. v. National Aluminum Corp. 1992 U.S. Dist. Lexis 11533	Previous owner/ operator= 3/4 Current owner/ operator= 1/4 Soil and groundwater contamination at factory	Ct. is free to allocate responsibility according to any combination of equitable factors it deems appropriate. The court may consider among other factors, the following: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished (2) the amount of the hazardous waste involved (3) the degree of toxicity of the hazardous waste involved (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment	The court found the 4th factor most important and also placed emphasis on the 1st, 5th, and 6th. The court also took notice of the existence of an indemnity clause.

W.D. Mich. 1991 6th Cir.	CPC International Inc. v. Aerojet - General Corp. 777 F.Supp. 549	Successors/ parent/ subsidiary Chemical manufacturing facility	(1) A responsible party's degree of involvement in the disposal of hazardous waste. (2) The amount of hazardous waste involved. (3) The degree of care exercised by the parties.	The question of successor liability could have some relevance to the court's future determination on the issue of apportionment. The court deferred any conclusions with respect to successorship until it reached allocation issues at the conclusion of the remedy phase of this case.
App. Ct. 1991 6th Cir.	U.S. v. R.W. Meyer, Inc. 932 F.2d 568	owner = 1/3 former operator/generator = 2/3 Immediate removal action at metal electroplating business	Appeal of Northernaire case above. In addition to the criteria listed by the Northernaire trial court, the court noted that the trial court could have considered: (1) the state of mind of the parties, (2) their economic status, (3) any contracts between them bearing on the subject, (4) any traditional equitable defenses as mitigating factor, and (5) any other factors deemed appropriate to balance the equities in the totality of the circumstances.	This case affirms the Northernaire apportionment.

W.D. Mich. 1989 6th Cir.	U.S. v. Northern-aire Plating Co. 1989 U.S. Dist. LEXIS 15913 20 ELR 20200 (Not published in F. Supp.)	owner = 1/3 generator/ transporter = 2/3 Immediate removal action at metal electroplating property.	(1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment; (7) classification as a "landowner" or a "generator" (8) relative fault	In determining the landowner's share, the court stressed its: (1) business involvement with the generator; (2) knowledge of the generator's activities; (3) failure to notify the generator of its knowledge of the inadequacy of its facilities for the generator's activities; (4) lack of cooperation with the authorities; and (5) classification as a "landowner". In determining the generator's share, the court stressed: (1) the volume and toxicity of the wastes; (2) the generator's high degree of involvement in the generation, treatment and storage of the wastes; (3) the generator's fault: "their careless and negligent containment and disposal of the hazardous wastes"; (4) the generator's lack of cooperation; and (5) their classification as "generators" (the court said that generators should bear the majority of costs in a contribution action with an owner).
S.D. Ohio 1983 6th Cir.	United States v. Chem-Dyne Corp. 572 F.Supp. 802	Generators Transporters Treatment facility	If the harm is divisible and if there is a reasonable basis for apportionment of damages, each defendant is liable only for the portion of harm he himself caused.	Burden of proof as to apportionment is upon the Defendant to limit his liability.

Bank- ruptcy E.D. Mich. 1989 6th Cir.	In re Sterling Steel Treating v. Becker 94 Bankr. 924	Present land owner = 50% Prior land owner in bankruptcy/ trustee = 50% Industrial property was used to heat treat steel Trailer containing haz. wastes was on the property.	present owner: (1) caveat emptor -- duty to inspect property before buying (2) knowledge of prior operations prior owner/trustee: (3) fiduciary duty to know assets being sold (4) duty to disclose knowledge of wastes	The court did not take into account the discount given on the final purchase price for clean-up expenses.
App. Ct. 1994 7th Cir.	Kerr- McGee Chemical v. Lefton Iron & Metal 14 F.3d 321	Prior owners= 0% Current owners= 100% Wood treatment plant	(1) Relevant fault of the parties; relevant "Gore Factors" as outlined in Environmental Transportation Systems v. Ensco, Inc., 969 F. 2d 503. (2) However, relevant Gore factors are neither an exhaustive or exclusive list of the factors to be considered. (3) Contracts between the parties (indemnities) bearing on the allocation of cleanup costs must be looked at.	In determining the relative contribution of the parties, courts must look to the totality of the circumstances. The court determined that the indemnification agreement allocated the costs to the current owners.

C.D. Ill. 1991 and App. Ct. 1992 7th Cir.	Environmental Transp. Systems, Inc. v. Ensco, Inc. 763 F. Supp. 384, 969 F.2d 503	Transporter = 100% Generator = 0% Subcontractor transported transformers containing PCBs	The court considered fault the deciding factor. In dicta, the court cited the Gore Factors with approval, but said this list was neither exhaustive nor exclusive. Pro rata apportionment is also acceptable, though not in this case. It also cited with approval cases that used the following factors: (1) financial resources of the parties involved, (2) benefits received from contaminating activities, (3) compliance with applicable regulations as it relates to the degree of care, and (4) knowledge and/or acquiescence of the parties in that activity.	This court refused to enumerate specific factors to be used in allocation cases generally. Each court has the discretion to consider any factors appropriate to balance the equities in the totality of the circumstances of the case before it. Appeals Court affirmed district court.
N.D. Illinois 1988 7th Cir.	Allied Corp. v. Acme Solvents Reclaiming, Inc. 691 F.Supp. 1100	Operator of waste disposal site Customers of waste disposal site Waste disposal site (motion to dismiss denied)	The court found that the factors that might persuade a court to reject joint and several liability where the harm is indivisible are the Gore factors as outlined in A & F Materials, 578 F. Supp. at 1256.	The court made "no ruling as to the propriety of the approach in cost recovery claims involving the government as plaintiff." The court determined that the scope of liability will be determined upon consideration of the specific and unique facts of the case.

S.D. Illinois 1984 7th Cir.	United States v. A & F Materials Co., Inc. 578 F.Supp. 1249	Generators Waste Disposal Site	Court said Congress intended the courts to enforce CERCLA by applying evolving principles of federal common law on a case by case basis. The Court also used the Gore Factors: (1) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished. (2) the amount of the hazardous waste involved (3) the degree of toxicity of the hazardous waste involved (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State or local officials to prevent any harm to the public health or the environment.	Burden of proof as to apportionment is upon the defendant who seeks to limit his liability. Gore factors provide a nonexhaustive but valuable roster of equitable apportionment considerations.
N.D. Ill. 1995 7th Cir.	Alcan-Toyo America, Inc. v. Northern Illinois Gas Co., 881 F. Supp. 342	Current owner/operator = 10% Former owner/operators = 90% jointly coal processing plant	Court recognizes fault, Gore factors, financial resources, benefits received, and contracts between parties as equitable factors that may be considered. Court says laches, unclean hands, estoppel, and caveat emptor, while not defenses, are equitable factors that may be considered. Court initially focuses on fault and finds defendants were the sole cause of the contamination. Court also finds that Alcan-Toyo, as current owner, assumed some liability in acquiring the property after CERCLA was enacted.	

N.D. Ill. 1992 7th Cir.	United States Steel Supply Inc. v. Alco Standard Corp. 1992 WL 229252	Former owner/operator = 15% Former owner/operator = 85% Steel heat treating facility	Court makes note of Gore factors and other factors that may be considered in an allocation process, but then simply states that a review of the totality of the circumstances indicates that Alco is primarily responsible for the generation of the majority of the contamination. USSSI's allocation share seems based on its release of some contaminants and lack of care in responding to knowledge of contamination.	
App. Ct. 1992 8th Cir.	Gopher Oil Co. v. Union Oil Co. 955 F.2d 519	Purchaser = 0% Seller= 100% Oil and chemical facility	Court affirmed the district court's findings that: (1) Seller knew of and is responsible for the leaking, spilling and dumping of oil and industrial chemicals resulting in contamination of the site. (2) Purchaser did not materially contribute to the contamination and did not have specific knowledge of the contamination (3) The contamination Seller caused is extensive and of a toxic nature. (4) The contamination Seller caused evidences a lack of care exercised in the blending, packaging and disposal of oil and industrial chemicals	
App. Ct. 1992 8th Cir.	U.S. v. Mexico Feed & Seed Co., Inc., 980 F.2d 478	lessee waste oil service company/president /active manger=owners/operators lessor waste oil service	Weyerhaeuser v. Koppers Co. factors: the benefits the landlord rec'd from the operation resulting in the contamination; the landlord's knowledge of the dangers of the operation and acquiescence to those dangers; the relationship between the parties; their relative degree of fault; and, their relative equality. (771 F. Supp. 1420, 1423, 1427 (D. Md. 1991). No reference to the Gore factors.	Court determined that while landlord was not innocent and unsuspecting, he was hardly in the waste oil hauling business. He had no close relationship with the lessee/waste oil co., and was if anything, very unhappy with its operations. He benefitted very little from the placement of the tanks in his land, and put no oil in them. In fact he had tried to have them removed. Therefore the 8th Cir. concurred w/the District Court's findings, including a portion of the landlord's and his company's legal costs in its contribution award.

E.D. Mo. 1991 8th Cir.	Danella Southwest v. South-western Bell Telephone 775 F.Supp. 1227	Owner/ operator = 100% Transporter/ contractor = 0% Dioxin contaminated dirt removed during construction	(1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment; (7) relative fault	The court noted that the transporter's failure to detect the contamination was not its fault. The court also pointed out that the transporter fully cooperated with authorities. As for the owner, the court emphasized that, under the facts of the case, it knew or should have known of the contamination.
E.D. Mo. 1995 8th Cir.	Anschutz Mining Corp. V. NL Indus., Inc. 891 F. Supp. 492	Current owner/operator = 20% Former owner/operator = 80%	Court notes the Gore Factors but did not specifically apply them as they had no precedent value. Court simply notes allocation must be done in an equitable fashion and then contrasts duration of operation and amount of hazardous material extracted by each company.	
Minn. Ct. App. 1988 8th Cir.	Advance Circuits, Inc. v. Carriere Properties 1988 Minn. App. LEXIS 118	generator = 30% owner/operator = 70% Recycling facility	Court concluded that owner/operator's care in the storage and treatment of material was primarily responsible for the cost of cleanup. Court reasoned the generators had to bear some responsibility simply because they were the originators of the hazardous material. Gore factors were not mentioned.	

W.D. Wash. 1992 9th Cir.	United States v. Western Processing Co. 35 ERC 1727	Generator= 3.7% Transporter= 1.7% Waste processing facility	The Court used the proportion of volume of waste the defendants dumped at the site to determine their contribution towards response costs.	
App. Ct. 1991 9th Cir.	In Re Dant & Russell, Inc. 951 F.2d 246	Operator/ Tenant = 52% Wood treatment factory	The Court affirmed the bankruptcy court's determination that the tenant was liable for the proportion of the total cleanup costs by converting to percentage the number of years the tenant operated the site out of the total number of years all tenants had operated the site. Because the tenant operated at the site for 12 of the 23 years, it was held liable for 12/23 or 52% of cleanup costs.	Not a good allocation case. The allocation is based purely on tenants years on sight and does not assign any share to owner or other operators.
W.D. Wash. 1991 9th Cir.	Louisiana-Pacific Corp. v. Asarco Inc. **Transcript of Judge's Oral Decision** 21 Chem. Waste Lit. Rep. 1165	Owners = 0% - 10% Generator = 79% - 100% Multiple Sites: Landfill & logyards	(1) The Gore factors (2) Causation (3) Fault (4) Economic benefit or loss caused by the pollution or contamination	Economic benefit was an important consideration

W.D. Wash. 1990 9th Cir.	U.S. v. Western Processing Company, Inc. 734 F.Supp. 930	Generator arranged for the treatment and disposal of arsenic at the Western Processing Site Waste processing facility	The court rejected the use of the Gore factors in determining liability, but said that they are appropriate considerations on the issues of allocation and contribution.	
S.D. Cal. 1992 9th Cir.	Price v. United States Navy 818 F. Supp. 1326	Former owner = 1% operator/contractor = 4% Navy as Generator/ Transporter = 95%	The court used "equity" to arrive at this allocation, but did not mention the Gore factors.	The case is also of limited value when proceeding through allocation pilots because the court never reached the issue of the owner of the facility at the time of the Navy's disposal. In the allocation all parties will be part of the process.
D. Ok. 1993 10th Cir.	Atlantic Richfield Co. v. American Airlines, Inc. 1993 U.S. Dist. LEXIS 20278	Owners/ Generators Sand Springs Home=6.19% Non-settling defendants contend that the settlement reached between ARCO and Sand Springs Home is unfair to them Petrochemical Complex	(1) The amount of hazardous waste involved (2) The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste (3) The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste (4) The degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment (5) The financial resources of the parties (6) Public interest considerations (7) Status as a charitable institution	A court may consider several factors, a few factors, or only one determining factor depending on the totality of the circumstances presented to the court. The court found the fact that Home did not generate any waste nor did it transport any waste to the site important. It also looked favorably upon Home's cooperation with the cleanup. The court also looked at the fact that Home is not in the waste oil hauling or solvent recycling business; it benefitted very little from placement of the storage tanks on its lands. Court rejected the idea that Home should be liable for between 25% to 50% simply because it is a landowner.

D. Colo. 1985 10th Cir.	State of Colorado v. Asarco, Inc. 608 F.Supp. 1484	Mining company Mining claim owners who have claims in contaminated tunnel Mining waste	(1) Demonstration by a preponderance of the evidence that the contribution of such person to a discharge, release, or disposal of a hazardous substance can be distinguished or apportioned; liability of such person shall be limited to that portion of the release or damages to which such person contributed. (2) Amount and degree of toxicity of hazardous substance involved. (3) Degree of cooperation with Government (4) Degree of care exercised by the parties	Person held jointly and severally liable with one or more persons is entitled to seek contribution from such persons. Contribution is only available where joint liability can be imposed. Court emphasized using federal common law to determine liability.
S.D. Fla. 1989 11th Cir.	South Florida Water Mgmt. Dist. v. Montalvo 1989 U.S. Dist. LEXIS 17555	Owner = 25% Operator/ Generator = 75% Pesticide business	present owner: (1) landowner's limited degree of participation, (2) knowledge of prior operations, (3) failure to inspect property upon purchase, operator/generator: (4) generation of the contaminates, (5) profit from contaminating operations, both parties: (6) amount, if any, of a discount when land was purchased, and (7) cooperation of the parties.	The court emphasized factors # 2 and #4 in its apportionment, which it believed accurately corresponded to the level of fault involved. The court said the Gore Factors are not applicable to this case because they were meant to allocate costs between operators and generators -- not landowners and generators.

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 5-5

TAB 5-5
CITATIONS TO TRADE PRESS PUBLICATIONS

1. Singh and Hinerman, *Superfund Costs Allocations: Equitable Techniques and Principles*, Toxic Law Report (October 12, 1994).

2. Hall et al, *Superfund Response Costs Allocations: The Law, The Science, and the Practice,"* The Business Lawyer, Vol. 49, #4 (August 1994).

See also Tabs 5-1, 5-2 and 5-3 for copies of non-copyrighted materials.

United States
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August 1996

Superfund Reform:
Orphan Share Implementation

Tab 5-6

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

FEB 22 1991

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Final Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA ("Waste-in" Guidance)

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

TO: Director, Waste Management Division,
Regions I, IV, V, and VII
Director, Emergency and Remedial Response Division,
Region II
Director, Hazardous Waste Management Division,
Regions III, VI, VIII, and IX
Director, Hazardous Waste Division,
Region X

This memorandum transmits to you our "Final Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA," which has been referred to as the "waste-in" guidance.

If EPA invokes special notice procedures under CERCLA section 122(e)(1), the Agency must provide PRPs with the names and addresses of all PRPs, the volumes and types of substances sent to the site by each PRP, and the volumes of all substances present at the site. To the extent such information is available, it must be released with the special notice letter.

This document provides guidance on the compilation and release of waste-in lists and volumetric rankings to help you comply with the information release requirements of CERCLA section 122(e) and the information release and exchange policies outlined in OSWER Directives 9835.12 and 9834.10.

Based on Regional input, we made several significant changes to the guidance relating to information release with RI/FS special notice, commonly contributed volumes, and the status of "mom and pop" gas station waste oil generators on waste-in lists. I thank you for your assistance.

Attachment

cc: Superfund Branch Chiefs, Regions I - X
"Waste-in" Guidance Contacts, Regions I - X

OSWER Directive 9835.16

GUIDANCE ON PREPARING WASTE-IN LISTS AND VOLUMETRIC RANKINGS FOR RELEASE TO POTENTIALLY RESPONSIBLE PARTIES (PRPs) UNDER CERCLA

FINAL

February 20, 1991

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. Such guidance and procedures 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 guidance and its internal implementing procedures.

GUIDANCE ON PREPARING WASTE-IN LISTS AND VOLUMETRIC RANKINGS FOR RELEASE TO POTENTIALLY RESPONSIBLE PARTIES (PRPs) UNDER CERCLA

I. INTRODUCTION

This document provides guidance on the compilation and release of waste-in lists and volumetric rankings. A waste-in list gives the volume and nature of substances contributed by each PRP identified at a facility. A volumetric ranking is a ranking by volume of the hazardous substances at a facility.

If EPA invokes special notice procedures under CERCLA section 122(e)(1), the Agency must provide PRPs with waste-in lists, volumetric rankings and a list of PRP names and addresses "to the extent that such information is available." This information facilitates the information exchange process with PRPs that can expedite a settlement agreement. Where available, waste-in information is sent to PRPs before formal negotiations begin. For more information on the Agency's policy on releasing information to PRPs at CERCLA sites, see Releasing Information to Potentially Responsible Parties at CERCLA Sites, OSWER, March 1, 1990, OSWER Directive 9835.12, and references cited there.

II. BACKGROUND

Experience has demonstrated that waste-in lists and volumetric rankings are a valuable tool in bringing about settlements at Superfund sites. When presented with an estimate of the nature and volume of hazardous substances contributed to a site, PRPs are more able to coalesce into committees and determine allocations among themselves, and often are more willing to participate in settlement negotiations with EPA. While not all sites are logical candidates for waste-in lists or volumetric rankings, production of waste-in lists and rankings is generally beneficial, whenever practicable.

In the Management Review of Superfund (June, 1989) the Administrator called for guidance to "ensure effective information collection, information exchange, and enforcement of information requests to encourage Potentially Responsible Party (PRP) participation in the settlement process." The recommendation emphasized the importance of a consistent approach when releasing information to PRPs about the identity and relative contributions of PRPs and the type and quantity of

wastes at a site, the latter of which is referred to in this guidance as "waste-in information."

Because waste-in lists have proven a valuable tool in initiating PRP negotiations and bringing about settlements, the Agency is providing guidance to improve the process of information gathering, waste-in compilation, and information release to PRPs. Production of waste-in lists will vary widely, depending upon the classes of PRPs (e.g., owner/operator vs. multigenerator) and available information. Where sufficient information is available, Regions should provide waste-in lists to PRPs.

Increasingly, and particularly at large, complex Superfund sites with multiple contributors, PRPs have been requesting EPA to furnish them with waste-in information in order to reach a settlement among themselves and with the Agency. This represents a shift from past experience, where PRPs often preferred to compile waste-in lists themselves. Whether EPA produces waste-in information on a site, or chooses to use or adopt waste-in information developed, at least in part, by PRPs must be a site-specific determination reflecting the Region's or PRPs' respective resources, willingness, familiarity with the site and experience with transactional databases. Where PRPs compile waste-in information, Regions must ensure that the information meets the qualitative standards articulated in this guidance before releasing it to other PRPs.

Often, Regions must rely heavily on information provided by the PRPs through 104(e) responses in order to compile a waste-in list or volumetric ranking. While Regions have broad discretion in providing PRPs with supporting documentation, waste-in information -- when developed -- should be sent to all identified PRPs at a site, consistent with OSWER Directive 9835.12.

III. DEFINITIONS

The following "waste-in" terms are defined solely for purposes of this guidance and are intended to assist Regions in its implementation:

Waste-in Information - Information on the type and quantity of hazardous substances at a facility. Waste-in information includes waste-in lists and volumetric rankings.

Waste-in List - A listing of the volume and nature of substances contributed by each PRP identified at a facility. A waste-in list satisfies the information-release requirements of CERCLA section 122(e)(1)(B).

Volumetric Ranking - A ranking of the hazardous substances at a facility in descending volumetric order. A volumetric ranking satisfies the information-release requirements of CERCLA section 122(e)(1)(C).

Volumetric Ranking of PRPs - A ranking of PRPs on the waste-in list in descending order of the total volume of hazardous substances that they contributed to a facility. PRP volumetric contribution is usually expressed as a percentage of the total volume of hazardous substances at the facility. These rankings are sometimes referred to as "generator rankings."

Non-Binding Allocation of Responsibility (NBAR) - A non-binding preliminary allocation of responsibility prepared pursuant to CERCLA section 122(e)(3) which allocates percentages of the total cost of response among potentially responsible parties at a facility.

Information Release - Distribution of waste-in and other site information to the PRPs identified at a facility in order to facilitate settlement between PRPs and the Agency.

IV. WASTE-IN LIST DEVELOPMENT AND INFORMATION RELEASE PROCESS

Waste-in list development and information release can be viewed as a five-part process. Part one is the PRP search. PRP search activities focus on the development of evidence for 106 and 107 actions and on waste-in information for waste-in lists and volumetric rankings. Part two is waste-in information assessment, conversion, and compilation. This is the process where waste-in information is converted into waste-in lists and volumetric rankings. Parts three, four, and five concern the dynamics of information release and exchange.

A) PRP Search

PRP search procedures include developing evidence for 106 and 107 actions as well as developing waste-in information for waste-in lists and volumetric rankings (PRP Search Supplemental

Guidance for Sites in the Superfund Remedial Program, OWPE, June, 1989, OSWER Directive No. 9834.3-2a). The supplemental guidance describes a two-phased process for conducting PRP searches and outlines the format and content for remedial PRP search reports. Although the following sections refer to remedial PRP searches, the waste-in information development process described in this guidance applies to both remedial and removal searches.

1) Baseline PRP Search

Phase one of a PRP search is called the baseline phase. Its focus is primarily on establishing owner/operator liability and identifying generators and transporters associated with the site. Baseline-phase activities usually include collecting records from federal, state, and local government agencies; interviewing current and past government officials; conducting a title search; and issuing section 104(e) information request letters to site owners and operators. Typically, owner/operator transactional records will be the only waste-in information that is developed during the baseline phase. Although these may not provide a complete waste-in picture, they will certainly provide a significant number of leads that can be pursued during the follow-up PRP search.

2) Follow-up PRP Search

The second phase of a PRP search is called the follow-up phase. Its focus is on establishing generator and transporter liability and developing waste-in information for waste-in lists and volumetric rankings. Activities for the follow-up phase can vary considerably from site-to-site depending on site complexity, the number of generators and transporters associated with the site, and the difficulties encountered with waste-in information development. Follow-up PRP search activities usually include issuing section 104(e) information request letters to generators and transporters, interviewing PRPs and current and past PRP employees, and conducting specialized tasks, as needed, which are described in the PRP Search Manual, OWPE, November, 1987, OSWER Directive No. 9834.6.

In addition to the development of evidence for 106 and 107 actions, activities conducted during the follow-up PRP search should focus on waste-in information for waste-in lists and volumetric rankings. Often, the person who can provide information on a PRP's liability can provide information on the wastes that were sent to the site.

3) Waste-in Lists and PRP Search Planning

Regions should plan an information release strategy and schedule when they are doing PRP search planning. The plan should include a schedule for waste-in list preparation, revision, and release. Important milestones for scheduling include assessment of waste-in information, when to issue general notice letters, a cut-off date for refining waste-in lists, and whether to send out lists before or with special notice letters. Where special notice is not invoked but Regions choose to produce waste-in lists, a schedule detailing list compilation, revision, and release is equally important to ensure that the information gets to PRPs in a timely manner.

B) Assessment, Conversion, and Compilation of Waste-in Information

1) Assessment

At some point during the follow-up PRP search, the PRP search team (i.e., the work assignment manager or RPM, civil investigator, program management, and ORC attorney) should assess the quality and completeness of the waste-in information and determine whether waste-in lists and volumetric rankings will be developed. The statute gives EPA considerable discretion to decide whether to do a list or ranking. Whether the records at a site constitute sufficient evidence to produce waste-in lists and volumetric rankings will be a highly site-specific determination by each Region.

Regions should develop an approach for assessing waste-in information that is internally consistent and based on a common set of considerations. Attachment 1 is provided to assist Regions in assessing waste-in information. When special notice procedures are invoked, Regions should prepare waste-in lists and rankings for release to PRPs as provided in section 122(e)(1) of CERCLA. In general, Regions should prepare waste-in lists and volumetric rankings whenever practicable, especially where it would facilitate settlement.

2) Conversion

Waste-in information should be converted to a common unit of measurement. In general, most sites will be receiving hazardous substances in drums or tankers, making gallons the preferable

unit in which to express volume. However, some sites such as landfills may have large amounts of solid waste, trash, and other hazardous substances coming in by weight, in which case pounds or tons may be more appropriate. Where transactional records are divided among liquid volumes and weights, Regions should convert all volumes to a single standard using the equation 1 gallon = 8.33 pounds, unless more specific density information is provided. Attachment 2 is a list of standard conversion factors that can be used to convert volumes and weights to a common unit of measurement.

3) Compilation

a) Making Assumptions About Waste-in Information

In order to compile waste-in lists and volumetric rankings, Regional staff may have to interpret ambiguous data and make assumptions regarding waste-in information. When making assumptions about waste-in information, Regions should generally follow three broad rules:

- Assumptions should be defensible. Regions should use established conversion standards and base assumptions on patterns established in the data in order to avoid charges of being arbitrary or capricious.

- State assumptions openly. When interpreting illegible numbers on a manifest, or assuming a disposal destination from an unclear hauling ticket, it is preferable to let PRPs know where EPA made assumptions and to identify where ambiguity still exists. The lists are thus more credible and PRPs have the opportunity to make their own corrections. Assumptions should be reviewed by Regional counsel to ensure that they do not jeopardize a cost recovery case or other enforcement action.

- Be consistent. PRPs involved at more than one site within a single Region will be aware of any discrepancies in the kinds of assumptions made for waste-in lists at these sites, and disputes over inconsistent assumptions only slow down the settlement process. Regions should ensure that everyone compiling waste-in information is using the same Region-wide set of assumptions and compilation methodology. Some

inconsistencies may be unavoidable, however, where facts in separate cases differ significantly.

Based on Regional experience in preparing waste-in lists and volumetric rankings, a list of generally accepted assumptions for waste-in lists and volumetric rankings has been compiled in Attachment 3.

In many cases, Regions will have to make additional site-specific assumptions about waste-in information to improve the comprehensiveness of waste-in information and the willingness of PRPs to negotiate. However, Regions should bear in mind that assumptions that are not easily supported may have the effect of slowing down or thwarting the formation of a PRP negotiating group while PRPs dispute EPA's numbers.

b) Who to Include on Waste-in Lists

Pursuant to CERCLA section 107(a), PRPs include generators of a hazardous substance, transporters of a hazardous substance, and owners or operators of sites where hazardous substances were treated or disposed of. In general, generators are always included in a waste-in list where evidence indicates they contributed hazardous substances to a Superfund site.

Transporters should be included on waste-in lists when the transporter - and not the generator - determined where the hazardous substances were to be taken for treatment or disposal. EPA interprets CERCLA sections 107(a)(4), 101(20)(B), and 101(20)(C) to exempt transporters from notice as PRPs where they did not select the site or facility to which hazardous substances were delivered (Policy for Enforcement Actions Against Transporters Under CERCLA, OSWER, December 23, 1985, OSWER Directive No. 9829.0). The policy states that while all transporters should be sent 104(e) information request letters, only those transporters who appear to have selected the site for hazardous substance disposal should be sent notice letters and waste-in information.

While owner/operators may be PRPs and consequently may be jointly and severally liable under CERCLA section 107, in most cases they are not included on waste-in lists. Owner/operators should be included on waste-in lists, however, where there is evidence to suggest they also acted as a transporter or generated waste at the site.

C) Information Release with General Notice

To provide PRPs ample time to organize and develop a reasonable offer to conduct or finance a response action, Regions should issue a general notice letter (GNL) prior to issuing a special notice letter (SNL) under section 122(e) for an RI/FS or RD/RA. General notice letters should be sent to all persons where there is sufficient evidence to make a preliminary determination of potential liability under section 107. For more information on general and special notice letters, see Interim Guidance on Notice Letters, Negotiations, and Information Exchange, OSWER, October, 1987, OSWER Directive 9834.10.

In most cases, Regions should not expect to release waste-in lists and rankings to PRPs with general notice letters issued before an RI/FS. This is due to the fact that follow-up PRP search activities are being conducted and complete waste-in information has not yet been developed. General notice letters, however, may include the names and addresses of PRPs to the extent this information is available.

D) Refining and Revising Waste-in Lists and Volumetric Rankings

If waste-in lists and volumetric rankings are released before issuance of special notice letters, Regions should revise and update this information prior to its release with special notice letters to ensure that the information provided to the PRPs is based on currently available data. The following guidelines pertain to list and ranking revisions prior to issuance of special notice letters, or prior to information release where no special notice letter is sent for RI/FS or RD/RA work:

- Regions should not spend an unreasonable amount of time on waste allocation. Waste-in lists and volumetric rankings are intended to provide PRPs with contribution information, but do not constitute EPA's final position on PRP contributions or allocations.

- Regions should not spend unreasonable amounts of time on waste characterization. Where records give detailed information on chemical compounds and hazardous constituents, Regions should provide as much detail as available in the waste-in list to help convince PRPs of the strength of EPA's evidence and encourage them to

begin negotiating. However, where more detailed waste information is not easily available, general waste characterization should be sufficient at this stage in the process.

- o General terms, such as "waste oil" or "solvent", can be descriptive enough for the purposes of demonstrating PRP contribution to a site, and for volumetric rankings. The primary distinction in the information release process is whether or not a substance is hazardous, and, therefore, should be counted in the ranking and waste-in attribution.

The Regions should bear in mind that the time available for waste-in information revisions will be restricted by the target special notice date and PRP requests for waste-in information under section 122(e)(1).

E) Information Release with RI/FS or RD/RA Special Notice

Special notice letters are used to initiate a formal period of negotiations with PRPs and to invoke the statutory moratorium on section 104 and 106 actions. Special notice can be given prior to the conduct of the RI/FS or RD/RA, in which case PRPs are encouraged to conduct or finance these response activities. Along with the special notice letter, the Agency releases to the PRPs the names and addresses of all PRPs, the volumes and types of substances sent to the site by each PRP, and the volumes of all substances present at the site. To the extent such information is available, it must be released with the special notice letter.

If waste-in information is not available for RI/FS special notice, the information-release requirements of section 122(e) can be met by releasing the names and addresses of PRPs and other information in our possession relating to the volume and nature of substances. RD/RA special notice must be accompanied by waste-in information, to the extent it is available. (Interim Guidance on Notice Letters, Negotiations, and Information Exchange, OSWER, October, 1987, OSWER Directive 9834.10, and Releasing Information to Potentially Responsible Parties at CERCLA Sites, OSWER, March, 1990, OSWER Directive 9835.12).

V. GENERAL CONSIDERATIONS FOR RELEASING WASTE-IN INFORMATION

The following are general guidelines on what to consider when releasing waste-in information to PRPs:

1. Always include a disclaimer when releasing waste-in information to PRPs. Waste-in information is not equivalent to a nonbinding preliminary allocation of responsibility (NBAR) or cost allocation; emphasize this in the disclaimer. Similarly, it is important to emphasize the preliminary (and hence incomplete) nature of waste-in information. Regions should include the following disclaimer when releasing waste-in information to PRPs:

   "This information does not constitute a non-binding preliminary allocation of responsibility under CERCLA section 122(e)(3). This information should not be construed as an allocation of responsibility or liability by EPA. This waste-in list and volumetric ranking is provided solely for your information. This list is preliminary and subject to revisions based upon new information as, and if, it becomes available."

2. When releasing waste-in information to PRPs, Regions should openly state assumptions made when compiling the lists and rankings. Where records are less than complete, assumptions typically must be made about volumes and weights, conversion factors, waste characterization and shipment and disposal destinations. By stating assumptions openly, and by identifying uncertainties in a list or ranking, PRPs will have better information upon which to judge the accuracy of waste-in information, to revise lists themselves, and to base allocation among themselves -- all of which can facilitate settlement. Assumptions should not, however, jeopardize a cost recovery case or other enforcement actions.

   Because the lists are not binding and do not serve as preliminary allocations of responsibility or liability, PRPs should not be able to successfully challenge waste-in information, although many will undoubtedly dispute EPA's rankings and volumetric attributions. Additionally, EPA should always state that the burden is on the PRPs to demonstrate where EPA's assumptions are incorrect.

3. There are some limits on information release. Any information, such as supporting documentation, that Regions release to PRPs beyond what is statutorily required under section 122(e)(1) is at the discretion of the Region. When available, however, waste-in information that falls outside the scope of 122(e)(1) may be subject to certain limitations. For example, information that is identified in a section 104(e) information request response as Confidential Business Information (CBI) should not be released with special notice unless permitted by 40 CFR Part 2 and/or required by section 104(e)(7). Information release may also be governed by FOIA, which includes a number of exemptions and privileges such as the attorney-client privilege. (See OSWER Directive 9835.12).

4. Where hundreds of PRPs are identified at a Superfund site, Regions may prefer to distribute waste-in lists and rankings to PRPs through an information meeting. Experience has shown that meetings are useful for bringing large numbers of PRPs together where they can meet and form a bargaining committee. Presenting waste-in information to PRPs at a meeting also may encourage reluctant PRPs to begin negotiations.

5. Correcting inaccuracies and producing new lists. In general, if PRPs are willing to make corrections and incorporate new information themselves, and settlement will not be delayed by this work, it is preferable to let PRPs rework the lists themselves. However, where substantial new numbers of PRPs or new site-related waste information comes to light through information request responses or other channels, Regions may wish to revise waste-in lists themselves where such revision would expedite settlement and limit internal debate among negotiating PRPs. In general, Regions should only issue a revised list once between the RI/FS and RD/RA stages.

6. Regions should avoid playing the role of referee in PRP disputes over waste-in information and respective allocations. PRPs will often ask EPA to moderate disputes over contributions and allocations, preferring EPA as a "neutral" voice over that of the PRP steering committee or rival PRP factions. In many cases pressure will be put on EPA to step in and moderate disputes between large and small PRPs, or where small PRPs are trying to assert de minimis status.

Due to resource implications, Regions should not become overly concerned with internal PRP allocation issues, even when smaller contributors may claim coercion from larger contributors. Regions might consider involvement in allocation questions, however, when they appear to jeopardize the likelihood of settlement. Small contributors may be eligible for a de minimis settlement. (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, OSWER, June 6, 1989, OSWER Directive 9835.9).

7. EPA should inform PRP groups that viable PRPs will have to absorb orphan shares. Many waste-in lists are characterized by unattributable volumes and hazardous substances. Where lists and rankings contain these "orphan" shares, Regions should encourage PRP negotiating groups to absorb these shares and apportion the shares as part of the internal allocation process.

VI. FORMAT AND CONTENT OF WASTE-IN INFORMATION

For the sake of illustration, waste-in lists and volumetric rankings are discussed in this section as separate documents, even though the information could very easily be combined into a single document that also includes the names and addresses of PRPs.

A) Waste-in Lists [CERCLA section 122(e)(1)(B)]

Waste-in lists contain the volume and nature of substances contributed by each PRP identified at a facility. At a minimum, the lists should contain columns for the names and addresses of PRPs as well as the types and volumes of hazardous substances. Although EPA is under no statutory obligation to release information beyond this in a waste-in list, Regions should release supplemental waste-in list information unless there are countervailing legal, policy, or strategy reasons not to do so. (See OSWER Directive 9835.12). Supplemental waste-in information can include, but is not limited to, the dates of shipments, the names of transporters, the types of evidence from which waste-in lists were derived, and comments to clarify assumptions, ambiguities, and double-counts. Attachment 4 is a waste-in list that contains supplemental waste-in information.

In some situations, it may be advantageous to prepare separate waste-in lists for generators and transporters. Where most PRPs at a site are generators, waste-in lists should be organized by generator, with a column provided for listing the transporter of each shipment in order to link the generator to the site. Where there are multiple transporter PRPs, it may be advisable to prepare separate waste-in lists for generators and transporters. [See discussion under paragraph D) below].

B) Volumetric Rankings of Substances at a Facility [CERCLA section 122(e)(1)(C)]

CERCLA also requires that special notice recipients be provided with a volumetric ranking of hazardous substances at the facility, to the extent such information is available. This ranking lists hazardous substances and their respective volumes in descending volumetric order. It can be developed from waste-in list information.

C) Volumetric Rankings of PRPs

The statute does not require the release of "volumetric PRP rankings", sometimes referred to as generator rankings, with special notice; however, several Regions release information to PRPs in this format because they feel it provides a logical starting point for negotiations. Volumetric rankings of PRPs rank the PRPs on the waste-in list in descending order of volume and express their contributions as a percentage of the total volume of hazardous substances at the facility. Regions should bear in mind and convey to the PRPs that waste-in information provided with special notice is intended as an estimate of individual PRP contributions, and is neither definitive nor binding in any way. It is intended solely as information to facilitate settlement agreements between PRPs and the Agency.

Where there is insufficient information to convert volumes into a single unit of measurement, Regions may provide a volumetric ranking using raw data from records in unconverted form. PRPs can then choose to clarify ambiguities concerning volumes or substances themselves in order to produce a better list upon which to negotiate.

D) Accounting for Commonly Contributed Volumes

Where hazardous substances are contributed both by the generator and the transporter who designated the treatment or disposal site, Regions should attribute the volumes to both parties when compiling waste-in information. EPA should not try to apportion responsibility for a hazardous substance shipment generated by one PRP and transported by another among the two PRPs in a volumetric ranking or waste-in list, but should let the PRPs themselves allocate their respective responsibilities for commonly contributed volumes.

Commonly contributed volumes can be accounted for on volumetric rankings of PRPs by attributing the volume of each shipment to both generator and transporter. This is the preferred approach when separate generator and transporter volumetric rankings have been prepared; however, it creates a situation where some shipments can be counted twice, which may cause PRPs to question the validity of methodologies used to compile waste-in information unless double-counted shipments are clearly identified and their impact on total volumes is explained. Accordingly, when volumetric rankings of PRPs contain double-counted shipment volumes, Regions should provide PRPs with an explanation of why shipments have been double-counted and clearly identify, by means of a comment field or other notation, which shipment volumes have been attributed to both generators and transporters.

Another way of accounting for commonly contributed volumes is to identify the transporter linked to each shipment on a generator waste-in list and indicate whether the transporter designated the treatment or disposal facility. This is the preferred approach when separate generator and transporter volumetric rankings cannot be prepared due to insufficient information or information management system limitations. Further, it is recommended that waste-in lists be prepared in this way even when commonly contributed volumes are accounted for on volumetric rankings of PRPs to ensure that these volumes are consistently identified on all waste-in information that EPA releases to PRPs.

VII. SITE-SPECIFIC VOLUMETRIC INFORMATION GUIDANCE

This section offers guidance specific to the following types of Superfund sites: municipal landfills, removal actions, sites

with little or no documentation, solvent recycling/ transshipment sites and, briefly, lead-battery sites and mining sites.

A) Municipal Landfills

Landfills are notoriously difficult sites for producing waste-in information, both because of poor record-keeping practices and because of the mixture of different wastes disposed there. Many Regions do not even attempt compiling waste-in information for landfills. However, because of the importance of waste-in information in bringing about negotiations, Regions should at least assess whether waste-in lists and volumetric rankings could be developed, particularly where records exist and where interviews can provide good supplemental information on truck routes, generators and shipment volumes.

In many instances, most of the wastes in a municipal landfill are not hazardous substances and do not belong in a waste-in list or volumetric ranking. The Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes (OSWER Directive 9834.13) provides that generators and transporters of municipal solid waste or sewage sludge generally will not be notified as PRPs unless evidence shows that the waste or sludge contains a hazardous substance, and that hazardous substance came from a commercial, industrial or institutional process or activity. Generators and transporters of commercial trash, however, generally are notified as PRPs unless they can demonstrate that none of the hazardous substances contained in the trash are derived from a commercial, institutional or industrial process or activity, and that the amount and toxicity of the hazardous substances do not exceed the amount normally found in common household trash. From this policy, Regions generally should not include municipal solid wastes in waste-in lists or volumetric rankings except where evidence suggests that the waste or sludge contains a hazardous substance, and that hazardous substance came from a commercial, industrial or institutional process or activity. Further, unless PRPs can demonstrate otherwise, Regions generally should include trash from commercial, institutional and industrial entities in waste-in calculations.

All generators, transporters and owner/operators involved at a municipal landfill site usually should still be sent Section 104(e) request letters to provide Regions with as much information and documentation on the site as possible. Regions

should only send notice letters, waste-in lists, and volumetric rankings to those identified as PRPs.

Regions should also compare information they have gathered at a landfill site with information on PRPs and hazardous substances at other Superfund sites in the area. In some instances, the same transporters who shipped hazardous substances to nearby facilities or Superfund sites may have also shipped substances to the municipal landfill. Interviews and civil investigations of nearby industries and commercial entities may provide information that can link hazardous substance shipments from these entities to a municipal landfill, particularly where transactional records show that hazardous substance shipments did not reach a designated RCRA facility for disposal.

B) Removals

Most removal sites are not good candidates for compiling waste-in information since they require clean-up action sooner than the time it would take to produce waste-in lists. Non-time-critical removal sites, with a planning process of six months or more, are the only sites for which waste-in lists and rankings should be considered. Where adequate transaction documentation exists and settlement seems possible, Regions should prepare waste-in lists and rankings as described in section 122(e)(1) for release to PRPs.

As with remedial sites, Regions should begin preparing a schedule for waste-in list and ranking compilation, revision and release during the early stages of the PRP search. Because removals proceed at an accelerated rate, it is important to start waste-in preparation early, spend less time fine-tuning lists and rankings, and release the information to PRPs as early as possible. Regions should notify PRPs of their potential liability orally, followed by a confirming written notice, or through a general notice letter. Information on the identity of other PRPs at a site, and evidence on individual contribution, should be sent out with this written notice. Where a special notice letter is sent, waste-in lists and rankings should be sent out with or before the special notice letter. Where no special notice letter is sent, Regions can either send waste-in lists and rankings through a separate mailing between the general notice and the beginning of the removal action, or distribute the information at a meeting of PRPs during that time. Where a removal site involves large numbers of PRPs, Regions may prefer to distribute waste-in information at a central meeting as they

might for a remedial site. For more information on notifying PRPs at a removal site, see Chapter V of the Superfund Removal Procedures Manual, and Interim Guidance on Notice Letters, Negotiations, and Information Exchange, OSWER, October, 1987, OSWER Directive 9834.10.

Regions should initiate information gathering and document retrieval very early, and move quickly to retrieve site documents that might otherwise be destroyed during removal activities. Regions should make special arrangements to gather evidence at sites where documents are contaminated and cannot be collected in a normal information-gathering operation. These special arrangements could include photographing contaminated documents.

C) Sites with no Records or Poor Records

Where preliminary baseline records collection during the PRP search fails to yield good site or transactional records, Regions should not abandon the idea of compiling volumetric rankings or waste-in lists. A number of Regions have succeeded in locating missing records or new PRPs, and in supplementing weak documentation by persisting in their information gathering through alternate sources, or using civil investigators and eye-witness accounts. In general, where site records are inadequate to produce waste-in lists and rankings but where such information would enhance the possibility of reaching a settlement, Regions should consider using other avenues to gather information on a site. These include:

- Civil Investigators, who can be used for tracking down withheld records, identifying new PRPs who may have documentation, interviewing witnesses whose accounts can lead to new information and new PRPs, and clarifying incomplete documentation;

- Supplemental 104(e) Information Request Letters, which can be used to request further information, clarify existing information, or be sent to new PRPs discovered through prior 104(e) letter responses (see Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, OECM, August, 1988, OSWER Directive 9834.4-A). Supplemental request letters can be sent out at any time during the remedial or removal process, but are most useful for the purpose of compiling waste-in information if sent before the special notice letter and moratorium; and,

- Administrative Subpoenas, as provided in CERCLA section 122(e)(3)(B), which are available to Regions "to collect information necessary or appropriate" for performing a preliminary non-binding allocation of responsibility or "for otherwise implementing this section," including preparation of waste-in information under section 122(e)(1). Administrative subpoenas, whose use is encouraged in the Administrator's Management Review of Superfund, June, 1989, provide Regions with an additional enforcement tool for deposing witnesses and collecting "reports, papers, documents, answers to questions, and other information that the President deems necessary." (Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, OECM, August, 1988, OSWER Directive 9834.4-A).

D) Solvent Recycling and Other Transshipment Sites

Solvent recycling and other transshipment sites are often characterized by operations that make it difficult to compile accurate waste-in information, even though good transactional records may exist. Transshipment activities usually involve the temporary storage of hazardous substances prior to off-site shipment for treatment or disposal. Recycling activities typically involve the recovery and sale of "pure" products from spent solvents and waste oils.

Regions may encounter difficulties when compiling waste-in list volumes for solvent recycling and transshipment sites. Unless records indicate clearly what percentage of incoming substances were shipped off-site as pure product or as temporarily stored substances, Regions should include all incoming wastes in both volumetric rankings and waste-in lists, and put the burden on PRPs to demonstrate that hazardous substances left the facility and in what quantities.

Where all hazardous substances were brought to a central site and then shipped to subsequent disposal sites, Regions may find it easier to create a main transactional database for the central site and subcategories for each disposal site within the main database, or create separate lists for each site. Again, the purpose of waste-in information is not to produce an exact allocation of substances contributed by each PRP, but an

approximate ranking by volume that PRPs can use to determine an appropriate allocation among themselves.

Hauler records will often provide good information on which hazardous substances were brought to a facility; they are not always as clear, however, on what substances left that facility, particularly when different transporters are involved. Hauler records used in conjunction with a site log provide a good means to chart the inflow and outflow of hazardous substances from a site. Where transporter records indicate hazardous substances were shipped to a certain site, Regions should assume the documentation is correct unless PRPs can demonstrate otherwise. Similarly, where generators' shipments were known to have been sent to different sites, Regions should assume on a preliminary basis that the destination recorded on the transporter ticket is correct.

Hazardous waste recycling facilities operated after 1980 should have RCRA manifest documentation, although manifests are not always reliable and not always kept for three years (or longer) as required under RCRA 40 CFR section 263.20. Recycling sites operated prior to 1980 are less likely to have good site or transactional records. Where a recycling facility has been in operation before and after 1980, recent RCRA manifests may provide clues to pre-1980 site operations, including end products, incoming shipment volumes and substances, and disposal patterns on site.

E) Lead Battery Sites

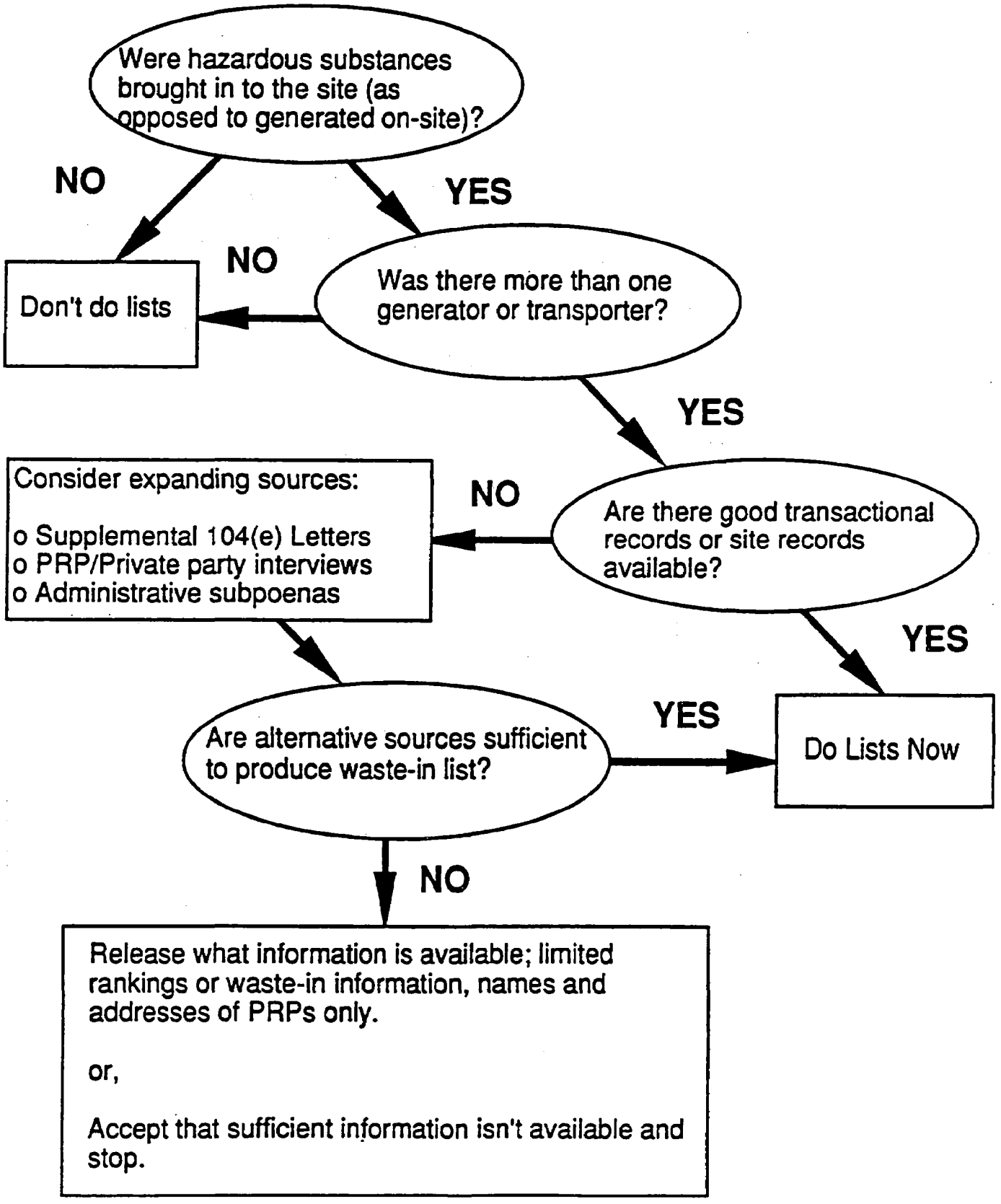
Sites run as lead-recycling operations where automotive batteries are cracked open to capture reusable lead electrodes often produce hazardous substance contamination through improperly disposed sulfuric acid. These sites, along with transformer recycling sites contaminated by PCBs, are notoriously difficult for producing waste-in information. Documentation is often poor to nonexistent, and volumes are extremely difficult to determine. Regions face difficult questions about how far up the waste-stream to go after PRPs. Where site records and transactional records are reliable and available, Regions should try to produce waste-in information. In most cases, Regions probably will not have such documentation.

F) Mining Sites

Abandoned mining sites or sites contaminated by mining overburden also frequently may pose difficulties for producing waste-in information. This is due to the fact that documentation is rarely available; PRPs are often no longer in business, insolvent or untraceable; calculating volumes can be extremely difficult due to the large volume of wastes; and under RCRA [40 CFR 261.4(b)(3)], certain mining wastes are exempt as RCRA hazardous wastes and therefore may not be CERCLA hazardous substances (unless some other basis exists for defining the material as a hazardous substance under CERCLA section 101(14)). Municipalities may keep records on land ownership or mining leases, and occasionally record annual tonnage and profit figures for individual mines. Even these records, however, may require major assumptions on the amounts of waste produced per ton of mined product. In general, unless documentation is good and viable PRPs can be found, Regions should not attempt compiling waste-in information for mining sites.

Attachment 1

WASTE-IN LIST DECISION GUIDELINE



STANDARD CONVERSION FACTORS FOR WASTE-IN LISTS AND VOLUMETRIC RANKINGS[1]

1 truckload = 74 drums

1 drum = 55 gallons

1 barrel = 55 gallons

1 gallon = 8.33 pounds

1 pail = 5 gallons

1 ton = 2,000 pounds

1 metric ton = 2,204 pounds

1 ton = 250 gallons

1 liter = 0.264 gallons

1 cubic foot = 7.482 gallons

1 cubic yard = 202.018 gallons

1 box = 1 gallon

1 tank truck = 4,500 gallons

1 pound = 1 pint = 0.125 gallons

In addition, asbestos ceiling tile is assumed to be 1 inch thick. One square foot is therefore assumed to = 0.6233 gallons.

Where volumes indicated on transactional records are unclear, such as "pallet," "wheelbarrow," "box car," Regions should try to corroborate assumptions or estimates of volumes through interviews, alternate sources of records, or site-log information. Where there is no corroborating evidence, Regions should include their best estimate of the volume and indicate it is an estimate.

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[1]Tank trucks and drums come in several different sizes and Regions should check waste-in documents carefully to ensure that the correct conversion factor is used.

GENERALLY ACCEPTED WASTE-IN LIST AND VOLUMETRIC RANKING ASSUMPTIONS

The following is a partial list of reasonable assumptions which may be appropriate when preparing waste-in information:

- A 55-gallon drum or any other container of hazardous substances for disposal was full when it was shipped and when it was disposed. Unless a shipping or disposal record unambiguously indicates otherwise, either because the recorded volume is less than that of the full container volume, or the price is less than that normally charged for a full container, the burden of proof is on the PRP to show that a container was less than completely full.

- Anything labeled a "corrosive" without additional explanation or identification is hazardous and should be included in volumetric and waste-in lists. "Corrosives" are regulated as hazardous waste under 40 CFR 261.22 of RCRA. The burden is on the PRP to demonstrate why a substance labeled "corrosive" did not meet the definition in CERCLA of a hazardous substance.

- The destination listed on a manifest or other transactional record is correct. The burden is on the PRP to show that a shipment of hazardous substances recorded as sent to one destination was not in fact sent there. Regions may want to scrutinize transshipment site records particularly closely, since hazardous substances are shipped to, as well as from, these sites. Where records clearly indicate that hazardous substances were removed from a site, Regions can factor this information into waste-in lists and volumetric rankings. Where records are less clear, Region should include all wastes as sent to the site and put the burden of proof on PRPs to demonstrate that hazardous substances left the site. Where Regions make assumptions about destinations, they may want to state them openly in appropriate circumstances.

- Commercial, industrial or institutional trash is hazardous and should be included in waste-in lists and volumetric rankings unless PRPs can demonstrate otherwise. The Interim CERCLA Municipal Settlement Policy (OSWER Dir. 9834.13) provides that generators and transporters of trash from a commercial, industrial or institutional entity generally will be notified as PRPs unless they can demonstrate that none of the hazardous substances contained in the trash are derived from commercial, industrial or institutional processes or activities, and where the amount and toxicity of those hazardous substances are not above the level commonly found in household trash. Where EPA is compiling the lists, it is better to include industrial trash as hazardous, and let PRPs make necessary revisions afterwards. On the other hand, the Interim CERCLA Municipal Settlement Policy indicates that generators and transporters of household trash generally will not be notified as PRPs.

- Anything labeled "solvent" is hazardous, and should be included in waste-in and volumetric lists. In many cases, labels on drums will describe hazardous substances generically and not include information on specific compounds. Regions should make reasonable efforts to find other evidence to corroborate the hazardous nature of a substance, where possible.

- Where hazardous and nonhazardous substances are mixed together, the mixture is considered hazardous and should be included in its entirety on waste-in and volumetric lists. Solid wastes, when mixed with one or more hazardous wastes, are considered a RCRA hazardous waste as described in 40 CFR sections 261.3(a)(2)(iii) and (iv), except where the waste was a characteristic waste and no longer exhibits any of the characteristics of a hazardous waste or where it has been excluded as a hazardous waste in 40 CFR 261.3. Under CERCLA, where there is mixing of hazardous and nonhazardous substances during transport or disposal, the combination would be subject to CERCLA if it still contains a hazardous substance.

Date: 01/09/89
Time: 17:48:27

LIST OF WASTE TRANSACTIONS
COMBINED SITE RECORDS
COMMERCIAL OIL SERVICES

CORD NBER	INVOICE NUMBER	TRANS. DATE	WASTE DESCRIPTION	QUANTITY	UNIT SIZE	UNIT	DOCUMENT TYPES	TRANSPORTER	SHIP DATE	RECEIVE DATE	COMMENTS
PRNAME ROADWAY SERVICES, INC.											
PRCODE ROADWI											
18792	11336	12/01/82	WASTE OIL	850.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	12/01/82	12/01/82	
18793	11300	12/03/82	OIL, WATER, AND SLUDGE	2000.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	12/03/82	12/03/82	
18796	12559	01/18/83	BSW	1500.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	01/18/83	01/18/83	
18797	12453	02/15/83	BSW	2000.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	02/15/83	02/15/83	
18798	12691	03/04/83	WASTE OIL	450.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	03/04/83	03/04/83	
18799	12816	03/24/83	WASTE OIL	400.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	03/24/83	03/24/83	
18800	12459	04/06/83	WASTE OIL	1000.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	04/06/83	04/06/83	
18801	12847	04/15/83	WASTE OIL	425.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	04/15/83	04/15/83	
18802	12864	04/28/83	WASTE OIL	400.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	04/28/83	04/28/83	
18803	12640	05/06/83	BSW	2000.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	05/06/83	05/06/83	
18804	12743	05/16/83	WASTE OIL	400.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	05/16/83	05/16/83	
18805	12647	05/27/83	BSW	300.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	05/27/83	05/27/83	
18794	12502	06/03/83	WASTE OIL	700.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	06/03/83	06/03/83	
18806	13039	06/07/83	WASTE OIL	450.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	06/07/83	06/07/83	
18807	13084	06/23/83	SLUDGE WASTE WATER	300.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	06/23/83	06/23/83	
18808	13168	07/06/83	WASTE OIL	650.0000	1.00	GAL	RECEIPT	COMMERCIAL OIL SERVICES	07/06/83	07/06/83	
18809	13115	07/14/83	WASTE OIL AND WATER	2000.0000	1.00	GAL	RECEIPT INVOICE CHECK STUBB	COMMERCIAL OIL SERVICES	07/14/83	07/14/83	

OSWER Directive 9835.16

Attachment 4

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Tab 6-1

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

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REVISIONS TO MODEL RD/RA SPECIAL NOTICE LETTERS

On p. 2, after paragraph 2, add new paragraph[1]:

> Pursuant to the Superfund Reforms announced October 2, 1995, when EPA enters into future RD/RA settlements, EPA intends to compensate settlors for a portion of the shares specifically attributable to insolvent and defunct PRPs ("orphan share"), if any. EPA believes that there may be PRPs at this site who are insolvent or defunct. [*Alternative language, if EPA knows of parties that are insolvent or defunct*: These parties include: (list names of known insolvent and defunct PRPs)]. [*If EPA knows of no insolvent or defunct PRPs*: At this site, EPA does not believe that there are any PRPs who are insolvent or defunct and, therefore, this reform is not applicable.] If you, either individually or with other PRPs, enter into an RD/RA settlement with EPA and provide sufficient information about the existence, liability, and relative shares of responsibility of insolvent and defunct PRPs, EPA will analyze the information, determining whether to consider the shares of these parties in the amount of EPA's past costs and future oversight costs to recover in such settlement.
>
> For purposes of this reform, the term orphan share refers to that share of responsibility specifically attributable to identified parties EPA has determined are: (1) potentially liable; (2) insolvent or defunct; and (3) unaffiliated with any party potentially liable for response costs at the site. You should note that this definition of orphan share does not include shares due to, for example: (1) unallocable waste; (2) the difference between a party's share and its ability to pay; or (3) those parties, such as *de micromis* contributors, municipal solid waste contributors or certain lenders or residential homeowners, that EPA would not ordinarily pursue for cleanup costs. See "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" (Sept. 22, 1995); "Policy Toward Owners of Property Containing Contaminated Aquifers" (May 24, 1995); "Guidance on CERCLA Settlements with De Micromis Waste Contributors,"

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[1] This language modifies the model special notice letter for RD/RA issued under the signature of Bruce Diamond, OSWER Directive No. 9834.10 (Feb. 7, 1989). However, Regions may have developed their own models to which this language may be added.

OSWER Directive No. 9834.17 (July 30, 1993); "Policy Toward Owners of Residential Property" (July 3, 1991); "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (Dec. 6, 1989).

On p. 3, add at the end of element 1:

If you believe that there are insolvent or defunct PRPs at the site [*Or, if EPA previously named PRPs:*: other than the ones identified above], you should submit to EPA the names, addresses, evidence of liability and relative shares of responsibility for each such insolvent or defunct PRP, together with detailed information as to the basis for your claim that each such party is insolvent or defunct, as defined by EPA's guidelines.

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 6-2

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

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NOTE: Case-specific language in [brackets].

DATE

PRP GROUP
Address

Dear -------,

This letter is being sent to ensure that you are aware of the Environmental Protection Agency's (EPA) new policy on orphan share compensation. On October 2, 1995, Administrator Browner announced several new Superfund Reforms intended to promote fairness, reduce Superfund costs and promote settlements at Superfund sites. The cornerstone of these reforms was the announcement of EPA's intent to provide a limited portion of orphan share compensation at sites where parties agree to perform the cleanup.

The policy on compensating orphan shares applies to sites where (1) EPA initiates or is engaged in on-going negotiations for a remedial design or remedial action (RD/RA) at a site or for a non-time-critical removal (NTC) at a National Priorities List site under the Superfund Accelerated Cleanup Model (SACM); (2) a PRP or group of PRPs agrees to conduct the RD/RA or RA pursuant to a consent decree or the NTC removal pursuant to an administrative order on consent or consent decree; and (3) an "orphan share" exists at the site. For purposes of this reform, the term orphan share refers to that share of responsibility specifically attributable to identified parties EPA has determined are: (1) potentially liable; (2) insolvent or defunct; and (3) unaffiliated with any party potentially liable for response costs at the site. A party may be considered to be "insolvent" if EPA determines that a party has no ability to pay. A party may be considered to be "defunct" if: (1) the entity has ceased to exist or ceased operations; and (2) the entity has fully dissipated its assets such that the party has no ability to pay.

Compensation for the orphan share may be provided through forgiveness of past costs and reduction of liability for future oversight costs, subject to certain limits [as described more fully in the attached interim guidance].

[*Where special notice has already been issued, or will not be issued, the Region may want to add this explanatory language indicating why this notice is being furnished*: Generally, EPA Regions will provide notice of the potential availability of this reform at the time it provides notice of forthcoming negotiations. In the case of (site name), advance notice is not possible because negotiations began prior to the implementation of this reform. Accordingly, we are sending you this notice now.] [*or for where special notice has not yet been issued, but the Region wants to notify parties or initiate negotiations*: Although negotiations are not yet scheduled to be opened in this case, we believe that it is important to notify you of the principles of this reform.] It appears that this policy may have application at the (name) site [and we invite you to provide any information you wish to submit regarding the proposed orphan share, along with a basic rationale and supporting documentation].

[*If the Region has exchanged settlement proposals with PRPs*: Please note that this letter does not constitute a new proposal in settlement discussions and should not be interpreted as comprising in whole or in part a response or counter-offer to (prior proposals).]

Please feel free to call me at (###) if you have any questions or require any further information.

Sincerely,

xxx
Assistant Regional Counsel

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 7

United States
Environmental Protection Agency
August 1996

EPA

Superfund Administrative Reforms: Orphan Share Implementation

TAB 7:
ORPHAN SHARE PRE-APPROVAL PROCEDURES

Headquarters pre-approval will be required for any proposed settlement at a site where the projected ROD remedy or non-time critical (NTC) removal costs exceed $30 million.

When pre-approval required: *prior to formal settlement offer*

- Pre-approval is required prior to conveying a formal settlement offer to a PRP or group of PRPs that includes an orphan share component.

- Should the offer be subsequently reduced (and it can only be reduced pursuant to factors enumerated in the guidance or as a result of a change in site cost information) or if it increases pursuant to additional information, the Region should contact Headquarters again.

How to obtain pre-approval: *call or write team contact*

- Regions should, either orally or in writing, notify their Regional contact on the Orphan Share Assistance Team (see attached) to initiate the pre-approval process, conveying sufficient information so that Headquarters understands the determination that the Region has made with respect to who the orphan share parties are, the size of the orphan share and any deadlines running in the case. Such information might include: # PRPs, # orphan parties, cost of ROD or NTC removal, amount of unreimbursed past costs and future oversight costs; rationale behind determination of orphan parties and size of orphan share; other litigation risk at the site.

- The Regional contact on the Team will coordinate with Regional Support Division (RSD) management and any RSD staffer assigned to case to evaluate the proposed offer based on criteria in the orphan share guidance.

Evaluation and Decision:

- Headquarters will promptly evaluate the proposed compensation in light of site-specific factors, state concerns and national priorities, including meaningful implementation of the reform and impact on the Trust Fund.

- RSD Division Director will issue memorandum to Regional [Branch Chief] conveying reasons for pre-approval; OR

- Regional contact will set up conference call with the Region to work out a resolution of differences. Upon resolution, RSD will issue memo to Region regarding approval.

ORPHAN SHARE ASSISTANCE TEAM
REGIONAL CONTACTS
OFFICE OF SITE REMEDIATION ENFORCMENT,
REGIONAL SUPPORT DIVISION

Region 1:	Maria Cintron, (202) 564-4227
Region 2:	Maria Cintron, (202) 564-4227
Region 3:	Kimberly Barr, (202) 564-4212
Region 4:	Melissa Ward, (202) 564-4282
Region 5:	Victoria van Roden, (202) 564-4268
Region 6:	Kimberly Barr, (202) 564-4212
Region 7:	Victoria van Roden, (202) 564-4268
Region 8:	Melissa Ward, (202) 564-4282
Region 9:	David Clay, (202) 564-4228
Region 10:	David Clay, (202) 564-4228

United States
Environmental Protection Agency
August 1996

EPA

Superfund Reform:
Orphan Share Implementation

TAB 8-1:
PLACEHOLDER FOR
MODEL RD/RA LANGUAGE
REGARDING THE PAYMENT OF OVERSIGHT COSTS[1]

[1] Language for the model decree will set out how oversight costs are to be credited as part of the reform. For example, language may be offered such as "Parties may receive a credit of a fixed sum for payment of oversight costs as compensation for the orphan share. Their obligation to pay oversight costs would be triggered once EPA had billed oversight costs up to the credit they receive."

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 8-2

United States
Environmental Protection Agency
August 1996

Superfund Reform: Orphan Share Implementation

SAMPLE TEN POINT MEMORANDUM ANALYSIS

As part of the settlement, the Region compensated settling PRPs for the portion of orphan share attributable to insolvent/defunct parties. This compensation was in the form of forgiveness of past costs and of future oversight costs.

The Region determined that of the 15 PRPs, two fell within the definition of insolvent or defunct. After analysis of financial information (tax returns and financial questionnaires), the Region determined that Mr. Smith, the current owner of the site, has no ability to pay absent extreme hardship. Mr. Smith is retired, and on a limited income, although he owns his house. The other PRP, Peerless Inc., a former generator, ceased operations 10 years ago. No assets remain and the Region has determined that Peerless had no successor nor was the corporation affiliated with any other party with liability at the site.

The Region analyzed the facts of the case to determine a fair allocation between the parties at the site, using Gore factors, applicable judicial decisions, and other tools. Mr. Smith was owner of the site during the entire period of disposal. He accepted waste for disposal at the site, but the Region believes that waste generators may have taken advantage of his lack of sophistication. Accordingly, the Region attributes an orphan share of 40-50% to Mr. Smith.

Peerless contributed wastes from its plating operations during a period of 10 years of the 20 years of operation of the site. Although deposition testimony indicates that Peerless' production was minimal, and its subsequent wastes also minimal, its wastes contained toxic metals. The 13 PRPs, while they contributed much greater volume of materials, did not contribute waste as high in toxicity. Accordingly, the Region attributes 20-25% orphan share to Peerless (approximately 1/2 of the generator share).

The total of past costs and future oversight costs is $10 million. Added to the estimated ROD costs of $10 million, total site costs are estimated to be $20 million. The orphan share in dollars is $12 million to 15 million (60-75% times total site costs of $20 million. Twenty-five percent of ROD costs of $10 million are 2.5 million. Thus, the maximum amount appropriation for compensation at this site was thus $2.5 million (the 25% of ROD costs total was the limiting factor).

Despite the strong presumption that settling PRPs should receive the maximum available compensation at a site, at this site the larger, viable PRPs brought numerous contribution actions against small parties. Accordingly, the Region reduced the available compensation by 20%, to $2 million.

The Region compromised an additional $1 million in past costs, due to strength of evidence considerations against the remaining PRPs (see discussion at page ___ of this Ten Point Memorandum). Thus total compromises at this site amounted to $3 million.

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 9

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

ENFORCEMENT CONFIDENTIAL

TAB 9
Questions & Answers

A. BACKGROUND

1. What is the purpose of the Orphan Share Compensation Reform?

As part of the third series of Superfund Reforms introduced in October 1995, the orphan share reform is intended to encourage PRPs to perform cleanup work and to facilitate settlements with performing parties.

2. When does the reform/policy become effective?

In October 1995 EPA committed to compensating the orphan share at RD/RA sites. The policy setting out guidelines for implementation is effective June 3, 1996.

a. Does the reform apply to settlement negotiations initiated prior to either the announcement of the reform or the issuance of the guidance?

Yes, as long as there is not a final settlement and settlement negotiations would not be jeopardized or unduly delayed. However, if an "agreement in principle" was established at a site prior to issuance of the guidance in June 1996, the Region has discretion on whether to implement the reform at that site.

3. Since this is only interim guidance, when is the final expected?

The guidance is entitled "interim" to give EPA the flexibility to modify the guidance as we gain experience through implementing the reform. Although labeled "interim" it has the same effect as "final" guidance. At a later date, we may modify the guidance to reflect lessons learned and issue a final version of the guidance.

4. How does the orphan share reform affect the Region's ability to pursue parties under principles of joint and several liability?

Common law tort principles of joint and several liability are not disturbed by this reform. CERCLA remains a statute that provides for joint and several liability unless there is sufficient proof of divisibility of harm and a reasonable basis of apportionment.

For limited settlement purposes, however, the Regions will consider the "orphan share" as one component of their settlement analysis, along with traditional factors such as litigation risks, cooperation of performing parties and resources of parties.

a. How does the reform affect the Region's treatment of nonsettlors?

If settlement does not occur, the Regions should pursue non-settling parties jointly and severally for cleanup work and recovery of response costs. Again, the orphan share component of the federal compromise is only available through EPA's enforcement discretion during settlement negotiations and in accordance with the orphan share guidance.

5. What if the Region or a court determines that parties have met their burden of proving that the harm is divisible and reasonably capable of apportionment?

The orphan share reform is not intended to disturb a party's divisibility of harm defense to joint and several liability. The orphan share reform by its terms would not apply because the party would not be assuming the orphan share since its share has been apportioned.

6. Is mixed funding available to implement the reform?

The reform does not provide for mixed funding nor does it disturb the Agency's enforcement discretion to enter into mixed funding agreements. See footnote 3, page 3, of the Guidance.

B. ELIGIBILITY

1. What sites are eligible for orphan share compensation?

Generally, the orphan share reform applies to all sites where parties are signing up for *future cleanup settlements.* The site must satisfy the following criteria:

1) there will be or there are ongoing negotiations for a remedial design and/or remedial action OR for a non-time-critical (NTC) removal at a NPL site under SACM;
2) PRP or group of PRPs agree to do the work being negotiated pursuant to a consent decree or administrative order on consent; AND
3) an orphan share exists at the site.

2. Can I apply orphan share reform to benefit parties in my cost recovery case?

No, the reform does not apply to CERCLA §107 cost recovery cases where parties are not agreeing to perform RD/RA work or a non-time critical removal at a NPL site.

3. **Since the guidance applies at non-time-critical removals at NPL sites, does this mean we can't apply it to time-critical removals or non-NPL sites?**

The guidance is intended to encourage PRPs to perform cleanup work. The most appropriate sites for applying the reform are RD/RA and non-time-critical removals at NPL sites. However, the Region may determine that it is also appropriate, in light of timing, resources and other factors, to apply the reform to time-critical removals or removals at non-NPL sites. This probably would happen in only limited circumstances due to the urgency of removals.

4. **What sites are NOT eligible for orphan share compensation?**

The following type of sites are excluded from the benefits of the reform:

1) Federal facilities.
2) Sites where every PRP is liable as current or former owners and/or operators (i.e., chain-of-title sites where the only PRPs identified by the Region are owners or operators and no generators or transporters are PRPs).
3) Sites where work has been completed or subject of settlement negotiations is for past costs only.

a. **Why are owner/operator-only sites (or, chain-of-title sites) excluded from the *reform*?**

Consistent with legislative reauthorization proposals and to ensure fairness in the allocation of limited Trust Fund monies, the Agency will not extend the orphan share reform to those sites where the only identified PRPs are either owners or operators. Some of the reasons for this exclusion are: 1) current owners benefit financially from cleanup activities at their site; 2) owners have a duty to inspect property before purchasing it; 3) owners and operators typically have control over the release of waste on site.

b. **What if an owner/operator was also a generator?**

Consistent with the Senate's Superfund Reform Act of 1994 (S. 1834), owner/operator-only sites are excluded *notwithstanding any other basis for liability*. In other words, even if an operator may be liable also as a generator at the site, its generator liability would not make the site eligible for orphan share compensation.

c. **If the only generators at the site are "Aceto" generators, and the only other PRPs are owner/operators, is the site eligible for orphan share compensation?**

Yes, Aceto generators are not necessarily excluded from the orphan share reform because of their similarities to owner/operator liability. Although generators held liable

under an "Aceto" theory may have had ownership and some control of wastes generated from formulating or manufacturing processes at the site, they are held liable under an "arranger" theory because of their control of the process. *See*, United States v. Aceto Agricultural Chem. Corp., 872 F2d 1373 (8th Cir. 1989) (pesticide manufacturer held liable as an arranger when it contracted with pesticide formulator to process manufacuter's raw material into commercial product; it retained ownership of pesticide throughout process; and, generation of wastes was inherent in process.)

d. Does this mean that sites that have one or more owner/operators are excluded, even if there are generators at the site?

No, the exclusion applies only to "pure" owner/operator sites. The presence of a single PRP whose liability is based on a generator or transporter theory means that the orphan share reform can apply at the site, even to the benefit of owner PRPs.

5. Are Federal PRPs at a privately owned site eligible for orphan share compensation?

Yes. Federal PRPs are treated the same as private parties at a site for purposes of the orphan share reform. The Region should offer orphan share compensation to the Federal PRPs as they would the private parties. This is consistent with analogous liability provisions in current reauthorization proposals in which Federal PRPs are subject to and entitled to the benefits of the allocation process. Also, Federal PRPs may receive such compensation even if federal parties are the only generators or transporters at the site.

6. What if the subject of negotiations is only the remedial action and not the remedial design?

Orphan share compensation is available wherever future work is being negotiated -- whether the negotiations are for remedial design or remedial action. But remember, if the subject of the negotiations is limited to the remedial action, the calculation for determining the appropriate amount for orphan share compensation must be limited to the EPA's unreimbursed past costs and future oversight costs; it cannot include the PRP past costs for work performed at the site (e.g., PRP costs for performing remedial design). Similarly, when Regions calculate 25% of the ROD costs, they should only use the estimated RA costs. It should be noted that if, pursuant to the RD, RA costs have increased, Regions may use that increased number.

7. Can PRPs who are doing work under UAO convert to a consent decree in order to benefit from orphan share compensation?

No. PRPs who had the opportunity to agree to perform work **cannot** renegotiate and obtain the benefits of the orphan share reform. However, in very limited circumstances, the Regions may consider offering orphan share compensation where substantial benefit accrues to the Agency and fairness dictates application of the reform. For example, it may be

appropriate to apply the reform where the Region issued a UAO to move critical work forward with the assurance that a CD would be negotiated later.

8. **If the Region has filed cost recovery litigation against PRPs based on the statute of limitations, can the parties benefit from orphan share compensation?**

Provided that work remains to be done and RD/RA negotiations have been initiated, the Region may provide the benefit of orphan share compensation to parties agreeing to perform the work under a CD. However, the reform is not available at sites where we are only seeking to recover past costs.

9. **Does the reform apply to state-lead sites subject to cooperative agreements?**

No. Only the federal government has committed to provide orphan share compensation. However, when the state-lead site returns to federal lead (usually at the remedial phase) the site may be eligible for orphan share compensation, if it satisfies the criteria.

10. **Can I give de minimis parties the benefit of orphan share compensation?**

De minimis parties may receive the benefit of orphan share compensation where they participate in a global or concurrent settlement under which other parties have agreed to perform the remedy at the site or where the de minimis party agrees to do work under the consent decree being negotiated. If the de minimis parties are cashing-out in a separate settlement, which is neither global or concurrent, orphan share compensation will not be available to them.

11. **Does the reform apply where the subject of the consent decree consists only of an agreement to perform operations and maintenance (O&M)?**

Yes, the reform applies to settlements in which the PRPs agree to perform only the operations and maintenance at the site.

C. DETERMINING ORPHAN SHARE

1. **What is an "orphan share"?**

The orphan share is that share of responsibility for response costs specifically attributable to identified parties determined by the Agency to be:

1) potentially liable;
2) insolvent or defunct; AND
3) unaffiliated with any party potentially liable for response costs at the site.

2. **Does the orphan share include "deltas" -- the difference between a party's ability to pay and their equitable share?**

No. The orphan share in this reform does NOT include shares associated with :

1) unattributable wastes;
2) the difference between a party's actual share and its ability-to-pay share; OR
3) de micromis, MSW and other contributors typically not pursued by the Agency.

3. **When is a party "insolvent"? When is a party "defunct"?.**

A party is insolvent when it has "no-ability-to-pay". A party is defunct if the entity ceased to exist or ceased operations and the entity has fully dissipated its assets such that the party has "no-ability-to-pay". A PRP which has a successor or other affiliated party with potential liability cannot be considered to be an insolvent or defunct party.

a. **How does the Region determine whether a party has "no-ability-to-pay"?**

To determine whether a party has "no-ability-to-pay", the Region should evaluate the party's financial status. In general, if a party cannot make any payment at a site without extreme financial hardship, the party would be considered to have "no-ability-to-pay" (provided a viable affiliate has not been identified). For example , if the Region's evaluation indicates that a party could pay $100 toward a $1 million claim, the Region could determine that the party has "no-ability-to-pay" and is an orphan party. However, if a party could pay $250,000 out of a $1 million claim, the Region could determine that the party has a "limited ability to pay" and therefore not an orphan party. For further assistance in making "no-ability-to-pay" determinations, consult the Headquarters contacts and/or the document, "Overview of the Process for Providing Orphan Share Compensation," located in the Orphan Share Implementation Notebook at Tab 3.

b. **What is an "affiliated party"?**

The guidance provides that an insolvent or defunct party affiliated with a potentially liable and financially viable party cannot be an "orphan" party at the site for purposes of applying the reform. An affiliated party can include a successor corporation, a parent corporation, a subsidiary corporation or an individual (e.g., officers, directors, shareholders, employees). If the affiliate is liable for the "no-ability-to-pay" party's share under a credible legal theory, the "no-ability-to-pay" party should not be considered an orphan party.

4. Does the Region have to perform an ability-to-pay analysis for each party?

No, but an inquiry into the party's financial status is necessary to determine whether the party is insolvent or defunct. The degree of inquiry for each party depends on the available information and the specific circumstances of the case. In one case, a party may be identified as an 'orphan' based upon a review of the party's tax returns while in another case the expertise of a financial analyst may be appropriate. (See Tab 3 of the Orphan Share Implementation Notebook, "Overview of the Process for Providing Orphan Share Compensation.")

5. Should a party be considered an orphan if it has insurance proceeds?

The Region should consider whether funds from sources such as insurance recoveries, indemnification agreements, contribution actions, and increases in property values resulting from clean up activities will be available to the party being analyzed. If these funds are significant and likely to be recovered, they should be considered in determining whether the party is an 'orphan.' This is consistent with the Agency's ability to pay analysis policy.

6. Should the Gore Factors be considered when estimating the orphan share?

The Gore Factors are usually relied upon by courts in making equitable allocations in contribution actions and may be helpful to the Region when estimating the equitable share of the orphan party.

D. CALCULATING ORPHAN SHARE COMPENSATION

1. How should the Region calculate the amount of orphan share compensation to offer?

The guidance provides a presumption that the Region will offer the maximum amount appropriate for the orphan share component of the federal compromise. The maximum amount appropriate is the lower of the following dollar figures:

1) *Orphan share % of total site costs* (total site costs include all unreimbursed past costs incurred by EPA; ROD costs or NTC removal costs; and projected future oversight costs);

2) *25% of future ROD costs or removal costs (for the phase being negotiated);*

3) *EPA's total unreimbursed past costs (not PRP past costs) plus future oversight costs.*

2. **Why is there a 25% cap on the ROD costs?**

Because Congress has not reauthorized Superfund or reinstated the Superfund taxing authority and has not provided the Agency with a separate appropriation for orphan share compensation, the Trust Fund will be depleted by costs expended to implement the program and achieve cleanups. Given these circumstances, EPA believes that establishing a limitation at every site would strike the appropriate balance between providing meaningful implementation of this reform and preserving the Trust Fund.

3. **If some of the past costs have already been the subject of a prior settlement, should these costs be used in calculating the maximum available compensation?**

It depends on whether the parties to the prior settlement are the same parties to the current settlement negotiations and whether EPA compromised those past costs in the prior settlement.

a. **If the parties to the prior settlement are the same parties to the current settlement negotiations --**

and some portion of the past costs were forgiven in the prior settlement (i.e., EPA compromised the costs in the prior settlement), the forgiven costs (and any reimbursed past costs) should not be used in calculating the appropriate orphan share compensation. In other words, the costs already forgiven by the Agency and the monies already collected by the Agency are off the table for purposes of the current settlements negotiations.

b. **If the parties to the prior settlement are different from the parties to the current settlement negotiations --**

and some portion of the past costs were forgiven in the prior settlement, the Region may decide to include those forgiven past costs in the current settlement negotiations. The reason that these unreimbursed costs may be included in the calculation of orphan share compensation here and not in the above scenario is because, consistent with joint and several liability, these new parties are still liable for the costs not reimbursed by the other parties. The Agency had not forgiven past costs with respect to this new set of parties.

4. **Is the Region required to offer the maximum amount appropriate for the orphan share compensation?**

There is a *presumption* that Regions will offer the maximum amount available for orphan share compensation. In limited circumstances, equitable considerations may justify offering less than the maximum. The Region must provide an analysis of its decision to offer less than the maximum amount in the ten-point analysis.

5. **What "equitable factors" may the Regions consider when calculating the appropriate amount of orphan share compensation?**

The guidance describes three factors to consider when calculating the appropriate amount of orphan share compensation:

(1) PRP fairness to other PRPs, including small businesses, MSW parties, small volume waste contributors and certain lenders and homeowners;
(2) PRP cooperation; and
(3) size of the orphan share.

Regions should give greater consideration to these factors when activities encompassed by the factors occur after issuance of this guidance.

6. **How should the orphan share compensation be calculated when the Region is negotiating with parties to perform less than the entire Operable Unit (OU)?**

The benefit of orphan share compensation is based on the work to be performed, so the Regions should use the estimated costs of only the portion of the OU to be performed (e.g., a geographical unit may be the appropriate subject of negotiations).

7. **How do you deal with using past costs for compensation at sites where there are multiple OUs?**

The basic rule of thumb is that orphan share compensation is available to offset whatever costs the Region is negotiating (i.e., "what's on the table"). Where the same PRPs are liable for each OU at a site, but the Region is only negotiating one of the OUs, the Region has discretion to agree to recover past costs from other OUs (and provide compensation by forgiving such past costs) or to determine that such past costs should be recovered separately when EPA negotiates a settlement with the PRPs for the work at that OU. Where different sets (or overlapping sets) of PRPs are responsible for the multiple OUs, such settlements will be so difficult to negotiate that Regions are encouraged to keep costs associated with each OU separate. (See Question D.3. with regard to prior settlements with PRPs for work at site.)

8. **I have a municipality that sent municipal solid waste (MSW) to my site. The guidance says that an MSW party cannot be an orphan party. When I allocate shares between the generators at my site, do I include the volume of the MSW waste sent to the site?**

No. MSW volumes are not considered in calculating the generator shares because EPA generally does not pursue parties who contributed MSW to a site. (See, "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes," (Dec. 6, 1989). This is also consistent with the guidance on preparing waste-in lists which states that Regions should not include volumes attributable to parties whose contribution is solely

MSW. (See, "Final Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) under CERCLA," OSWER Directive No. 9835.16 (Feb. 22, 1991). Thus, only the wastes of those parties who we would ordinarily pursue should be included in the total volume of wastes for purposes of allocating equitable shares among the generators.

E. IMPLEMENTATION

1. Should the Region notify all parties about the site's eligibility for orphan share compensation?

Yes. If negotiations are forthcoming, Regions should indicate in the special notice letter that the site is eligible for orphan share compensation. If the special notice letter is waived or if negotiations are ongoing, Regions should send out a letter to PRPs indicating the same.

a. Should the maximum amount appropriate for orphan share compensation be included in the notice letter?

Whether to inform the PRPs about the specific maximum amount available for orphan share is left to regional discretion; however, if the Region informs parties of the amount available, PRPs may have greater incentive to negotiate. Additionally, EPA will be in a better position to take credit for an offer of orphan share.

2. Is HQ pre-approval required for every settlement with orphan share compensation?

No. While HQ is available for consultation and assistance at every site, HQ pre-approval is required only for any settlement offer where the projected ROD remedy or NTC removal cost exceeds $30 million.

a. When pre-approval is required, how is it obtained?

Regional staff should contact their HQ contact, either orally or in writing, prior to making the formal offer. HQ will evaluate the proposed offer, considering site-specific data, state concerns and national priorities.

3. **Does the Region have to distinguish between OS compensation and litigation risks when it makes an offer to PRPs? Can't Region just distinguish in ten-point analysis for HQ use?**

   Although it is not mandatory that the Region expressly disclose to the settlors what portion of the federal compromise is actually attributable to the orphan share reform, it is *strongly* encouraged. It is important to communicate to the PRPs that the orphan share compensation offered during settlement is one way in which the Agency is reforming the Superfund program.

4. **How should the orphan share compensation be documented in the ten-point settlement documents?**

   The Region should provide an analysis supporting the orphan share party determination and the orphan share component of the federal compromise in the ten-point settlement document.

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Tab 10-1

U.S. Department of Justice

U.S. Environmental Protection Agency

June 3, 1996

MEMORANDUM

SUBJECT: Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors

FROM: Jerry Clifford, Director
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

Bruce S. Gelber, Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Regional Counsel, Regions I - X
Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Regions III, IX
Director, Waste Management Division, Region IV
Director, Superfund Division, Regions V, VI, VII
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Environmental Cleanup Office, Region X
Assistant Chiefs, Environmental Enforcement Section

This memorandum transmits the "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors." The revised guidance supersedes EPA's "Guidance on CERCLA Settlements with De Micromis Waste Contributors," issued on July 30, 1993. It consists of a memorandum and seven attachments which are designed to provide guidance on using CERCLA's settlement authorities to resolve the liability of potentially responsible parties ("PRPs") who have contributed even less hazardous substances to a site that the traditional de minimis party.

As stated in the 1993 guidance, de micromis settlements are simply a subset of de minimis settlements and are entered under the de minimis contributor settlement authority of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A). De micromis settlements may be available to parties who generated or transported a minuscule amount of waste to a Superfund

site, an amount less than the minimal amount normally contributed by de minimis waste contributors. De micromis settlements are not available to owners or operators of Superfund sites. This guidance document is not intended to affect ongoing de minimis settlement negotiations.

Summary of Major Changes Made by Revised Guidance

As announced in EPA's Administrative Reform initiative of October 1995, the revised guidance makes three important changes to EPA's 1993 de micromis policy. First, the 1993 guidance provided as examples two volumetric cut-offs for eligibility for a de micromis settlement: 0.001% of total volume for hazardous substance contributors; and 0.1% for municipal solid waste (MSW) contributors. The revised guidance endorses eligibility cut-off levels that double the levels identified in the 1993 guidance (0.002% for hazardous substance contributors and 0.2% for MSW contributors). Moreover, where the Region determines that site-specific factors warrant the use of an absolute volume cut-off for hazardous substance contributors, the guidance endorses the use of an eligibility cut-off at 110 gallons (such as two 55-gallon drums) or 200 pounds.

Second, the 1993 guidance recommended that the Regions determine de micromis settlement payments using a "matrix approach" that considers both individual volumetric contribution and total site costs. Reflecting EPA's policy that de micromis parties, who have contributed only a minuscule amount of waste to the site, should not participate in financing the cleanup, the revised guidance recommends that de micromis settlements be effected without any exchange of money. (Although the Administrative Reform initiative referred to "one-dollar de micromis settlements," for purposes of administrative efficiency and resource savings, the revised guidance does not recommend collecting the $1.00 payment.)

Third, the revised guidance clarifies that de micromis settlements should only be considered when the Region finds that minuscule contributors are being pursued by other PRPs at the site. Specifically, the revised guidance recommends that the Region offer a de micromis settlement to qualifying parties only if such parties: (1) have been sued by other PRPs at the site; (2) face the concrete threat of litigation by other PRPs at the site; or (3) have approached EPA seeking settlement, and the Region has determined that such parties have a reasonable expectation of facing contribution litigation.

Description of Attachments

In addition to the guidance memorandum itself, the revised guidance includes seven attachments:

(1) An informational brochure entitled "Superfund and Small Volume Waste Contributors: De Micromis Settlements"
(2) Sample Cover Letter for De Micromis Questionnaire

(3) Model De Micromis Questionnaire
(4) Sample Cover Letter for De Micromis Settlement
(5) Model CERCLA § 122(g)(4) De Micromis Administrative Order on Consent (AOC)
(6) Model CERCLA § 122(g)(4) De Micromis Consent Decree (CD)
(7) Model CERCLA § 122(i) De Micromis Federal Register Notice

The attachments are designed to increase the speed and efficiency of the de micromis settlement process by establishing regular and routine settlement practices. Attachment 1 is an informational brochure that provides introductory information for potential settlors about the Superfund program and de micromis settlements. Attachment 2 is a sample cover letter to be used with the third attachment, the de micromis questionnaire. The cover letter introduces the recipient to the Superfund program, the site and the concept of de micromis settlements, and invites the recipient to fill out the questionnaire. Attachment 3, the questionnaire, is designed to assist EPA staff in determining which parties are eligible for de micromis settlements. It is a form to be filled out by potential de micromis settlors which contains a series of questions about the potential settlor's waste and its involvement with the site.

Attachment 4 is a sample cover letter to accompany the de micromis settlement when it is sent out for signature by the settling party. Attachment 5, the de micromis AOC, provides model settlement language for administrative resolution of a de micromis party's liability. Attachment 6, the de micromis CD provides model settlement language for the judicial resolution of a de micromis party's liability. In general, EPA and DOJ prefer resolution by AOC because administrative settlements usually are quicker and less expensive than judicial settlements. Typically, the CD would be used when the settling de micromis party has been named as a defendant in a contribution action or when the United States has already initiated CERCLA litigation at the site.

The AOC and CD are brief in length, are written in plain English, and are designed to be self-explanatory and non-threatening to the potential settlor. We encourage our staff to use them as guidance when drafting settlements and to adhere as closely as possible to their terms. Once the appropriate model has been tailored to the facts and circumstances of the case it should not be subject to negotiation with the settling parties. This will ensure that de micromis settlements will be completed quickly, will contain nationally-consistent terms, will receive expeditious management review and approval at EPA and DOJ, and will be accomplished with the expenditure of fewer resources to settling parties and to the Government than would be necessary for a negotiated settlement.

The seventh and final attachment is a model Federal Register notice. It is for use by EPA staff when providing the public notice and opportunity to comment on administrative de micromis settlements required by Section 122(I) of CERCLA, 42 U.S.C. § 6922(I). (The Department of Justice will use a similar Federal Register notice for de micromis CDS.)

This guidance was developed with the assistance of workgroup members from Headquarters, the Regions, and the Department of Justice, and we would like to thank all workgroup members for their contribution to this project.

If you have any questions about the revised guidance, please contact Susan Boushell of the Program and Policy Evaluation Division of OSRE at (202) 564-5107 or Tom Mariani of the Environmental Enforcement Section (EES) at (202) 514-4620. If you have any questions about the attached models, please contact Janice Linett of the Regional Support Division in OSRE at (202) 564-5131 or Tom Mariani of EES.

For EPA staff, the guidance and attachments are available electronically in the Superfund Enforcement Infobase by accessing Agency LAN Services/Information Services. For DOJ staff, the guidance and the model AOC, CD, and questionnaire are available electronically on the Section's work product directory: N:\NET\SS52\UDD\EESINDEX\CERMODEL.

Attachments (7)

cc: Lawrence E. Starfield, Associate General Counsel,
-Solid Waste and Emergency Response Division
Stephen D. Luftig, Director, Office of Emergency and Remedial Response
Joel S. Gross, Chief, Environmental Enforcement Section
Letitia Grishaw, Chief, Environmental Defense Section
Regional Counsel Branch Chiefs, Regions I - X (with disk containing attachments 2-7)
Regional Waste Management Branch Chiefs, Regions I - X

REVISED GUIDANCE ON CERCLA SETTLEMENTS WITH DE MICROMIS WASTE CONTRIBUTORS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20460

REVISED GUIDANCE ON CERCLA
SETTLEMENTS WITH DE MICROMIS WASTE CONTRIBUTORS

I. Background and Purpose

EPA strongly supports efforts to resolve quickly and fairly the liability of small volume waste generators and transporters.[1] The Agency has published several guidance documents to assist the Regions in resolving the liability of these contributors using the provisions of § 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA), 42 U.S.C. § 9622(g).[2] This guidance document is focused specifically on EPA's use of CERCLA settlement authorities to resolve the liability of "de micromis" parties who may be sued in contribution by other parties at the site. As described in more detail below, a de micromis party is typically one that contributed either: (a) a minuscule quantity of hazardous substances to a site (even less than a typical de minimis party); (b) a small quantity of municipal solid waste (MSW) or industrial trash;[3] or possibly (c) both.

There are various situations in which EPA may best serve the public interest by exercising its enforcement discretion and offering a de micromis settlement to eligible parties. This guidance explains how to use EPA's existing settlement authority in an expeditious manner to resolve the liability of de micromis parties so they may receive the full extent of contribution

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[1] Performed under the authority of CERCLA § 122(g)(1)(A), de micromis settlements are available only to parties who may be liable as generators or transporters (under § 107(a)(3) or § 107(a)(4), respectively), and not to parties whose liability derives from ownership or operation of a facility.

[2] This guidance document supersedes EPA's existing guidance on de micromis settlements: "Guidance on CERCLA Settlements with De Micromis Waste Contributors" (White/Diamond, July 30, 1993). However, this document supplements existing guidance regarding de minimis settlements insofar as they may apply to de micromis settlements. See, e.g., "Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA § 122(g)(1)(A)" (Diamond/White, July 30, 1993) (OSWER Directive #9834.7-1D); "Methodology for Early De Minimis Waste Contributor Settlements under CERCLA § 122(g)(1)(A)" (Diamond/White, June 2, 1992) (OSWER Directive #9834.7-1C); "Methodologies for Implementation of CERCLA § 122(g)(1)(A) De Minimis Waste Contributor Settlements" (Diamond/Unterberger, December 20, 1989) (OSWER Directive #9834.7-1B); "Interim Guidance on Settlements with De Minimis Waste Contributors under § 122(g) of SARA," (Adams/Porter, June 19, 1987) published at 52 Fed. Reg. 24333 (June 30, 1987).

[3] For definition of the terms "municipal solid waste" and "industrial trash," as they are used in this guidance, Regions should refer to the "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Waste" (Clay, Dec. 6, 1989) (OSWER Dir. # 9834.13), at 4-6, published at 54 Fed. Reg. 51071 (Dec. 12, 1989).

protection available under the statute.

To provide further assistance, attached are several additional documents: an informational brochure entitled "Small Volume Waste Contributors: De Micromis Settlements" (attachment 1); a sample cover letter to accompany the De Micromis Questionnaire (attachment 2); a model De Micromis Questionnaire (attachment 3); a sample cover letter to accompany the De Micromis Settlement (attachment 4); a model CERCLA § 122(g)(4) De Micromis Administrative Order on Consent (attachment 5); a model CERCLA § 122(g)(4) De Micromis Consent Decree (attachment 6); and a model CERCLA § 122(i) De Micromis Federal Register Notice (attachment 7).

II. Policy Discussion

Under § 122(g) of CERCLA, EPA has the authority to enter into settlements at any point in the cleanup process with persons who may have contributed minuscule amounts of hazardous substances. EPA has determined that de minimis settlements are in the public interest because they simplify cases, reduce the transaction costs of both de minimis and non-de minimis parties, and provide greater certainty to the de minimis parties who are able to resolve their liability at a site. In addition, for many de minimis parties, the cost of legal representation, absent early settlement, may exceed those parties' proportional share of responsibility. For these reasons, EPA has redoubled its efforts to resolve the liability of small volume waste contributors.

These efforts are not enough, however, for those parties whose contributions are so small that their shares of responsibility are in effect zero. For these de micromis parties, the administrative costs of determining and verifying the party's share, if any, and the cost of collecting the small payment required through a de minimis settlement could far exceed that share. Therefore, as a matter of national policy, EPA intends to use its authority where appropriate to review and resolve the potential liability of de micromis parties without incurring such costs. This settlement guidance is designed to provide assistance to Regional personnel at sites where the Agency determines that a de micromis settlement may be in the public interest.

A de micromis settlement may be appropriate for many types of parties, including homeowners, small businesses, or other entities whose activities resulted in the generation or disposal of only an insignificant amount of hazardous substances. A de micromis settlement may also be appropriate for federal agencies or industrial/commercial entities if their contribution to the site meets the de micromis eligibility test established for a particular Superfund site. De micromis contributor settlements are not available to owners or operators of Superfund sites.[4]

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[4] See supra note 1.

EPA's regional offices have discretion to decide whether and when to offer a de micromis settlement. In general, the Region should only offer a de micromis settlement to qualifying (or potentially qualifying) parties if one of the following conditions is met: (1) such parties have been sued by other PRPs at the site; (2) such parties face the concrete threat of litigation from other PRPs at the site; or (3) such parties have approached EPA seeking a settlement, and the Region has determined that such parties have a reasonable expectation of facing contribution litigation.

In some cases, EPA may obtain advance notice of this type of third-party litigation. For example, the defendants in a CERCLA action brought by the United States may move to join potentially de micromis parties to a pending enforcement action, or signatories to a consent decree may notify EPA of contribution suits they initiate (as required by ¶ 93 of the Final Revised Model CERCLA RD/RA Consent Decree (Herman/Schiffer, July 13, 1995), published at 60 Fed. Reg. 38817 (July 28, 1995)). In such cases, it may be appropriate for the Region to consider the feasibility of a de micromis settlement.

However, if there are de micromis parties at a site who are not being pursued by other PRPs, EPA should not offer a de micromis settlement. De micromis parties are, by definition, parties that EPA believes should not be pursued or otherwise compelled to expend transaction costs to resolve potential Superfund liability. Even reading, understanding, and responding to a de micromis settlement offer made by the United States may cost a de micromis party legal fees or cause them to incur other financial burdens. For this reason, EPA should not extend a settlement offer to parties who are under no threat of suit and incurring no transaction costs in connection with the site.

This guidance is not intended to affect ongoing de minimis settlement negotiations. Indeed, the Regions are encouraged to conduct de minimis settlements where they have determined that small volume contributors at the site should share the costs of response and would benefit from an expedited settlement. If the Region is in the process of conducting a de minimis settlement at the site, it may, in its discretion, choose to establish both a de minimis and a de micromis class within the known small volume waste contributors at the site. A distinction between de minimis and de micromis parties may be appropriate, for example, if de micromis parties are known to EPA but would not normally be pursued by EPA for response costs -- either because of the type of waste contributed (e.g., MSW) or the very low volume contributed. Unlike traditional de minimis settlements, the Region should use its discretion to offer de micromis settlements only where they would be helpful to the parties involved; it should not, typically, offer such settlements where qualifying parties would suffer no detriment in the absence of EPA's assistance. Finally, even if small contributors at a site are parties to (or have been threatened with) contribution litigation, the Region has discretion, under appropriate circumstances, to decline to offer de micromis settlements.

III. Settlement Authority

A. Section 122(g)

CERCLA § 122(g)(1)(A) provides discretionary authority to enter into administrative and judicial de minimis settlements with certain contributors of hazardous substances. To qualify for a de minimis settlement under § 122(g)(1)(A), the settling party's contribution of hazardous substances must be minimal in its amount and toxicity in comparison to other hazardous substances at the facility (as described under "Eligibility" below). In addition, the statute requires that each party's settlement involve only a minor portion of the total response costs. Finally, the settlement must be practicable and in the public interest.

A de micromis settlement is a type of de minimis settlement authorized by § 122(g) of CERCLA. As in the standard de minimis settlement, a de micromis settlement will contain an immediately effective covenant not to sue for past and future liability at the specific facility under §§ 106 and 107 of CERCLA and § 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973.[5] In addition, a § 122(g) de micromis settlement provides contribution protection as set forth in §§ 113(f) and 122(g)(5) of CERCLA.

B. Deciding Whether to Pursue an Administrative or Judicial Settlement

When a Region decides to enter into a de micromis settlement, the circumstances surrounding that decision will dictate whether to settle administratively or judicially under §122(g). Typically, a judicial consent decree should be used if the settling party has already been named as a defendant in a contribution action or if the United States has already initiated a CERCLA judicial action with respect to other parties at the site. In other situations, EPA prefers an administrative settlement because it usually can be accomplished more quickly and inexpensively than a judicial settlement.[6]

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[5] The present and future liability concepts are explained in the interim guidance entitled "Covenants Not to Sue Under SARA" (Adams/Porter, July 10, 1987), published at 52 Fed. Reg. 28038 (July 27, 1987).

[6] The contribution protection provided through an administrative §122(g) settlement has been upheld against challenge. See Dravo v. Zuber, 13 F.3d 1222 (8th Cir. 1994) (finding contribution protection effective even though administrative settlement under § 122(g) not final at time contribution action commenced); Waste Management of Pennsylvania v. City of York, 910 F. Supp. 1035, 1041 (M.D. Pa. 1995) (noting that settlements under § 122(g) are final, and thus convey complete contribution protection).

IV. De Micromis Settlement Procedures

A. Eligibility

De micromis settlements are a subset of de minimis contributor settlements under CERCLA section 122(g), and are intended to encompass only the parties who contributed minuscule amounts of hazardous substances to a site, including parties who sent only MSW or industrial trash to the site. Therefore, in considering whether parties are eligible for de micromis settlements, the Region must first be able to make the findings required by § 122(g) for a de minimis settlement with respect to those parties: (1) that the amount of hazardous substances contributed is minimal in comparison to the other hazardous substances at the site; (2) that the toxic or other hazardous effects of the substances contributed are minimal in comparison to the other hazardous substances at the site; and (3) that the settlement is practicable and in the public interest and involves only a minor portion of the response costs at the site. Next, the Region should establish a volumetric cut-off, above which no party could qualify for a de micromis settlement. Parties above this cutoff may still qualify for a de minimis settlement, but not a de micromis settlement. In relative terms, to qualify for a de micromis settlement, the party's waste contribution must be smaller than "minor" -- it must be minuscule.

The Region should consider several factors in determining the de micromis eligibility cut-off. For example, the Region should consider the settlor's contribution of hazardous substances in relation to the total volume of waste at the site, the toxic or other hazardous effects of such hazardous substances, and the effect of the de micromis settlement on the remaining parties at the site. Below are a few examples of how a de micromis cutoff might be established at different types of sites. Of course, these examples are illustrative only; there may be sites at which the eligibility criteria suggested in these examples would be too high or too low, or at which it may be inappropriate to offer a de micromis settlement at all. Similarly, there may be *other* types of sites where a de micromis settlement might be appropriate. Furthermore, disposal of minuscule amounts of hazardous substances does not automatically make a party eligible for a de micromis settlement. The Region should evaluate site-specific factors in determining whether a de micromis settlement is appropriate in a given situation.[7]

1. Sites containing wastes of similar toxicity

As mentioned above, to satisfy the statutory (§ 122(g)(1)(A)) requirement for a de minimis or de micromis settlement, the toxic or other hazardous effects of an eligible party's

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[7] A de micromis settlement may be appropriate even where the Agency is considering performing a non-binding allocation of responsibility (NBAR) or adopting a private party allocation at the site. Offering a de micromis settlement to qualifying parties, rather than including such parties in an allocation process, is consistent with EPA's view that de micromis parties should not be required to participate in financing or performing the cleanup.

substances must be minimal in comparison to the other hazardous substances at the facility. At a site where the wastes are found to be essentially similar in toxicity (such as at a battery cracking, waste oil recycling, or scrap metal facility), a de micromis settlement may be appropriate with parties who contributed only a minuscule amount. In such cases, the Region could establish a cut-off for de micromis eligibility based simply on the volumetric waste contribution (e.g., the percentage of the number of batteries or gallons of waste oil sent by a party as compared to the total number of batteries or gallons of waste oil at the site). Given the nature of wastes at these sites and their similar toxicities, a typical de micromis cutoff might be 0.002% of the total volume of waste at the site, or 110 gallons (such as two 55-gallon drums) or 200 pounds of materials containing hazardous substances, whichever is greater.

Of course, the Region may vary this cutoff in accordance with site-specific factors. For example, at a small site, a 110-gallon contributor may actually be responsible for 1% (or even 5%) of the total waste at the site. In such a case, the Region might determine that the 110-gallon contributor is eligible for a de minimis settlement, or perhaps not eligible for an expedited settlement at all. Furthermore, where the Region has extensive volumetric information, a natural break in the data might justify a slightly higher or lower de micromis cutoff. Regardless of the percentage of waste contributed, however, where the toxic or other hazardous effects of the 110-gallon contributor's waste is not "minimal in comparison to the other hazardous substances at the facility," a CERCLA § 122(g) settlement is not appropriate.

2. Co-disposal landfills containing wastes of varying toxicity

Co-disposal landfills are typically sites that received MSW, industrial trash, or municipal sewage sludge (MSS)[8] as well as hazardous substances derived from a commercial, institutional, or industrial process or activity. Although the waste at these landfills varies in toxicity, the MSW and industrial trash contributions are generally of high volume and low toxicity. Based on the significantly lower toxicity of MSW and industrial trash as compared to industrial hazardous substances, it is appropriate for a Region to consider a higher volumetric cut-off for de micromis eligibility for parties contributing such wastes. Accordingly:

(a) If a potential de micromis party contributed solely MSW or industrial trash, the Region should consider a de micromis settlement to a PRP whose contribution did not exceed 0.2% of the total waste at the site.[9] The Region should also take site-specific factors into account

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[8] See "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes," supra note 3 at 4-6, for general definitions of the terms "municipal solid waste," "industrial trash," and "municipal sewage sludge."

[9] Generators of MSS sometimes seek settlement under CERCLA § 122(g)(4). EPA explained in 1989 that, as with MSW and industrial trash contributors, the Agency typically would not pursue contributors of MSS unless site-specific evidence indicated that such contributions contained hazardous substances derived from a commercial, institutional, or industrial process or

when establishing this volumetric cut-off. In order to qualify for a de micromis settlement under these criteria, parties must certify that their contribution to the site was solely MSW or industrial trash.

(b) If a potential de micromis party contributed solely hazardous substances derived from a commercial, institutional, or industrial process or activity, the Region should consider utilizing an eligibility cutoff for such party as described in Section IV.A.1 above (i.e., 0.002% of the total volume of waste containing hazardous substances at the site or 110 gallons/200 pounds of materials containing hazardous substances).

(c) If a potential de micromis party contributed both (1) MSW or industrial trash and (2) hazardous substances derived from a commercial, institutional, or industrial process or activity (e.g., MSW mixed with trace amounts of industrial hazardous substances that are distinct from ordinary household hazardous waste), the Region should consider some combination of the cutoffs described above in (1) (i.e., 0.002% for wastes of similar toxicity) and (2)(a) (i.e., 0.2% for MSW).[10]

B. Site-specific Information

The Region should evaluate the following site information before pursuing a de micromis settlement (assuming one or more of the circumstances described in II above is present): (1) information regarding hazardous substances sent to the site by the de micromis party, and (2) the total estimate of waste at the site.

The Region may use a variety of site-specific information to determine a party's eligibility for a de micromis settlement. Sources of this type of information include: state

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activity. See "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Waste," supra note 3 at 12. However, to offer a de micromis settlement to an MSS contributor -- and thus give covenants and contribution protection -- goes beyond the Agency's decision to refrain from enforcement. Wastes containing widely varying concentrations or amounts of hazardous substances may well be called MSS, distinguishing this category somewhat from MSW or industrial trash. Nevertheless, where a Region concludes that the MSS contributed by a PRP to a particular site is essentially the same as MSW, the Region may elect to treat such MSS like MSW for purposes of determining whether that PRP qualifies for a de micromis settlement. For a Region to conclude that any particular MSS is essentially the same as MSW, the case-specific facts must show that the MSS in question did not contain any greater concentration or amount of hazardous substances than typically found in MSW.

[10] The Agency has developed these eligibility cutoffs because parties responsible for even minuscule waste contributions may be statutorily liable under CERCLA. These eligibility cutoffs are intended only to inform the Regions' exercise of discretion in deciding whether to settle with such minuscule contributors.

records, manifests, site records, canceled checks, interviews, waste-in lists, other allocation documents, or § 104(e) information request responses. The Region does not have to produce a waste-in list, even if the information is available, if the Region has information in its possession to determine that the potential settlor is a de micromis party. However, the Region should use a prepared waste-in list if it is available. As described below, the Region should use a questionnaire to assess the nature and quantity of wastes contributed by each potential de micromis party to determine eligibility.[11] In some cases, where the Region already has sufficient information about each party's contribution, the questionnaire may be replaced with a more simplified self-certification that may, in some cases, be simply included in the settlement document.

C. Contacting De Micromis Settlors

As mentioned above, EPA's regional offices have discretion to decide whether and when to offer a de micromis settlement. In general, the Region should only offer a de micromis settlement if there are contributors of minuscule volumes of waste at the site that have either: (1) been sued by other PRPs at the site, (2) been threatened with suit by other PRPs at the site; or (3) approached EPA seeking a settlement and EPA believes they may reasonably expect to soon face contribution demands by other PRPs. As previously discussed, if there are de micromis parties at a site who do not meet this test, EPA should not offer them a de micromis settlement.

Where EPA determines it is appropriate to offer a de micromis settlement, the Region should be particularly sensitive when it contacts and communicates with potential de micromis parties. Such parties may not be familiar with the Superfund process. Indeed, they may see no practical difference between a demand letter from a settling PRP and a letter from the government containing a de micromis settlement offer. The potential de micromis settlor may be unaware of the possibilities of contribution litigation and any benefits such a person would receive by settling with the government, such as contribution protection and reduced transaction costs. Therefore, the site case team should formulate a communication strategy before the settlement offer is sent to the de micromis parties.

Such a strategy will aid in communicating EPA's actions to public officials, potential de micromis parties, and other PRPs at the site. Effective communication increases fairness, could reduce later settlement challenges, and may identify issues or additional information that should be considered in the settlement offer. After consideration of the number of parties and site-specific circumstances, it may be appropriate for the case team to discuss the settlement strategy with EPA's congressional affairs representatives and community relations personnel. The case team should develop a communication strategy which states that the parties are being sent a

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[11] The model De Micromis Questionnaire (attachment 3) includes a certification by the potential settlor that it has made a thorough search for documents and information relating to its involvement with the site and has accurately and completely filled out the questionnaire.

preemptive settlement offer rather than a threat of enforcement action and explains how the settlement will benefit the de micromis party. The communication strategy should also state that the federal government does not intend to pursue bona fide de micromis parties who decide not to enter into a settlement. EPA's congressional affairs representatives should be given a copy of the draft settlement offer letter where legislators may have an interest. Finally, in appropriate circumstances, the case team should consider offering a briefing to local, state, and federal elected officials early in the settlement process.

Attached are several documents to assist in preliminary communications with potential de micromis parties: (1) a brochure describing the basic facts of de micromis settlements (attachment 1); (2) a model preliminary letter to be attached to the questionnaire and certification (attachment 2); and (3) a model follow-up letter confirming the party's eligibility for a de micromis settlement (attachment 4). These are written in plain English, emphasize the voluntary nature of de micromis settlements, and inform the recipient that de micromis settlement terms are non-negotiable to reduce transaction costs and administrative expenses.

D. Notification of EPA Headquarters, Department of Justice and Federal Trustees

In accordance with current delegations, the Region must consult with the Director of the Regional Support Division in the Office of Site Remediation Enforcement at Headquarters when planning the Region's first de micromis settlement. Subsequent de micromis settlements do not require Headquarter's consultation. A de micromis settlement does not require the concurrence of Headquarter's Office of Enforcement and Compliance Assurance unless it "significantly deviates from written Agency policy" or "breaks new ground in an important, sensitive area."[12] In addition, the Department of Justice (DOJ) must approve all administrative de micromis settlements where total site costs are expected to exceed $500,000 and all de micromis consent decrees.

If the settlement requires DOJ approval, the Region should consult with DOJ as early in the process as possible, and keep the Department apprised of progress toward settlement and any significant departures from this guidance or its attachments. Within 30 days of receiving the Region's referral of the proposed settlement, DOJ will advise the Region whether the settlement is approved. For administrative settlements, the settlement will be deemed approved if DOJ does not reject a proposed de micromis settlement within the 30-day period, unless there has been an agreement to enlarge this time period between the appropriate Assistant Section Chief from DOJ's Environmental Enforcement Section and EPA's Regional Counsel (or other appropriate regional official).

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[12] See "Office of Enforcement Compliance and Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (Herman, May 19, 1995) at page 2 of the attachment.

The federal natural resource trustees have agreed to waive the natural resource damage claim against de micromis settlors whose monetary consideration is $1.00 or less, subject to a right to withdraw that consent in a given case. For this reason, the Region should notify the trustees as early in the process as possible after it has decided to develop a de micromis settlement offer. For both administrative and judicial settlements, the Region must give potentially interested federal trustees 30 days to review a proposed settlement prior to EPA's signing it. The 30 days may run concurrently with the period given to the de micromis parties to review and sign the proposed settlement. Unless a trustee objects within the 30-day period (or an enlarged time period agreed to by the Region and the trustee), the trustee's generic waiver of natural resource claims applies.

E. Public Comment Requirements

The Region must publish notice of all *administrative* de micromis settlements in the Federal Register for no fewer than 30 days, pursuant to § 122(i) of CERCLA. Although the Regional Administrator may sign the settlement either before or after this public comment period, DOJ approval must be complete before the Federal Register notice is published by the Region. DOJ will lodge *judicial* de micromis settlements with the court and provide no fewer than 30 days for public notice and comment.

V. De Micromis Settlement Provisions

The terms of a de micromis settlement are set forth in the Model CERCLA § 122(g)(4) De Micromis Administrative Order on Consent (AOC) (attachment 5) and the Model CERCLA § 122(g)(4) De Micromis Consent Decree (CD) (attachment 6). The main provisions of these model documents are described below.

A. Resolution of Liability

De micromis settlements under CERCLA § 122(g) (administrative or judicial) will address a party's potential liability under §§ 106 and 107 of CERCLA and § 7003 of RCRA and provide the settlor with an immediately effective covenant not to sue for past and future liability at the site. EPA intends de micromis settlements to be a final resolution of the de micromis party's potential liability, save for a few relatively narrow reservations which are described under (B) below.

B. Reservations of Rights

A de micromis settlement under § 122(g) should generally contain a reservation of rights for the following situations: (1) EPA obtains new information showing that the settlor no longer qualifies for a de micromis settlement under the criteria established for the site (e.g., the waste contributed was of a greater volume or toxicity than the de micromis threshold); and (2) after

signature of the De Micromis Questionnaire, the settlor becomes an owner or operator of the site or undertakes any activity with respect to a hazardous substance or solid waste at the site. Further, all de micromis settlement agreements should state that the settlement has no effect on the Agency's ability to pursue non-settling parties.

C. Contribution Protection

The de micromis settlement should contain language that the settlor receives protection against contribution actions to the full extent provided in CERCLA §§ 113(f) and 122(g)(5). As reflected in the model De Micromis CD and AOC, this contribution protection applies to all matters addressed in the settlement, defined as "all response actions taken and to be taken and all response costs incurred and to be incurred, in connection with the Site, by the United States or by any person who is a potentially responsible party under CERCLA at the Site." The "matters addressed" do not include those response actions and those response costs for which liability is reserved in the United States' reservation of rights.

D. Obligations of the Settling Party

This guidance establishes a change in EPA's approach to establishing settlement values for de micromis offers. Consistent with the model administrative order and consent decree, the Regions should generally not require any monetary payment as part of a de micromis settlement. This approach reflects EPA's position that it would be inequitable to require de micromis parties to participate in financing or performing cleanup at the site because their liability is negligible at most. Moreover, because a de micromis party's actual connection to the site is so small, the administrative costs of executing a de micromis settlement, combined with the private party's associated transaction costs will likely equal or exceed the de micromis party's proportional share of response costs at the site, if any. Given this inequity, it is fair, and thus in the public interest, to conclude zero-dollar de micromis settlements with qualifying parties.

In exchange for the United States' broad covenant not to sue and receipt of full contribution protection, the settlor certifies that it has responded fully and accurately to the De Micromis Questionnaire (and any other EPA requests for information regarding the site). Moreover, the settlor agrees not to assert any claims against the United States or its contractors or employees with respect to the site or the settlement. Further, the settlor is required to waive all claims regarding the site against any other person who may be a potentially responsible party at the site. Where multiple settlors are involved, each settlor also waives its claims regarding the site against every other settlor.

VI. Purpose and Use of this Guidance

This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Environmental Protection Agency and the

U.S. Department of Justice. This guidance is not a rule and does not create any legal obligations. Whether and how EPA applies the guidance to any particular site will depend on the facts at the site.

VII. Further Information

For further information concerning this guidance, please contact Susan Boushell in the Office of Site Remediation Enforcement at 202-564-5107. For further information on any of the attachments, contact Janice Linett in the Office of Site Remediation Enforcement at 202-564-5131.

What is Superfund?

Superfund is a federal program, administered by the Environmental Protection Agency (EPA), that is designed to clean up hazardous substances (or "waste") that may pose a threat to human health or the environment. The full name of the law is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

Superfund sites are frequently areas or facilities where solvents, sludges, heavy metals, or other wastes have been disposed. In some cases, Superfund sites are old landfills that have received municipal solid waste as well as industrial waste. Sites vary significantly in size – from a 1/4-acre metal plating shop to a 250-square mile mining complex. Contamination from these sites is often found in the soil, groundwater, and/or nearby streams and lakes.

Who Pays for Cleanups?

When Congress enacted Superfund, it intended to make the "polluters pay" for the costs of cleaning up these sites. The Superfund law holds parties who contributed to the contamination responsible for the costs of cleanup, even if their actions were in accordance with the law at the time of waste disposal.

Where Can I Get More Information?

To find out more about de micromis settlements, and whether you might qualify, contact the nearest Regional U.S. Environmental Protection Agency (EPA) Superfund program office. Ask to speak to the attorney, project manager, or community relations representative assigned to your site. If you do not know where the nearest EPA office is located, call 1-800-424-9346 for assistance.

Superfund and Small Waste Contributors

De Micromis Settlements

Have you been contacted regarding your possible involvement with a Superfund site? If you believe you contributed only a minuscule amount of waste to the site, or only household trash, you should learn about "de micromis settlements."

This pamphlet describes what Superfund is, what de micromis means, and why a Superfund de micromis settlement may be to your advantage.

U.S. Environmental Protection Agency (EPA)
Office of Enforcement and Compliance Assurance
Office of Site Remediation Enforcement
401 M St., S.W., Washington, D.C. 20460

Attachment 1

Am I a "De Micromis" Party?

"De micromis"parties can be individuals, small businesses, schools, large companies, or any party who has contributed a minuscule amount of hazardous substances to a Superfund site. At any given site, the U.S. Environmental Protection Agency's (EPA) Regional office determines who qualifies for a de micromis settlement. Some parties may qualify as de micromis because their sole contribution to a site was a small amount of municipal solid waste. Other parties may qualify as de micromis because they contributed a very small amount of hazardous substances to the site.

As a matter of policy, EPA does not pursue de micromis parties for the costs of cleaning up a site, because their contribution was so small it would be inequitable to require them to make a payment. However, because a de micromis party may be responsible for waste disposed of at a site, other parties at the site may approach them, or even sue them, to recover cleanup costs. De micromis settlements serve to protect de micromis parties from such actions.

How Much Does a "De micromis" Settlement Cost?

If EPA determines that you are eligible for a de micromis settlement, you will not be asked to make any payment to EPA.

Who is Eligible for a "De micromis" Settlement?

The Superfund statute includes a set of required "findings" that EPA must make in order to determine that a party is eligible for a de micromis settlement. In addition to these few statutory requirements, EPA has significant discretion at each site to determine who qualifies for a de micromis settlement.

In general, the statute requires that, in order to be eligible for a de micromis settlement:

- the amount of waste you contributed to the site must be minimal compared to the other hazardous substances at the site;
- the toxic or other hazardous effects of the waste you contributed must be minimal in comparison to the other hazardous substances at the site; and
- the de micromis settlement must be in the public interest, and involve only a minor portion of the response costs at the site.

Not all parties who meet this description will be eligible for a de micromis settlement. Some small volume contributors, who meet these statutory requirements, are considered *de minimis* parties, and may be offered a slightly different type of settlement with EPA. The decision of who qualifies for *de minimis* and de micromis settlements is made by EPA's Regional Office on a site-specific basis.

What are the Benefits of a "De micromis" Settlement?

EPA wants to ensure that de micromis parties are not pursued for the recovery of response costs at a site – not by EPA or by any other parties associated with the site. De micromis settlements provide this type of protection.

The benefits of a de micromis settlement include:

"Contribution Protection" - This provision offers protection to the de micromis settlor from being sued by other "potentially responsible parties" (PRPs) at the site. Frequently, major waste contributors will sue many small waste contributors to recover their cleanup costs. A de micromis settlement provides protection from such suits that extends to all matters covered by the settlement.

"Covenant Not to Sue" - This provision is a promise that the EPA will not bring any future legal actions against the de micromis party regarding the site and the specific matters named in the settlement.

Taken together, contribution protection, the covenant not to sue, and other de micromis settlement terms provide settlors with a high level of certainty that their responsibilities at the site are fulfilled, and that they are protected from future legal actions related to those matters addressed by the settlement.

ATTACHMENT 2

SAMPLE COVER LETTER FOR DE MICROMIS QUESTIONNAIRE

RE: Questionnaire for [insert site name and location]

Dear [name of potential settling party]:

The United States Environmental Protection Agency (EPA) is currently working to clean up the [insert site name] Site, located in [city, county, state], using the Superfund program. Superfund is a Federal program administered by the EPA that is designed to clean up hazardous substances that may pose a threat to human health or the environment.

EPA is writing to you because [[if recipient has been sued for contribution, insert: "you have been identified as a defendant in a lawsuit entitled [insert case name, court, and civil action number]. In this lawsuit, [insert name of plaintiff] is asking you to contribute to site cleanup costs because you may have sent trash or other material to the site." If recipient has not been sued for contribution, insert applicable facts such as: "you have been contacted by a party associated with this site who may be asking you to contribute to site cleanup costs based on that party's belief that you may have sent trash or other material to the site."]]

In general, EPA does not believe that contributors of minuscule quantities of waste should be required to participate either in financing or performing cleanup efforts at Superfund sites. EPA would like to protect parties that sent minuscule amounts of waste to Superfund sites from lawsuits [such as the one filed against you]. You may be eligible to receive this kind of protection, which can be obtained through a "de micromis" settlement with EPA.

"De micromis" settlements are based on authority EPA has under the Superfund law to reach quick and final settlements with parties whose waste contribution to a site is minimal in volume and toxicity. This authority is found in Section 122(g) of the Superfund law, which is formally known as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9622(g). If you qualify, a "de micromis" settlement can provide you with protection against legal action by private parties seeking collection of costs they may have incurred in performing or financing cleanup at the site. "De micromis" settlements can also provide you with the assurance that EPA will not pursue you for costs associated with the site.

If you would like EPA to consider whether you might be eligible for this type of settlement, please complete the enclosed questionnaire. The questionnaire is intended to gather information about the nature and quantity of trash or other material that you may have sent to the [insert site name] site.

The questionnaire must be completed, signed, and returned no later than **[insert date]**. This deadline is necessary to reduce legal and administrative costs to EPA. A self-addressed, postage-paid envelope is enclosed. Please keep a copy of the signed questionnaire and any materials you submit with it for your files. If we do not receive the completed and signed questionnaire from you by **[insert date]**, we will assume that you do not wish to be considered for a "de micromis" settlement at this site.

Please keep in mind that this process is entirely voluntary. Please also be assured that you are not obligated to enter into a "de micromis" settlement merely because you return a completed questionnaire. If, after review of your questionnaire, EPA finds that you are eligible for a "de micromis" settlement, EPA will send you a "de micromis" settlement document, which you may choose to sign or not to sign at that time.

Enclosed with this letter is an informational brochure entitled "Superfund and Small Waste Contributors: De Micromis Settlements," which provides additional background information on "de micromis" settlements and may answer some of your questions. If you have any other questions regarding this letter or the questionnaire, please contact **[insert Regional contact's name and telephone number]**.

Sincerely,

Enclosures:

1) Questionnaire, 2) Self-addressed, postage-paid envelope, and 3) informational "de micromis" brochure

ATTACHMENT 3

MODEL DE MICROMIS QUESTIONNAIRE

[NOTE: When using the questionnaire, questions may be modified, added, or deleted, as necessary, to reflect known site-specific information. For example, questions may be tailored to the dates of operation of the facility, known haulers or transporters may be identified, and additional questions may be added about sewage sludge.]

[INSERT SITE NAME] QUESTIONNAIRE

This questionnaire is designed to gather information about the trash or other material you may have sent to the **[insert site name]** Superfund site located in **[insert location]** and any other involvement you may have had with this site. Your answers to this questionnaire will be used by the United States Environmental Protection Agency (EPA) to determine if you are eligible to partipate in a "de micromis" settlement. Please fill out this form as completely and accurately as possible. Your answers should reflect your best recollection of the quantity and types of trash or other material you may have sent to the site and any other involvement you may have had with the site. When answering questions, you may rely on records or other documents, such as receipts, canceled checks, invoices, contracts, etc., as well as on other sources of information, including discussions with others. If your answers do not fit in the spaces provided, you may continue them on additional sheets of paper. Please write your name and the name of the site on the top of any additional sheets of paper and please identify the number of the question that is being continued.

If you have any questions about this form, please call:

[insert Regional contact's name and phone number].

I. PROMISE THAT QUESTIONNAIRE WILL BE FILLED OUT TRUTHFULLY AND COMPLETELY

I, _____ (insert your name), certify that I am authorized to complete this questionnaire on behalf of _____ (insert name of party for whom you are responding, or if you are responding on behalf of yourself as an individual, insert "self"), and that I am authorized to make the representations set forth below.

I further certify that I have made a thorough, comprehensive, and good faith search for all records, documents, or other information in the possession or control of _____ (insert name of party for whom you are responding, or if you are responding on behalf of

yourself as an individual, insert "self") to obtain all information which relates in any way to the ownership or operation of the **[insert site name and location]** ("the site") or to the ownership, operation, transportation, treatment, storage, and/or disposal of trash or other material at the site, including having discussions with persons who have or may have knowledge about these matters. Based upon my review of such records, I certify that the answers stated below are true, accurate, and complete.

I DECLARE UNDER PENALTY OF PERJURY THAT THE INFORMATION SUBMITTED IN RESPONSE TO THIS QUESTIONNAIRE IS TRUE, ACCURATE, AND COMPLETE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF:

Signature: _____ Date: _____

Print Name: _____

Title (if any): _____

Address: _____
_____
_____

Telephone (including area code): _____

II. BACKGROUND INFORMATION

A. Identity of Proposed De Micromis Settlor

Name: _____

Address: _____
_____
_____

Telephone (including area code): _____

If you have an attorney representing you for matters relating to this site, please give the following information about your attorney:

Name: _____

Address: _____
_____
_____

Telephone (including area code): _____

B. Do you currently own or control, or have you ever owned or

controlled, any of the real property at the site? By own or control we mean hold title, an easement, or a right-of-way through the property, or rent or lease the property. By real property we mean land, buildings, or other fixtures (any items intended to stay attached to the property permanently).
___ yes ___ no

If yes, please explain this ownership or control. _____
_____
_____
_____

C. Have you ever worked at the site or been involved in the operation of the site in any capacity? ___ yes ___ no

If yes, please describe the work you did, the dates of the work, and your title, if any. _____
_____
_____
_____

D. Have you ever hauled or transported to the site trash or other material produced by persons other than yourself?
___ yes ___ no

E. Could any trash or other material that you produced have ended up at the site? ___ yes ___ no

If no, where did your trash or other material go during the years ____ through ____? [NOTE: INSERT YEARS DURING WHICH SITE OPERATED] _____
_____
_____
_____

F. What is the source of any of your own trash or other material that could have ended up at the site?

1. Single residence? ___ yes ___ no

   a. Is there a business or commercial enterprise (for example, dry cleaner, beauty shop, automobile repair, electroplating or furniture repair, etc.) that operates or has operated from this single residence? ___ yes ___ no

   If yes, please state the type of enterprise and briefly describe it: _____
   _____
   _____
   _____

2. Multiple-unit residence (including apartment building,

condominium)? ___ yes ___ no

If yes, please state the number of residential units: ___

a. Is there a business or commercial enterprise (for example, dry cleaner, beauty shop, automobile repair, electroplating or furniture repair, etc.) that operates or has operated from this multiple-unit residence?
___ yes ___ no

If yes, please state the type of enterprise and briefly describe it: _____
_____
_____

3. Business or commercial establishment? ___ yes ___ no

If yes, please state the type of business or commercial establishment and briefly describe it: _____
_____
_____

4. Governmental entity? ___ yes ___ no

If yes, please state the type of governmental entity: _____
_____
_____

5. Other (such as school, hospital, non-profit organization)?
___ yes ___ no

If yes, please describe: _____
_____
_____

III. QUESTIONS TO BE ANSWERED BY POTENTIAL SETTLORS WHOSE OWN TRASH OR OTHER MATERIAL COULD HAVE ENDED UP AT THE SITE

For purposes of this questionnaire, the following definitions apply:

"Household Waste" means any material (including garbage, trash, and sanitary wastes in septic tanks) derived from households (including single residences and multiple-unit residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas). Household waste is primarily composed of non-hazardous substances (including yard waste, food waste, paper waste, glass and aluminum) and may contain small quantities of household hazardous wastes (including pesticides and solvents).

"Industrial Trash" means any material from a commercial, institutional, or industrial entity which is very similar to "Household Waste." This term covers only those wastes that are essentially the same as what one would expect to find in common household trash. This term does not include hazardous substances that are derived from a commercial, institutional, or industrial process or activity.

"Sewage Sludge" means any solid, semi-solid, or liquid residue removed during the treatment of municipal wastewater or domestic sewage.

"Other Waste" means hazardous substances that are derived from a commercial, institutional, or industrial process or activity, and any material not covered by any of the other three definitions.

A. What type of trash or other material that you produced could have ended up at the site?

1. Household Waste? ___ yes ___ no

   If yes, please describe the type of material that was contained in this Household Waste: _____
   _____
   _____
   _____

2. Industrial Trash? ___ yes ___ no

   If yes, please describe the type of material that was contained in this Industrial Trash: _____
   _____
   _____

3. Sewage Sludge? ___ yes ___ no

4. Other Waste? ___ yes ___ no

   If yes, please describe this Other Waste: _____
   _____
   _____
   _____

5. If the trash or other material was from a commercial, institutional, and/or industrial process or activity, please describe the process: _____
   _____
   _____
   _____
   _____

6. If the trash or other material was from a commercial, institutional, and/or industrial process or activity, please describe the type of materials contained in this waste. In particular, please identify all materials that contained hazardous substances. Please attach any Material Safety Data Sheets you may have for these materials, and any other documents showing the contents of these materials:

_____
_____
_____
_____
_____

B. How much of your trash or other material could have ended up at the site?

1. Please estimate the total quantity. Please identify the unit(s) of measurement used in your response, such as pounds, gallons, cubic yards, barrels, bags, dumpsters:

_____
_____
_____
_____
_____

2. Please estimate the percentage of this total that was Household Waste ___%, Industrial Trash ___%, Sewage Sludge ___%, or Other Waste ___%

3. Please estimate how much of the waste or other material contained hazardous substances: _____
_____
_____
_____

4. How did you arrive at the estimates included in your responses to questions 1, 2 and 3? _____
_____
_____
_____
_____

C. Please describe the measures, if any, that you took to separate trash or other material containing hazardous substances from other types of trash or other material, and, if you took such measures, how did you dispose of the hazardous substances:

_____
_____
_____
_____
_____

D. Did you haul or transport the trash or other material to the site yourself? ___ yes ___ no

If yes, please provide the dates during which you did this hauling or transporting? _____

If no, please state the name, address, and telephone number (if known) of the hauler or transporter. If more than one hauler or transporter was used, please give the names, addresses, and telephone numbers of each and please give the dates each were used: _____

_____

_____

_____

_____

_____

E. If possible, please estimate the number of times your trash or other material was transported to the site: _____

F. Was any of your trash or other material compacted prior to disposal at the site? ___ yes ___ no

If yes, how did this compaction take place? _____

_____

_____

_____

If yes, was the quantity of trash or other material you identified in your responses to Question III(B) the quantity before or after compaction? ___ before ___ after

IV. QUESTIONS TO BE ANSWERED BY POTENTIAL SETTLORS WHO HAULED OR TRANSPORTED TO THE SITE TRASH OR OTHER MATERIAL PRODUCED BY OTHER PEOPLE

A. What were the dates during which your hauled or transported to the site? _____

B. How often during those dates did you haul or transport to the site? _____

C. What type of trash or other material did you haul or transport to the site?

1. Household Waste? ___ yes ___ no
2. Industrial Trash? ___ yes ___ no
3. Sewage Sludge? ___ yes ___ no
4. Other Waste? ___ yes ___ no

If yes, please describe this Other Waste: _____

D. How much trash or other material did you haul or transport to the site?

1. Please estimate the total quantity. Please identify the unit(s) of measurement used in your response, such as pounds, gallons, cubic yards, barrels, bags, dumpsters:

2. Please estimate the percentage of this total that was Household Waste ___%, Industrial Trash ___%, Sewage Sludge ___%, or Other Waste ___%

3. Please estimate how much of the waste or other material contained hazardous substances: _____

4. How did you arrive at the estimates included in your responses to questions 1, 2 and 3? _____

E. Please describe the measures, if any, that you took to separate trash or other material containing hazardous substances from other types of trash or other material, and, if you took such measures, how did you dispose of the hazardous substances:

F. Was any of the trash or other material that you hauled or transported to the site compacted prior to disposal?
___ yes ___ no

If yes, how did this compaction take place? _____

If yes, was the quantity of trash or other material that you

identified in your responses to Question IV(D) the quantity before or after compaction? ___ before ___ after

G. Please list the clients for whom you hauled or transported to the site (give names, addresses, and telephone numbers, if known):

_____
_____
_____
_____
_____
_____
_____

V. SOURCES OF INFORMATION

Please check the sources of information you used to fill out this questionnaire (more than one may apply):

___ Personal knowledge
___ Written records
___ Information from other persons

If your responses are based on information from other persons, please give the names, addresses, and telephone numbers of the other persons and a description of the information which they were able to provide:

_____
_____
_____
_____
_____
_____

Please attach copies of any records or other documents you used to fill out this questionnaire. Documents may include items such as receipts, canceled checks, invoices, contracts, or written agreements. Please write your name and the name of the site on the top of each attachment.

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended 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 model or its internal implementing procedures.]

ATTACHMENT 4

SAMPLE COVER LETTER FOR DE MICROMIS SETTLEMENT

RE: De Micromis Settlement at [insert site name and location]

Dear [name of potential settling party]:

Thank you for taking the time to complete the questionnaire concerning your involvement with the [insert site name] Superfund Site. The United States Environmental Protection Agency (EPA) has carefully reviewed your questionnaire and any information that you may have submitted with it. We have used your responses to evaluate the nature and quantity of trash or other material that you may have contributed to this site. We have concluded that you are eligible for a "de micromis" settlement at this site.

A "de micromis" settlement document is enclosed with this letter. This letter will provide you with an explanation of what EPA means by a "de micromis" settlement to assist you in deciding whether to participate. Additional background information on "de micromis" settlements is provided in the brochure entitled "Superfund and Small Waste Contibutors: De Micromis Settlements," which we provided to you with the De Micromis Questionnaire. Please keep in mind that participation in this settlement is entirely voluntary. A decision by you not to take part in this settlement will not be held against you in any way.

As you already know, EPA is currently working to clean up the [insert site name] Superfund site. Superfund is an EPA-administered Federal program that is designed to clean up sites contaminated with hazardous substances that may pose a threat to human health or the environment. EPA does not believe that parties such as yourself who contributed minuscule quantities of waste to a site should be required to participate either in financing or performing Superfund cleanups. [[Insert applicable facts, such as: "Unfortunately, other parties who are potentially liable to EPA based upon their greater involvement with the site have [contacted you] [filed a lawsuit against you] to ask you to contribute to site cleanup costs."]]

Through a "de micromis" settlement with EPA, you can obtain legal protection against lawsuits seeking payment of Superfund cleanup costs or performance of Superfund cleanups. EPA uses "de micromis" settlements to reach quick and final settlements with parties whose waste contribution to a site is extremely minimal in both volume and toxicity. These settlements are based on authority EPA has under Section 122(g) of the Superfund law, which is formally known as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9622(g).

In exchange for the protection provided by the "de micromis"

settlement, EPA asks that you sign the settlement and agree to its terms. The settlement does not require you to pay any money to EPA or to any person who may have liability at the site under the Superfund law (persons who may have such liability are known as "potentially responsible parties"). It requires only that you: 1) certify that you fully and accurately completed the De Micromis Questionnaire; 2) promise not to bring claims relating to the site against the United States; and 3) promise not to bring claims relating to the site against any potentially responsible party at the site. The settlement is not a negotiable document. This will reduce legal and administrative costs to EPA and to you as well, and will lead to equal treatment for all parties who qualify for "de micromis" settlements.

If you would like to participate in the settlement, please complete the signature page of the enclosed settlement and return the entire agreement in the enclosed envelope. We suggest that you keep a copy of the entire settlement for your files. If we do not receive your signed settlement by [insert date], we will assume that you are not interested in settling at this time.

Thank you for your prompt attention to this matter. If you have any questions, please contact [insert Regional contact's name and phone number].

Sincerely,

Enclosures: 1) "De Micromis" Settlement, 2) Self-addressed, postage-paid envelope

MODEL CERCLA SECTION 122(g)(4) DE MICROMIS ADMINISTRATIVE ORDER ON CONSENT

IN THE MATTER OF: [Insert Site Name and Location] Proceeding under Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4)	U.S. EPA Docket No. ____ **DE MICROMIS ADMINISTRATIVE ORDER ON CONSENT**

1. Jurisdiction/Parties Bound. This Administrative Order on Consent ("Consent Order") is issued under Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA" or "Superfund"), 42 U.S.C. § 9622(g)(4). This Consent Order is binding upon the United States Environmental Protection Agency ("EPA") and upon the parties who are identified in Attachment __ who are signatories to this Consent Order ("Settlors"). Settlors do not admit any liability.

2. Purpose. The purpose of this Consent Order is to reach a final "de micromis" settlement with Settlors which: a) resolves Settlors' potential civil liability to the United States under Superfund for payment of response costs and for performance of cleanup at the [insert site name]; and b) protects Settlors from any lawsuits seeking recovery of Site cleanup costs.

3. Statement of Facts. The [insert site name] ("the Site") is located at [insert address or location] in [city, county, state], and is generally [shown on/described by] the [map/property description] attached to this Consent Order as Attachment __. Under Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has incurred [approximately $_____ in] response costs at the Site and [will/may] incur additional costs. EPA currently estimates that total past and future response costs at the Site, including the costs of EPA and CERCLA potentially responsible parties, will be [insert either "$_____" or "between $_____ and $_____" or "in excess of $_____"]. Each Settlor may have contributed hazardous substances to the Site which are not in excess of [insert number of pounds or gallons] of materials containing hazardous substances [or, stated as a percentage, ___% of the hazardous substances at the Site] and which are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

4. Determinations. EPA determines that: a) in accordance with Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), it is practicable and in the public interest to reach this final settlement, involving only a minor portion of the response costs at the [insert site name] facility, with Settlors who may be potentially responsible parties who each may have contributed a

minimal amount of hazardous substances to the Site, the toxic or other hazardous effects of which are minimal in comparison to other hazardous substances at the Site; and b) Settlors are eligible for a de micromis settlement because they each contributed no more than a minuscule amount of hazardous substances to the Site, an amount which is so minor that it would be inequitable to require them to help finance or perform cleanup at the Site[.] **[Insert if applicable: "; and c) total past and projected response costs of the United States at the Site will not exceed $500,000, excluding interest."]**

5. Certification. Each Settlor certifies that to the best of its knowledge it has fully and accurately completed the **[insert site name]** De Micromis Questionnaire.

6. United States' Covenant Not to Sue. In consideration of Settlors' agreement to this Consent Order, and except as specifically provided in Paragraph 7, the United States covenants not to sue or take administrative action against Settlors under Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, relating to the Site.

7. United States' Reservations of Rights. The United States reserves the right to seek additional relief from any Settlor if: 1) information is discovered indicating that such Settlor's contribution of hazardous substances to the Site is of such greater amount or of such greater toxic or other hazardous effect that it no longer qualifies for settlement under the criteria stated in Paragraph 3; or 2) after Settlor signs the **[insert site name]** De Micromis Questionnaire, such Settlor becomes an owner or operator of the Site or undertakes any activity with regard to hazardous substances or solid wastes at the Site. The United States also reserves all rights which it may have as to any matter relating in any way to the Site against any person who is not a party to this Consent Order.

8. Settlors' Covenant Not to Sue. Settlors covenant not to sue and agree not to assert any claims against the United States or its contractors or employees with respect to the Site or this Consent Order. Settlors also covenant not to sue and agree not to assert any claims with respect to the Site against each other or against any other person who is a potentially responsible party under CERCLA at the Site.

9. Contribution Protection. Each Settlor is entitled to protection from contribution claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are all response actions taken and to be taken and all response costs incurred and to be incurred, in connection with the Site, by the United States

or by any person who is a potentially responsible party under CERCLA at the Site, except for those limited areas in Paragraph 7 for which the United States has reserved its rights.

10. **[NOTE: Insert if total past and projected response costs at the site will exceed $500,000, excluding interest.]** Attorney General Approval. The Attorney General has approved this settlement as required by Section 122(g)(4) of CERCLA, 42 U.S.C. §_9622(g)(4).

11. **Public Comment/Effective Date.** This Consent Order is subject to public comment under Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), and is effective on the date that EPA issues written notice that the public comment period has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

IT IS SO AGREED AND ORDERED:

U.S. Environmental Protection Agency

By: _____ _____
[Name] [Date]
[Insert Title of Delegated Official]

THE UNDERSIGNED SETTLOR enters in to this Consent Order in the matter of [insert U.S. EPA docket number], relating to the [insert site name and location]:

FOR SETTLOR: _____
[Name]

_____
[Address]

By: _____ _____
[Name] [Date]

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended 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 model or its internal implementing procedures.]

MODEL CERCLA SECTION 122(g)(4) DE MICROMIS CONSENT DECREE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [_____]
[_____] DIVISION[1]

UNITED STATES OF AMERICA, Plaintiff, v. [DEFENDANTS] Defendants.	Civil Action No. _____ Judge _____

DE MICROMIS CONSENT DECREE[2]

A. [NOTE: **Insert explanation of procedural posture of the case. To the extent applicable, the following language may be used.**] The United States on behalf of the Environmental Protection Agency ("EPA") filed a complaint in this matter under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA" or "Superfund"), to recover costs it has spent for the cleanup of the **[insert site name]**. The defendants sued by the United States filed contribution actions against third-party defendants, some of whom are Settlors under this Consent Decree. Settlors do not admit any liability.

B. The **[insert site name]** ("the Site") is located at **[insert address or location]** in **[city, county, state]**, and is generally **[shown on/described by]** the **[map/property description]** attached to this Consent Decree as Attachment __. Under Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has incurred **[approximately $_____ in]** response costs at the Site and **[will/may]** incur additional costs. EPA currently estimates that total past and future response costs at the Site, including costs of EPA and CERCLA potentially responsible parties, will be **[insert either "$_____" or "between $_____ and _____" or "in excess of $____"]**. Each Settlor may have contributed hazardous substances to the

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[1] Follow local rules for caption format.

[2] As a general rule, a judicial consent decree should only be used if the settlor has already been named as a defendant in a contribution action, or if the United States has already initiated CERCLA litigation at the site.

Site which are not in excess of [**insert number of pounds or gallons**] of materials containing hazardous substances [**or, stated as a percentage, ___% of the hazardous substances at the Site**] and which are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

C. EPA has determined that: 1) in accordance with Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), it is practicable and in the public interest to reach this final settlement, involving only a minor portion of the response costs at the [**insert site name**] facility, with Settlors who may be potentially responsible parties who each may have contributed a minimal amount of hazardous substances to the Site, the toxic or other hazardous effects of which are minimal in comparison to other hazardous substances at the Site; and 2) Settlors are eligible for a de micromis settlement because they each contributed no more than a minuscule amount of hazardous substances to the Site, an amount which is so minor that it would be inequitable to require them to help finance or perform cleanup at the Site.

THEREFORE, with the consent of the parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

1. **Jurisdiction/Parties Bound.** 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. § 9613(b) and also has personal jurisdiction over Settlors. Settlors consent to this Consent Decree and this Court's jurisdiction to enter and enforce this Consent Decree. This Consent Decree is binding upon the United States and upon the parties who are identified in Attachment __ who are signatories to this Consent Decree ("Settlors").

2. **Purpose.** The purpose of this Consent Decree is to reach a final de micromis settlement with Settlors, which: a) resolves Settlors' potential civil liability to the United States under Superfund for payment of response costs and for performance of cleanup at the Site; and b) protects Settlors from any lawsuits seeking recovery of Site cleanup costs.

3. **Certification.** Each Settlor certifies that to the best of its knowledge it has fully and accurately completed the [**insert site name**] De Micromis Questionnaire.

4. **United States' Covenant Not to Sue.** In consideration of Settlors' agreement to this Consent Decree, and except as specifically provided in Paragraph 5, the United States covenants not to sue or take administrative action against Settlors under Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, relating to the Site.

5. **United States' Reservations of Rights.** The United States reserves the right to seek additional relief from any Settlor: 1) if information is discovered indicating that such Settlor's contribution of hazardous substances to the Site is of such greater amount or of such greater toxic or other hazardous effect that it no longer qualifies for settlement under the criteria stated in Paragraph B; or 2) after signing the **[insert site name]** De Micromis Questionnaire, such Settlor becomes an owner or operator of the Site or undertakes any activity with regard to hazardous substances or solid wastes at the Site. The United States also reserves all rights which it may have as to any matter relating in any way to the Site against any person who is not a party to this Consent Decree.

6. **Settlor's Covenant Not to Sue.** Settlors covenant not to sue and agree not to assert any claims against the United States or its contractors or employees with respect to the Site or this Consent Decree. Settlors also covenant not to sue and agree not to assert any claims with respect to the Site against each other or against any other person who is a potentially responsible party under CERCLA at the Site.

7. **Contribution Protection.** Each Settling Defendant is entitled to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken and to be taken and all response costs incurred and to be incurred, in connection with the Site, by the United States or by any person who is a potentially responsible party under CERCLA at the Site, except for those limited areas in Paragraph 5 for which the United States has reserved its rights.

8. **Public Comment/Effective Date.** The United States will lodge this Consent Decree with the Court for a period of not less than 30 days for public notice and comment. Provided that the United States does not withdraw the Consent Decree following such public notice and comment, this Consent Decree shall be effective on the date of entry by this Court.

9. **Service.** For all matters relating to this Consent Decree, each Settlor will personally receive service of process by mail sent to the name and address provided on the attached signature page, unless such Settlor provides the name and address of an agent for service of process on the attached signature page. Settlors agree to accept service in this manner and to waive the formal service requirements of Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

SO ORDERED THIS _____ DAY OF _____, 19__.

_____
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

_____
[Name]
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

_____
[NAME]
United States Attorney
[Address]

_____
[NAME]
Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

_____

[Name]
Regional Administrator, Region [ ]
U.S. Environmental Protection Agency
[Address]

_____

[Name]
Assistant Regional Counsel
U.S. Environmental Protection Agency
[Address]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR SETTLOR [ ]

Date: _____

_____
[Name and address of Settlor or Settlor's signatory]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: _____

Title: _____

Address: _____

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S. Department of Justice. They do not constitute rulemaking by the Agency or Department 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 or Department may take action at variance with this model or its internal implementing procedures.]

ATTACHMENT 7

MODEL CERCLA SECTION 122(i) DE MICROMIS
FEDERAL REGISTER NOTICE

Proper format is very important for a Federal Register notice. The format is shown in the following model. The notice should be typed on plain bond paper, not EPA letterhead stationery. Each page, including the first, should be consecutively numbered. The notice should be double-spaced and single-sided. Heading titles may not be varied. The official format requires the top, bottom and right margins to be one inch wide and the left margin to be one and a half inches wide, but minor variations in margin size will not result in rejection of the notice. Legal citations should be written as, e.g., 42 U.S.C. 9622(i) (do not include a section symbol [§] or the word "section.") The notice should be signed by a Regional official authorized to submit documents for publication in the Federal Register by EPA Delegation 1-21. The name and title of the official signing the notice should be typed on the notice. If an acting official will be signing for the authorized official, the acting official's name and the acting official's title, e.g., "Acting Regional Administrator," must be typed on the notice. The billing code should be typed or hand-written at the end of the notice below the Regional official's signature.

To publish the notice, the Region should send 1) the original signed notice, 2) three single-sided copies of the signed notice, 3) a disk containing the file for the notice, and 4) a completed Federal Register Typesetting Request (EPA Form 2340-15) to: Vickie Reed, Federal Register Liaison (Mail Code 2136), Regulation Development Branch, Regulatory Management Division, Office of Regulatory Management and Evaluation, Office of Policy, Planning and Evaluation, EPA Headquarters, 401 M St., S.W., Washington, D.C., 20460. When filling out the Federal Register Typesetting Request, publication costs should be billed to the site-specific Superfund account number. The formula for calculating publication costs on the Typesetting Request is as follows: two double-spaced pages equals one column, and one column costs $100.00 (half pages and half columns should be rounded up; if a disk is not provided, the per column cost increases to $125.00).

Questions about these procedures should be directed to Vickie Reed at (202) 260-7204.

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended 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 model or its internal implementing procedures.]

ENVIRONMENTAL PROTECTION AGENCY

[ ] [NOTE: Leave brackets to left blank.]

Proposed CERCLA Administrative De Micromis Settlement; [Insert name of settling party, or if there are multiple settling parties, insert site name -- capitalize first letter of each word]

AGENCY: Environmental Protection Agency

ACTION: Notice; request for public comment

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative de micromis settlement concerning the [insert site name] site in [insert site location] with the following settling party(ies): [insert names here or reference list included in Supplementary Information portion of notice]. The settlement is designed to resolve fully [the/each] settling party's liability at the site through a covenant not to sue under Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973. For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or

inadequate. The Agency's response to any comments received will be available for public inspection at [insert address of information repository at or near site] and [insert address of Regional public docket]. Commenters may request an opportunity for a public meeting in the affected area in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

DATES: Comments must be submitted on or before [insert 30 days from date of publication]. [NOTE: Do not fill in date; just type DATES sentence, including bracketed portion, exactly as it appears here.]

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at [insert address of Regional public docket or other Regional office location]. A copy of the proposed settlement may be obtained from [insert name, address, and telephone number of Regional docket clerk or other Regional representative]. Comments should reference the [insert site name, location] and EPA Docket No. _____ [insert EPA docket number for settlement] and should be addressed to [insert name and address of Regional docket clerk or other Regional representative designated to receive comments].

FOR FURTHER INFORMATION CONTACT: [Insert name, address, and telephone number of Regional representative who has knowledge of settlement].

SUPPLEMENTARY INFORMATION: [Use this optional section to,

e.g., list parties too numerous to list in Summary portion of notice or to provide further details about settlement].

_____ _____

[Insert typed name and title of Regional official] Date

[Insert billing code]

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Tab 10-2

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

U.S. Department of Justice

Washington, D.C. 20530

10/23/95 NOTE FROM EPA: The memorandum below has been altered from the original memorandum issued on 9/22/95 to reflect updated information about obtaining additional copies and whom to contact for further information. No other changes were made to the text of the policy -- thus, references to the policy should reflect the issuance date of 9/22/95.

MEMORANDUM

SUBJECT: Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily

FROM: Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Lois J. Schiffer, Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

TO: Regional Administrators, Regions I - X, EPA
Regional Counsel, Regions I - X, EPA
Waste Management Division Directors, Region I - X, EPA
Chief, Environmental Enforcement Section, DOJ
Assistant Section Chiefs, Environmental Enforcement Section, DOJ

This memorandum sets forth the Environmental Protection Agency's ("EPA") and the Department of Justice's ("DOJ") policy regarding the government's enforcement of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against lenders and against government entities that acquire property involuntarily. As an enforcement policy, EPA and DOJ intend to apply as guidance the provisions of the "Lender Liability Rule" promulgated in 1992, thereby endorsing the interpretations and rationales announced in the Rule. *See* "Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18,344 (April 29, 1992).[1] (This rule has been vacated by a court, as described below in the "Background" section).

[1] This guidance does not address lender liability under any statutory or regulatory authority, rule, regulation, policy, or guidance, other than CERCLA. Specifically, this guidance does not cover lender liability determinations as they relate to the Resource Conservation and Recovery Act ("RCRA") and RCRA's Underground Storage Tank program.

ADDRESSES: Additional copies of this policy statement can be ordered from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number PB95-234498. For telephone orders or further information on placing an order, call NTIS at 703-487-4650 for regular service or 800-553-NTIS for rush service. For orders via email/Internet send to the following address: orders@ntis.fedworld.gov.

FOR FURTHER INFORMATION CONTACT: Laura Bulatao, Office of Site Remediation Enforcement (2273-G), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 (703-603-9005), or the RCRA/Superfund Hotline at 800-424-9346 (in the Washington, D.C. area at 703-412-9810).

I. Background

This policy guidance establishes EPA's and DOJ's position regarding possible enforcement actions against lenders and government entities who are associated with property that may be subject to a CERCLA response action. EPA and DOJ recognize CERCLA's unintended effects on lenders and government entities and the relative concern from these parties regarding the consequences of potential enforcement. In light of these concerns, lenders may refuse to lend money to an owner or developer of a contaminated or potentially contaminated property or they may hesitate in exercising their rights as secured parties if such loans are made. Additionally, government entities that involuntarily acquire property may be reluctant to perform certain actions related to contaminated or potentially contaminated property.

The language of Section 101(20)(A) leaves lenders and other interested parties uncertain as to which types of actions -- such as monitoring vessel or facility operations, requiring compliance with applicable laws, and refinancing or undertaking loan workouts -- they may take to protect their security interests without risking EPA enforcement under CERCLA. Courts have not always agreed on when a lender's actions are "primarily to protect a security interest," and what degree of "participation in the management" of the property will forfeit the lender's eligibility for the exemption. This uncertainty was heightened by dicta in the

Fleet Factors[2] opinion, where the circuit court suggested that a lender participating in the management of a vessel or facility "to a degree indicating a capacity to influence the corporation's treatment of hazardous waste" could be considered liable under CERCLA.[3]

The lack of legislative history on and consistent court treatment of the CERCLA Section 101(20)(A) security interest exemption prompted EPA to address potential lender liability for cleanup costs at CERCLA sites in the Lender Liability Rule, which was promulgated in April 1992.

Regarding the exemption for government entities, neither the legislative history of CERCLA Sections 101(20)(D) and 101(35)(A) nor the case law provide sufficient explanation of when a property acquisition or transfer is considered involuntary. Thus, in the Rule, EPA also clarified the language of these sections, describing when a government entity was exempted from CERCLA enforcement as an owner or operator or was protected from third party actions.

However, in Kelley v. EPA,[4] the Circuit Court of Appeals for the District of Columbia vacated the Rule on the ground that EPA lacked authority to issue the Rule as a binding regulation. Nevertheless, the Kelley decision did not preclude EPA and DOJ from following the provisions of the Rule as enforcement policy, and the agencies have generally done so.

II. Policy Statement

This memorandum reaffirms EPA's and DOJ's intentions to follow the provisions of the Lender Liability Rule as enforcement policy. EPA and DOJ endorse the interpretations and rationales announced in the Rule and its preamble. The purpose of this memorandum is to provide guidance within EPA and DOJ on the exercise of enforcement discretion in determining whether particular lenders and government entities that acquire property involuntarily may be subject to CERCLA enforcement actions. In making such determinations, EPA and DOJ personnel should consult both the regulatory text of the Rule and the accompanying preamble language in exercising their

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[2] United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

[3] Fleet, 901 F.2d at 1557.

[4] 15 F.3d 1100 (D.C . Cir. 1994), *reh. denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, American Bankers Ass'n v. Kelly, 115 S.Ct. 900 (1995).

enforcement discretion under CERCLA as to lenders and government entities that acquire property involuntarily.[5]

After the promulgation of the Lender Liability Rule, but prior to its invalidation, several district and circuit courts adhered to the terms of the Rule or interpreted the statute in a manner consistent with the Rule.[6] Moreover, notwithstanding the Rule's invalidation in Kelley, since that decision several courts have also interpreted the statute in a way that is consistent with the Rule.[7] EPA and DOJ believe that this case law is further evidence of the reasonableness of the agencies' interpretation of the statute, as embodied formerly in the Rule and now in this policy statement.

III. Use of This Policy

The policies and procedures established in this document and any internal procedures adopted for its implementation are intended solely as guidance for employees of EPA and DOJ. They do not constitute rulemaking and may not be relied on to create a right or benefit, substantive or procedural, enforceable at law, or in equity, by any person. EPA and DOJ reserve the right to act at variance with this guidance or its internal implementing procedures.

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[5] *See* 57 Fed. Reg. 18,344 (April 29, 1992)(text and preamble).

[6] *See* Northeast Doran, Inc. v. Key Bank of Maine, 15 F.3rd 1 (1st Cir. 1994); United States v. McLamb, 5 F.3d 69 (4th Cir. 1993); Waterville Indus., Inc. v. Finance Authority of Maine, 984 F. 2d 549 (1st Cir. 1993); United States v. Fleet Factors, 901 F.2d 1150 (11th Cir. 1990), on remand, 821 F. Supp. 07 (S.D. Ga. 1993); Kelley v. Tiscornia, 810 F. Supp. 901 (W.D. Mich. 1993); Grantors to the Silresim Site Trust v. State Street Bank & Trust Co., 23 ELR 20428 (D. Mass. Nov. 24, 1992).

[7] *See* Z & Z Leasing, Inc. v. Graying Reel, Inc., 873 F.Supp. 51 (E.D. Mich. 1995); Kemp Industries, Inc. v. Safety Light Corp., 857 F.Supp. 373 (D.N.J. 1994).

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 10-3

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MAY 24 1995

MEMORANDUM

SUBJECT: Final Policy Toward Owners of Property Containing Contaminated Aquifers

FROM: Bruce M. Diamond, Director
Office of Site Remediation Enforcement

TO: Regional Counsel (Region 1-10)
Waste Management Division Directors (Region 1-10)
Brownfields Coordinators (Regions 1-10)

Attached please find the final "Policy Toward Owners of Property Containing Contaminated Aquifers." This Policy states the agency's position that, subject to certain conditions, where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement actions against the owner of such property to require the performance of response actions or the payment of response costs. Further, as outlined in the policy, EPA may consider de minimis settlements under Section 122(g)(1)(B) of CERCLA where necessary to protect such landowners from contribution suits.

The development of this policy was announced by the Administrator as part of the Superfund Administrative Reforms. It is also a component of the Agency's Brownfields Initiative to remove barriers to economic redevelopment.

The comments received from many Regional and Headquarters offices, as well as the Department of Justice, were very helpful in developing this Policy. I appreciate your assistance, especially given the short turnaround time.

EPA intends to publish this Policy in the Federal Register within the next 30 days.

If you have any questions about this Policy, please call Ellen Kandell at 703-603-8996, mail code 2273-G or by FAX at 703-603-9117 or 603-9119.

Attachment

cc: Elliot Laws, OSWER
Lisa Friedman, OGC
Bruce Gelber, DOJ
Linda Boornazian, PPED
Sandra Connors, RSD
Steve Luftig, OERR
Larry Reed, HSED
Earl Salo, OGC
Crane Harris, OSWER

Policy Toward Owners of Property Containing Contaminated Aquifers

I. STATEMENT OF POLICY

Based on the Agency's interpretation of CERCLA, existing EPA guidance, and EPA's Superfund program expertise, it is the Agency's position that where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs.[1] Further, EPA may consider de minimis settlements under Section 122(g)(1)(B) of CERCLA where necessary to protect such landowners from contribution suits.

This Policy is subject to the following conditions:

A) The landowner did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substances, through an act or omission. The failure to take affirmative steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, constitute an "omission" by the landowner within the meaning of this condition. This policy may not apply where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer. These cases will require fact-specific analysis.

B) The person that caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner. In cases where the landowner acquired the property, directly or indirectly, from a person that caused the original release, application of this Policy will require an analysis of whether, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances that gave rise to the contamination in the aquifer.

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[1] By this Policy, EPA does not intend to compromise or affect any right it possesses to seek access pursuant to Section 104(e) of CERCLA.

C) There is no alternative basis for the landowner's liability for the contaminated aquifer, such as liability as a generator or transporter under Section 107(a)(3) or (4) of CERCLA, or liability as an owner by reason of the existence of a source of contamination on the landowner's property other than the contamination that migrated in an aquifer from a source outside the property.

In appropriate circumstances, EPA may exercise its discretion under Section 122(g)(1)(B) to consider de minimis settlements with a landowner that satisfies the foregoing conditions. Such settlements may be particularly appropriate where such a landowner has been sued or threatened with contribution suits. EPA's Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements[2] should be consulted in connection with this circumstance.

In exchange for a covenant not to sue from the Agency and statutory contribution protection under Sections 113(f)(2) and 122(g)(5) of CERCLA, EPA may seek consideration from the landowner,[3] such as the landowner's full cooperation (including but not limited to providing access) in evaluating the need for and implementing institutional controls or any other response actions at the site.[4]

The Agency intends to use its Section 104(e) information gathering authority under CERCLA, 42 U.S.C. § 9604(e), as appropriate, to verify the presence of the conditions under which the Policy would be applied, unless the source of contamination and lack of culpability of the property owner are otherwise

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[2] See 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, OSWER Directive No. 9835.9, June 6, 1989, 54 Fed. Reg. 34,235 (August 18, 1989) (hereinafter "Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements").

[3] A more complete discussion of the appropriate consideration that may be sought under Section 122(g)(1)(B) settlements is contained in Section IV.B.3.a. of Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, supra note 2.

[4] The Agency has developed guidance which explains the authorities and procedures by which EPA obtains access or information. See Entry and Continued Access under CERCLA, OSWER Directive #9829.2, June 5, 1987; Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, OSWER Directive 9834.4-A, August 25, 1988.

clear.[5] Accordingly, failure by an property owner to provide certified responses to EPA's information requests may, by itself, be grounds for EPA to decline to offer a Section 122(g)(1)(B) de minimis settlement.

II. DISCUSSION

A. Background

Nationwide there are numerous sites that are the subject of response actions under CERCLA due to contaminated groundwater. Approximately 85% of the sites on the National Priorities List have some degree of groundwater contamination. Natural subsurface processes, such as infiltration and groundwater flow, often carry contaminants relatively large distances from their sources. Thus, the plume of contaminated groundwater may be relatively long and/or extend over a large area. For this reason, it is sometimes difficult to determine the source or sources of such contamination.

Any person owning property to which contamination has migrated in an aquifer faces potential uncertainty with respect to liability as an "owner" under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9601(a)(1), even where such owner has had no participation in the handling of hazardous substances, and has taken no action to exacerbate the release.

Some owners of property containing contaminated aquifers have experienced difficulty selling these properties or obtaining financing for development because prospective purchasers and lenders sometimes view the potential for CERCLA liability as a significant risk. The Agency is concerned that such unintended effects are having an adverse impact on property owners and on the ability of communities to develop or redevelop property.

EPA is issuing this policy to address the concerns raised by owners of property to which contamination has migrated in an aquifer, as well as lenders and prospective purchasers of such property. The intent of this policy is to lower the barriers to transfer of such property by reducing uncertainty regarding the possibility that EPA or third parties may take actions against these landowners.

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[5] See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, supra note 2, for an outline of the types of information which should be provided by the landowner to support a request for a de minimis settlement.

B. Existing Agency Policy

This policy is related to other guidance that EPA has issued. The Agency has previously published guidance on issues of landowner liability and de minimis landowner settlements.[6] Moreover, in other EPA policies, EPA has asserted its enforcement discretion in determining which parties not to pursue.[7]

C. Basis for the Policy

1. The Section 107(b)(3) Defense

Section 107(a)(1) of CERCLA imposes liability on an owner or operator of a "facility" from which there is a release or threatened release of a hazardous substance.[8] A "facility" is defined under Section 101(9) as including any "area where a hazardous substance has . . . come to be located." The standard of liability imposed under Section 107 is strict, and the government need not prove that an owner contributed to the release in any manner to establish a prima facie case.[9] However, Section 107(b)(3) provides an affirmative defense to liability where the release or threat of release was caused

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[6] See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, supra note 2. This guidance analyzes the language in Sections 107(b)(3) and 122(g)(1)(B) of CERCLA.

[7] See, e.g., Policy Towards Owners of Residential Property at Superfund Sites, OSWER Directive #9834.6, (July 3, 1991) (hereinafter "Residential Property Owners Policy") (stating Agency policy not to take enforcement actions against an owner of residential property unless homeowner's activities led to a release); National Priorities List for Uncontrolled Hazardous Waste Sites, 60 Fed. Reg. 20330, 20333 (April 25, 1995). In this notice the Residential Property Owners Policy was applied to "...residential property owners whose property is located above a groundwater plume that is proposed to or on the NPL, where the residential property owner did not contribute to the contamination of the site." See also, Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Waste, OSWER Directive # 9834.13, (December 6, 1989).

[8] EPA has taken the position that lessees may be "owners" for purposes of liability. See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, supra note 2, footnote 10.

[9] See, e.g., U.S. v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989)("CERCLA contemplates strict liability for landowners").

solely by "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant . . ." In order to invoke this defense, the defendant must additionally establish, by a preponderance of the evidence, that "(a) he exercised due care with respect to the hazardous substance concerned taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b)(3).

a. Due Care and Precautions

An owner of property may typically be unable to detect by reasonable means when or whether hazardous substances have come to be located beneath the property due to subsurface migration in an aquifer from a source or sources outside the property. Based on EPA's interpretation of CERCLA, it is the Agency's position that where the release or threat of release was caused solely by an unrelated third party at a location off the landowner's property, the landowner is not required to take any affirmative steps to investigate or prevent the activities that gave rise to the original release in order to satisfy the "due care" or "precautions" elements of the Section 107(b)(3) defense.

Not only is groundwater contamination difficult to detect, but once identified, it is often difficult to mitigate or address without extensive studies and pump and treat remediation. Based on EPA's technical experience and the Agency's interpretation of CERCLA, EPA has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems, is not, in the absence of exceptional circumstances, a failure to exercise "due care" or "take precautions" within the meaning of Section 107(b)(3).

The latter conclusion does not necessarily apply in the case where the property contains a groundwater well and the existence or operation of this well may affect the migration of contamination in the affected aquifer. In such a case, application of the "due care" and "precautions" tests of Section 107(b)(3) and evaluation of the appropriateness of a de minimis settlement under Section 122(g)(1)(B) require a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer. Accordingly, this Policy does not apply in the case where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected

aquifer. In such a case, however, the landowner may choose to assert a Section 107(b)(3) defense, depending on the case-specific facts and circumstances, and EPA may still exercise its discretion to enter into a Section 122(g)(1)(B) de minimis settlement.

b. Contractual Relationship

The Section 107(b)(3) defense is not available if the act or omission causing the release occurred in connection with a direct or indirect contractual relationship between the defendant and the third party that caused the release. Under Section 101(35)(A) of CERCLA, a "contractual relationship" for this purpose includes any land contract, deed, or instrument transferring title to or possession of real property, except in limited specified circumstances. Thus, application of the defense in the circumstances addressed by this Policy requires an examination of whether the landowner acquired the property, directly or indirectly, from a person that caused the original release. An example of this scenario would be where the property at issue was originally part of a larger parcel owned by the person that caused the release. If the larger parcel was subsequently subdivided, and the subdivided property was eventually sold to the current landowner, there may be a direct or indirect "contractual relationship" between the person that caused the release and the current landowner.

Even if the landowner acquired the property, directly or indirectly, from a person that caused the original release, this may or may not constitute a "contractual relationship" within the meaning of Section 101(35)(A), precluding the availability of the Section 107(b)(3) defense. Land contracts or instruments transferring title are **not** considered "contractual relationships" if the land was acquired after the disposal or placement of the hazardous substances on, in or at the facility under Section 101(35)(A) and the landowner establishes, pursuant to Section 101(35)(A)(i), that, at the time of the acquisition, the landowner "did not know and had no reason to know that any hazardous substance which is the subject of the release . . . was disposed of on, in, or at the facility."[10] Thus, in the subdivision scenario described above, the current landowner might still qualify for the Section 107(b)(3) defense if he or she did not know or have reason to know that the original landowner had disposed of hazardous substances elsewhere on the larger parcel.

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[10] Section 101(35)(A) also excludes from the definition of "contractual relationship" certain acquisitions of property by government entities and certain acquisitions by inheritance or bequest, so long as the other requirements of Section 101(35)(A) are met. See 42 U.S.C. § 101(35)(A)(ii) and (iii).

2. Settlements Under Section 122(g)(1)(B)

To address concerns that strict liability under Section 107(a)(1) could cause inequitable results with respect to landowners who had not been involved in hazardous substance disposal activities, Congress authorized the Agency to enter into de minimis settlements with certain property owners under Section 122(g)(1)(B) of CERCLA, 42 U.S.C. § 9622 (g)(1)(B). Under this Section, when the Agency determines that a settlement is "practicable and in the public interest," it "shall as promptly as possible reach a final settlement" if the settlement "involves only a minor portion of the response costs at the facility concerned" and the Agency determines that the potentially responsible party: "(i) is an 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 .... through any act or omission."[11]

The requirements which must be satisfied in order for the Agency to consider a settlement with landowners under the de minimis settlement provisions of Section 122(g)(1)(B) are substantially the same as the elements which must be proved at trial in order for a landowner to establish a third party defense under Section 107(b)(3), as described above.[12]

D. Use of the Policy

This Policy does not constitute rulemaking by the Agency and is not intended and cannot be relied on to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. Furthermore, the Agency may take action at variance with this Policy.

For further information concerning this Policy, please contact Ellen Kandell in the Office of Site Remediation Enforcement at (703) 603-8996.

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[11] A detailed discussion of each of these components of Section 122(g)(1)(B) and guidance on structuring settlements under this Section are provided in the Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, supra note 2.

[12] Id.

United States
Environmental Protection Agency
August 1996

Superfund Reform:
Orphan Share Implementation

Tab 10-4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

JUL 3 1991

OSWER Directive #9834.6

MEMORANDUM

SUBJECT: Policy Towards Owners of Residential Property at Superfund Sites

FROM: Don R. Clay
Assistant Administrator
Office of Solid Waste and Emergency Response

Raymond B. Ludwiszewski
Acting Assistant Administrator
Office of Enforcement

TO: Regional Administrators, Regions I - X

This memorandum transmits to you the Agency's "Policy Towards Owners of Residential Property at Superfund Sites."

The guidance sets forth the Agency's enforcement policy towards owners of residential property located on a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

This guidance has been developed jointly by the Office of Solid Waste and Emergency Response and Office of Enforcement. The guidance reflects input from the Regions, Office of General Counsel and the Department of Justice. There have been several drafts of this guidance and changes based on comments have been incorporated. We thank you for your assistance.

Attachment

cc: Director, Waste Management Division,
Regions I, IV, V, and VII
Director, Emergency and Remedial Response Division,
Region II
Director, Hazardous Waste Management Division,
Regions III, VI, VIII, and IX
Director, Hazardous Waste Division, Region X
Director, Environmental Services Division,
Regions I, VI, and VII
Regional Counsel, Regions I-X

OSWER Directive #9834.6

POLICY TOWARDS OWNERS OF RESIDENTIAL PROPERTY AT SUPERFUND SITES

U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
Office of Enforcement
Washington, D.C. 20460

I. INTRODUCTION

A. Purpose and Summary

This guidance describes EPA's policy for enforcement actions to recover response costs or to require response actions under 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), with respect to owners of residential property located on a Superfund site.

Under this policy, EPA, in the exercise of its enforcement discretion, will not take enforcement actions against an owner of residential property to require such owner to undertake response actions or pay response costs, unless the residential homeowner's activities lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site.[1] This policy does not apply when an owner of residential property fails to cooperate with the Agency's response actions or with a state that is taking a response action under a cooperative agreement with EPA pursuant to section 104(d)(1) of CERCLA. This policy also does not apply where the owner of residential property fails to meet other CERCLA obligations, or uses the residential property in any manner inconsistent with residential use.

EPA is issuing this policy to address concerns raised by owners of residential property, and to provide a nationally consistent approach on this issue.

B. Background

Several sites that are the subject of a response action (removal or remedial activities) under CERCLA include properties that are used exclusively as single family residences (one-to-four dwelling units). At several larger sites, soil or ground water contamination may be so extensive that there are several hundred of these residential properties located on a Superfund site.

Some owners of residential property located on a Superfund site are concerned about potential liability for performance of a response action or payment of cleanup costs because they may come

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[1] This policy does not provide an exemption from potential CERCLA liability for any party; it is a statement of the Agency's enforcement discretion. Liability is governed by Section 107 of CERCLA.

within the definition of "owner" under the statute.[2] Owners of residential property located on a Superfund site have expressed the concern that they may be unable to sell these properties because the buyer and the lending institution may also be concerned about potential liability.

C. Past Agency Practice and Basis for Policy

In the past, the Agency has not required owners of residential property located on a Superfund site to perform response actions or pay response costs except where the residential homeowners' activities lead to a release or threat of a release of hazardous substances, resulting in the taking of a response action at the site.[3] Despite this general practice, some owners of residential property have asked EPA for individual assurances that the Agency not take an enforcement action against them for performance of the response action or payment of response costs. The Agency has not been able to provide individual owners of residential property with assurances of no enforcement action outside the framework of a legal settlement, and this policy does not alter EPA's policy of not providing no action assurances.[4]

This guidance instead constitutes a general statement of policy regarding the Agency's exercise of enforcement discretion with respect to owners of residential property located on a Superfund site. The purpose of this policy is to continue the Agency's past practice and to provide guidance for Agency enforcement staff.

II. DEFINITION OF KEY TERMS

The following definitions are applicable for the limited purposes of this policy, and do not represent the Agency's interpretation of these or any similar or related statutory terms in any context other than this policy:

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[2] Under section 107(a)(1) of CERCLA, a person is liable if it is the owner or operator of a facility. 42 U.S.C. Section 9607(a)(1). Under section 101(9)(B) of CERCLA, a facility is defined to include "any site or area where a hazardous substance...has...come to be located." 42 U.S.C. Section 9601(9)(B).

[3] The Agency has required owners of residential property to provide access to the residential property in order to assess the need for a response action or implement a response action, and to otherwise cooperate with cleanup activities.

[4] See "Policy Against No Action Assurances," (November 15, 1984).

- The term "owner of residential property," means a person, as defined under section 101(21) of CERCLA, who owns residential property located on a Superfund site, and who uses or allows the use of the residential property exclusively for residential purposes. The term also includes owners who make improvements that are consistent with residential use. Such term does not include 1) any owner who has conducted or permitted the generation, transportation, storage, treatment or handling of hazardous substances on the residential property other than in quantities and uses typical of residential uses; 2) any owner who disposes of hazardous substances on the residential property resulting in the taking of a response action; and 3) any owner who acquires or develops the residential property for commercial use, or for any other use inconsistent with residential use.

- The term "residential property," refers to single family residences of one-to-four dwelling units, including accessory land, buildings or improvements incidental to such dwellings which are exclusively for residential use.[5]

- The phrase "located on a Superfund site" means properties that are within an area designated for investigation or study under CERCLA, listed as a Superfund site on the National Priorities List, identified as the subject of planned or current removal or remedial activities, where hazardous substances have come to be located, or which are subject to or affected by a removal or remedial action.

III. STATEMENT OF POLICY

In implementing CERCLA, EPA may use enforcement discretion in pursuing potentially responsible parties (PRPs) for enforcement actions. It is within the Agency's enforcement discretion to identify appropriate PRPs to perform response actions or pay response costs.[6]

In the exercise of its enforcement discretion, the Agency

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[5] EPA notes that this definition of "residential property" is consistent with the designation for single family residences under the National Housing Act, 12 U.S.C. Section 1701.

[6] See generally, Heckler v. Chaney, 470 U.S. 821 (1985); U.S. v. Helen Kramer, et al, No. 89-4340 (D.N.J. February 8, 1991).

has determined that it will not require owners of residential property located on a Superfund site to perform a response action or pay response costs if the owner's activities are consistent with this policy.[7] Under this policy, EPA's exercise of enforcement discretion will extend to lessees of residential property provided that the lessees' activities are consistent with this policy. This policy also applies to persons who acquire residential property through purchase, foreclosure, gift, inheritance or other form of acquisition, as long as those persons' activities after acquisition are consistent with this policy.[8]

This policy does not apply to an owner of residential property who has undertaken activities leading to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site.[9] In such situations, the Agency would contemplate bringing an enforcement action against the owner of the residential property to perform a response action or to pay response costs. In addition, if an owner of residential property located on a Superfund site develops or improves the property in a manner inconsistent with residential use, or the development of the residential property leads to a release or threat of release of hazardous substances resulting in the taking of a response action at the site, then the owner would not be within the scope of this policy. Also, if an owner of residential property fails to provide the Agency with access to the residential property located on a Superfund site to evaluate the need for a response action or to implement a response action, or fails to comply with any other CERCLA obligations, this policy would not apply.[10]

This exercise of enforcement discretion applies to owners of residential property located on a Superfund site who purchased or

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[7] Consistent with the Agency's no action assurance policy (see footnote 4), this policy does not require the Agency to make prospective determinations of whether particular owners of residential property meet the requirements of this policy.

[8] If the Agency has perfected a federal lien on the residential property prior to the acquisition by the new owner, this policy does not affect the status of that lien.

[9] The Agency's experience has been that in general, activities which are undertaken consistent with single family residential use do not lead to a release or threat of a release of hazardous substances, resulting in a response action being taken at a site.

[10] See Section IV of this policy for a further discussion of other CERCLA obligations.

sold the residential property in the past or who purchase or sell the residential property after the issuance of this policy. Whether an owner of residential property has or had knowledge or reason to know that contamination was present on the site at the time of purchase or sale of the residential property will not affect EPA's exercise of enforcement discretion under this policy.

This policy is not based on, and has no effect on, the defenses to liability available to an owner of residential property, or any other person, under section 107(b) of CERCLA. This policy is not related to the "innocent landowner defense" described in sections 107(b)(3) and 101(35) of CERCLA; it is based entirely on EPA's enforcement discretion. Thus, the ability of an owner of residential property to assert any defense to liability is unaffected by this policy.

IV. OTHER CERCLA OBLIGATIONS

Although the Agency, in the exercise of its enforcement discretion, will not require owners of residential property to undertake or pay for response actions if the owners' activities are consistent with this policy, to benefit from this policy an owner of residential property must comply with other CERCLA obligations.

To come within the scope of this policy, owners of residential property must provide access to the residential property when requested by EPA, or report information requested by the Agency.[11] In addition, owners of residential property must cooperate with EPA and not interfere with any of the Agency's activities on the residential property taken to respond to the release or threat of release. Similarly, owners of residential property must cooperate with and not interfere with the activities of a state that is taking a response action under a cooperative agreement with EPA pursuant to section 104(d)(1) of CERCLA. Moreover, owners of residential property must comply with institutional controls placed on their residential property in order to facilitate performance of a response action and to protect human health and the environment.[12]

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[11] The Agency has developed guidance which explains the authorities and procedures by which EPA obtains access or information. See OSWER Directive #9829.2, Entry and Continued Access under CERCLA (June 5, 1987). See also OSWER Directive #9834.4-A, Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas (August 25, 1988).

[12] Institutional controls are conditions or limitations commonly placed on property by local or state authorities to ensure that activities (e.g., excavation, construction or other

United States
Environmental Protection Agency

August 1996

Superfund Reform:
Orphan Share Implementation

Tab 10-5

United States
Environmental Protection
Agency

December 1989

Solid Waste And Emergency Response (OS-510)

EPA

Environmental Fact Sheet

Interim CERCLA Municipal Settlement Policy

Overview

The Environmental Protection Agency (EPA) has developed an interim policy on how municipalities and municipal waste will be included in the Superfund settlement process 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). This interim policy focuses on situations where EPA is seeking voluntary settlement of cleanup at Superfund sites that involve municipalities or municipal wastes. It also addresses EPA's treatment of private parties and certain kinds of commercial, institutional, or industrial wastes. Its publication follows nearly two years of discussions with state and local governments and organizations, industry and environmental groups, as well as Congressional staff. EPA has listened to all points of view in developing the new approach, which it believes is both fair and manageable.

EPA is publishing the interim policy at this time to inform the public about the proposed new nationwide approach and to solicit public comment. The policy provides EPA's Regional offices for the first time with nationally consistent guidelines for exercising their enforcement discretion in dealing with municipalities and municipal wastes in the Superfund settlement process. It also provides municipalities and private parties who may be potentially liable for the cost of Superfund cleanups with a sense about how EPA will treat them in the settlement process.

Content

The interim policy generally provides that wastes from households will not be included by EPA in the Superfund settlement process, and that, when municipalities are potentially liable for cleanup, they will be treated in the same manner as private parties.

EPA generally will continue to pursue both municipal and private-party owners or operators of facilities that have become Superfund sites. EPA generally will also continue to pursue both municipal and private-party generators or transporters of hazardous substances.

EPA generally will not pursue municipalities and private parties who are generators or transporters of **municipal solid waste or sewage sludge** to help pay for Superfund cleanup costs when the waste is believed to be derived from households, except in some truly exceptional situations. EPA may pursue such parties, however, if either waste contains a hazardous substance from a commercial, institutional, or industrial process or activity. EPA generally will not pursue generators or transporters of **trash from a commercial, institutional, or industrial entity** when the content of the waste is believed to be very similar to that derived from households. EPA generally will pursue generators or transporters of **low-hazardous industrial wastes** such as certain paint sludges and industrial wastewaters because such wastes are derived from a commercial, institutional, or industrial process or activity.

When municipalities are considered to be potentially liable for cleanup costs, they will be treated essentially the same as private parties in the Superfund settlement process although delayed payments, delayed payment schedules, and in-kind contributions may be available to some municipalities under certain circumstances.

Significance

Involving municipalities and municipal wastes in the settlement process is an issue because questions have been raised about how such parties and wastes should be treated in the settlement process. Until the development of this interim policy, EPA had not addressed these questions from a national perspective.

This issue is important because about 25 percent of the sites proposed for or actually included on EPA's National Priorities List (NPL) for Superfund cleanup are sites that involve municipalities or municipal wastes. Of those, about one in five sites is a municipal landfill. EPA expects the number of NPL sites involving municipalities or municipal waste to increase in the future. This issue is particularly complex because sites that typically involve municipalities or municipal waste are often municipal landfills that include multiple responsible parties (sometimes hundreds of parties), multiple sources of wastes (often municipal and industrial wastes), as well as diverse waste streams (in terms of amount and toxicity).

The important questions addressed in the interim policy are who should be included in the information gathering process, who should be considered potentially responsible for cleanup costs by EPA, how municipalities should be treated in the settlement process once they are considered potentially liable by EPA, and how the treatment of municipalities and municipal wastes affect EPA's treatment of private parties and certain kinds of commercial, institutional, or industrial wastes. Private parties and certain kinds of commercial, institutional, or industrial wastes are an issue for this interim policy because private parties sometimes handle municipal waste or generate waste streams that may be considered to be similar to municipal wastes, and because municipal and industrial wastes are often co-disposed at individual sites.

Public Involvement

In March 1988, EPA sponsored a Municipal Settlement Conference that was attended by over 100 representatives of state and local governments and organizations; industry, environmental, and other groups; as well as Congressional staff. To continue this dialogue with interested parties, EPA established the Municipal Settlement Discussion Group which met in June, August, and October 1988. These forums have been open to the public and have been organized primarily as information exchange mechanisms; EPA has used these forums to inform interested parties about the issues EPA is addressing as part of the interim policy as well as to stimulate public debate on these issues.

Forum Participants have included: the National League of Cities; the U.S. Conference of Mayors; the National Association of Towns and Township Officials; National Association of Counties; the International City Managers Association; the Government Refuse Collection and Disposal Association; the National Governors' Association; the National Association of Attorneys General; the Association of State and Territorial Solid Waste Management Officials; the U.S. Chamber of Commerce; the National Solid Waste Management Association; the National Association of Manufacturers; the Chemical Manufacturers Association; the American Petroleum Institute; Waste Management, Inc.; Browning-Ferris, Inc.; the Natural Resources Defense Council; the Conservation Foundation; and Congressional staff. Other representatives from private companies, individual state and local governments, and law firms representing municipal and private party clients have either attended and participated in these forums or have been kept informed through EPA's minutes of these meetings.

Comments Sought

The interim policy is expected to be published in the Federal Register for public comment on December 12, 1989. The public will be provided with 60 days from the date of publication to review and comment on the interim policy. EPA may change the interim policy at a later date or address additional issues in response to public comment or as EPA gains experience in implementing it over the next several months.

Who To Contact

For further information on this interim policy, please contact Kathleen MacKinnon in the Office of Waste Programs Enforcement at 202-475-6771.

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

DEC - 6 1989

MEMORANDUM

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

SUBJECT: Transmittal of "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (referred to as the "Municipal Settlement Policy")

FROM: Don R. Clay
Assistant Administrator

TO: Regional Administrators

Attached is a package containing the interim "Municipal Settlement Policy" and other related documents as follows:

- The "Interim CERCLA Municipal Settlement Policy Fact Sheet" which summarizes certain key provisions of the interim policy.
- The "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" which provides guidance to the Regions on how to involve municipalities and wastes in the Superfund settlement process and other related issues.
- The "Federal Register Notice" which explains to the public the process the Agency used for developing this interim policy, the Agency's rationale for this interim decision, and how they may provide the Agency with formal comment.

Attachments

cc:

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

INTERIM CERCLA MUNICIPAL SETTLEMENT POLICY FACT SHEET

DECEMBER 1989
OFFICE OF WASTE PROGRAMS ENFORCEMENT

I. INTRODUCTION

This fact sheet summarizes certain key provisions of the "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" (OSWER Directive #9834.13); it does not cover all aspects of the interim policy nor provide definitions of key terms. The Municipal Settlement Policy has been developed to provide the Regions with national guidance on how to involve municipalities and municipal wastes (i.e., municipal solid waste (MSW) or sewage sludge) in the Superfund settlement process. It also addresses how the treatment of municipalities and municipal wastes affects the treatment of private parties and certain kinds of commercial, institutional, or industrial wastes.

II. CERCLA LIABILITY

CERCLA does not provide an exemption from liability for municipalities nor for municipal wastes. Municipalities may be potentially responsible parties (PRPs) like private parties if they fall within the categories of liability specified under Section 107(a) of CERCLA (e.g., if they are owners/operators of facilities, or generators/transporters of hazardous substances). Municipal wastes may be considered hazardous substances if they are covered under the definition of hazardous substances in Section 101(14) of CERCLA and if they are the subject of a release or threatened release. The interim policy does not provide an exemption from legal liability for any party or any substance; potential liability continues to apply in all situations covered under Section 107 of CERCLA.

III. INFORMATION GATHERING

All owners/operators and generators/transporters should generally be included in the information gathering process (e.g., they should all generally receive Section 104(e) information request letters). This includes municipal owners/operators of facilities as well as municipal and private party generators/transporters of municipal wastes.

IV. NOTIFICATION

Owners/operators: Both municipal and private party past and present owners/operators should generally receive notice letters.

Generators/transporters of municipal solid waste: Municipal and private party generators/transporters of MSW will not generally be notified as PRPs unless:

- the Region obtains site-specific information that the MSW contains a hazardous substance; AND
- the Region has reason to believe that the hazardous substance is derived from a commercial, institutional, or industrial process or activity.

Notwithstanding this general policy, EPA may consider notifying generators/transporters for MSW containing a hazardous substance derived only from households in truly exceptional situations where the total contribution of commercial, institutional, and industrial hazardous waste by private parties is insignificant when compared to the MSW.

Generators/transporters of sewage sludge: Municipal and private party generators/transporters of sewage sludge will not generally be notified as PRPs unless:

- the Region obtains site-specific information that the sewage sludge contains a hazardous substance; AND
- the Region has reason to believe that the hazardous substance is derived from a commercial, institutional, or industrial process or activity.

Generators/transporters of trash from a commercial, institutional, or industrial entity: Parties who are generators/transporters of trash from a commercial, institutional, or industrial entity will not generally be notified as PRPs if such parties demonstrate to the Region that:

- none of the hazardous substances contained in the trash are derived from a commercial, institutional, or industrial process or activity; AND

the amount and toxicity of the hazardous substances contained in the trash do not exceed those which one would expect to find in common household trash.

Generators/transporters of any other hazardous substance, including low-hazardous industrial wastes: Municipalities and private parties who are generators/transporters of any hazardous substance or any substance that contains a hazardous substance (except those discussed above) will generally be notified as PRPs. This includes low-hazardous industrial wastes like certain paint sludges and industrial wastewaters.

V. SETTLEMENTS

The overall process and goals for reaching settlements at sites involving municipalities or municipal wastes is the same as for other Superfund sites (e.g., to reach one settlement agreement), although separate settlements like de minimis settlements may be used where appropriate.

Nonetheless, there are some settlement provisions that may be particularly suitable for municipal PRPs (e.g., delayed payments, delayed payment schedules, and in-kind contributions). These settlement provisions are not routinely available to municipal PRPs, but may be considered where a municipality has successfully demonstrated to EPA that they are appropriate. These settlement provisions may be separate settlements or may be folded into a larger settlement that includes private parties. Although these settlement provisions may be particularly appropriate for municipalities, they may be available to private parties, such as certain small businesses, where appropriate.

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

OSWER DIRECTIVE
#9834.13

DEC - 6 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes

FROM: Don R. Clay
Assistant Administrator

TO: Regional Administrators, Regions I - X

I. INTRODUCTION

A) Focus of Interim Policy

This memorandum establishes EPA's interim policy on settlements involving municipalities or municipal wastes 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). In particular, this interim policy indicates how EPA will exercise its enforcement discretion when pursuing settlements which involve municipalities or municipal wastes. The municipal wastes addressed by this interim policy are municipal solid waste (MSW) and sewage sludge as defined below. This interim policy has been developed to provide a consistent Agency-wide approach for addressing municipalities and municipal wastes in the Superfund settlement process.

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[1] This interim policy does not provide an exemption from potential CERCLA liability for any party; potential liability continues to apply in all situations covered under Section 107 of CERCLA.

Although this interim policy focuses on municipalities and municipal wastes, it addresses how private parties and certain kinds of commercial, institutional, or industrial wastes will be handled in the settlement process as well. It is important to address private parties and certain kinds of commercial, institutional, or industrial wastes in this interim policy because private parties sometimes handle municipal wastes or wastes of a similar nature and because municipal and private party waste streams are sometimes co-disposed at sites, particularly municipal landfills. The kinds of commercial, institutional, or industrial wastes covered by this interim policy include "trash from a commercial, institutional, or industrial entity" and "low-hazardous industrial wastes" as defined below.

There are three fundamental issues addressed by this interim policy. First is whether to notify generators/transporters of MSW or sewage sludge that they are considered to be potentially responsible parties (PRPs) and to include them in the Superfund settlement process. Such parties are usually municipalities, although they may include private parties as well. Second is how municipalities should be handled in the Superfund settlement process when the decision is made to notify them that they are PRPs under Section 107(a) of CERCLA. Third is how the treatment of municipalities and municipal wastes under this interim policy affects the treatment of private parties and certain kinds of

commercial, institutional, or industrial wastes in the Superfund settlement process.

Key questions specifically addressed as part of this interim policy include the following:

- Information Gathering: Should municipalities be included in the Agency's information gathering process? Should generators/transporters of MSW or sewage sludge be included in the information gathering process?
- Notification: Should municipalities be notified that they are PRPs? Should generators/transporters of MSW or sewage sludge be notified as PRPs?
- Settlements: How should municipalities be handled in the Superfund settlement process? What settlement process and settlement tools should be used to facilitate settlement involving municipalities or municipal wastes?
- Private Parties: How does the treatment of municipalities and municipal wastes affect the Agency's treatment of private parties and certain kinds of commercial, institutional, or industrial wastes?

B) Key Terms Used in Interim Policy[2]

The following defines the key terms used in this interim policy:

- The term "municipalities" refers to any political subdivision of a State and may include cities, counties, towns, townships, and other local governmental entities.
- The term "municipal solid waste" refers to solid waste generated primarily by households, but may include some contribution of wastes from commercial, institutional and industrial sources as well. As defined under the Resource Conservation and Recovery Act (RCRA), MSW contains only those wastes which are not required to be managed as hazardous wastes under Subtitle C of RCRA (e.g., non-hazardous substances, household hazardous wastes (HHW), or small quantity generator (SQG) wastes). Although the actual composition of such wastes varies considerably at individual sites, MSW is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and

[2] The definitions provided under this section are for the purpose of this interim policy only. Where possible, this interim policy includes already existing definitions used under other Federal environmental programs (e.g., under the Resource Conservation and Recovery Act or the Clean Water Act). However, nothing in this interim policy affects the regulatory efforts of these other programs.

aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents) as well as small quantity generator wastes.[3] Many industrial solid wastes and some commercial and institutional solid wastes are managed separately from household wastes, but may enter the MSW waste stream.

- The term "municipal landfill" refers to any landfill, whether publicly or privately owned, that has received municipal solid waste for disposal.
- The term "sewage sludge" refers to any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage.
- The term "trash from a commercial, institutional, or industrial entity" refers to waste which is very

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[3] All household wastes, including household hazardous wastes, are unconditionally exempt from the Federal hazardous waste regulations promulgated under Subtitle C of RCRA (See 40 CFR Section 261.4 (b)(1)). With regard to non-household sources of solid waste, if such waste is not a listed or characteristic hazardous waste accumulated in quantities exceeding the small quantity generator limitations (i.e., less than 100 kg/month of hazardous wastes and less than 1 kg/month for acute hazardous wastes), such waste is not required to be managed in a RCRA Subtitle C hazardous waste treatment, storage, or disposal facility (See 40 CFR Section 261.5). "Household hazardous wastes" refers to those wastes which are generated by households and would be managed as hazardous wastes under RCRA Subtitle C if they were generated by a non-household in quantities exceeding the small quantity generator limitations.

[4] The definition of sewage sludge is contained in the National Pollutant Discharge Elimination System Sewage Sludge Permit Regulations published in the Federal Register as a final rule May 2, 1989 (See 40 CFR Part 122.2).

similar to the MSW that is derived from households. This term covers only those wastes that are essentially the same as what one would expect to find in common household trash. This term does not include hazardous substances that are derived from a commercial, institutional, or industrial process or activity.

- The term "low-hazardous industrial wastes" refers to high volume wastes that contain small quantities of hazardous substances derived from an industrial, commercial, or institutional process or activity. Examples may include certain paint sludges or industrial wastewaters.

II. CERCLA LIABILITY

Important questions have been raised about whether municipalities may be PRPs and whether municipal wastes (i.e., MSW and sewage sludge) may be considered hazardous substances under CERCLA.

A) Municipalities as PRPs

The statute does not provide an exemption from liability for municipalities. Municipalities may be PRPs like private parties if municipalities fall within the categories of liability specified under Section 107(a) of CERCLA. In general, Section 107(a) establishes liability for past and present owners or operators of facilities as well as generators or transporters of hazardous substances for the release or threatened release of

hazardous substances. Such parties may be liable for the costs of responding to a release or threatened release of hazardous substances as well as for resulting damages to natural resources. The specific categories of liable parties under Section 107(a) are:

1. the owner and operator of a vessel or a facility,
2. 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,
3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, [commonly referred to as "generators"[5]], and
4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment

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[5] Persons who fall into this category are commonly referred to as "generators," although liability under this Section extends beyond "true generators" of hazardous substances to include persons who arranged for the disposal or treatment of hazardous substances owned or possessed by such party or another party. The term "generator" is used throughout this document to refer to any party who is potentially liable under Section 107(a)(3).

facilities, incineration vessels, or sites selected by such person [commonly referred to as "transporters"].

Section 107(a) describes liable parties as "persons" and the definition of "person" under Section 101(21) includes municipalities and political subdivisions of a State. Municipalities may, therefore, be PRPs as part of CERCLA's broad definition of who is potentially liable.

B) Municipal Wastes as Potential CERCLA Hazardous Substances

Similarly, the statute does not provide an exemption from liability for municipal wastes. Municipal wastes may be considered hazardous substances if they are covered under the definition of hazardous substances in Section 101(14) of CERCLA. As indicated under the definitions of MSW and sewage sludge, these municipal wastes are generally characterized by large volumes of non-hazardous substances and may contain small quantities of household hazardous or other wastes, although the actual composition of the waste streams vary considerably at individual sites. To the extent municipal wastes contain a hazardous substance that is covered under Section 101(14) of CERCLA and there is a release or threatened release, such municipal wastes may fall within the CERCLA liability framework.

III. INFORMATION GATHERING

The Regions should include all municipal and private party owners/operators and generators/transporters in the information

gathering process, including the generators/transporters of municipal wastes. This means that municipal owners/operators as well as municipal generators/transporters should generally receive Section 104(e) information request letters and should otherwise be fully included in the information gathering process like private parties. Information obtained through such letters or through other means is important for determining (among other things) whether it is appropriate to notify a party as a PRP, including whether to notify a generator/transporter of MSW or sewage sludge as discussed below.[6]

IV. NOTIFICATION OF POTENTIAL RESPONSIBILITY

A) Owners/Operators

The same approach will be used for both municipalities and private parties when determining whether to notify them as owners/operators. Specifically, such parties will generally be notified where they were past owners or operators of facilities at the time of disposal of hazardous substances, or they are present owners or operators of facilities where hazardous substances have been released or there is a threatened release.

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[6] The Regions may accept and consider credible site-specific information from any party to supplement their own information gathering efforts as appropriate.

B) Generators/Transporters[7]

1. Municipal solid waste: Municipalities and private parties will be treated the same when determining whether to notify them as PRPs when they are generators/transporters of MSW. Specifically, such parties will not generally be notified unless:

- o the Region obtains site-specific information that the MSW contains a hazardous substance;[8] AND
- o the Region has reason to believe that the hazardous substance is derived from a commercial, institutional, or industrial process or activity.

This means that EPA will not generally notify municipalities or private parties who are generators/transporters of MSW if only household hazardous wastes (HHW) are present, unless the truly exceptional situation discussed below exists. The general policy

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[7] The categories of wastes discussed below, i.e., relating to municipal solid waste, sewage sludge, trash from a commercial, institutional, or industrial entity, and low-hazardous industrial wastes, are defined in the "Introduction" to this interim policy (See I.B.).

[8] The term "site-specific" information refers to information pertaining to a particular Superfund site. "Site-specific" information does not generally include, for example, "general studies" conducted by EPA or other parties which draw general conclusions about whether MSW or sewage sludge typically contain a certain percentage of hazardous substances, unless the "general study" includes "site-specific" information obtained from the PRP or Superfund site in question. "General studies" may nonetheless be used to supplement "site-specific" information.

of not notifying parties who are generators/transporters of HHW extends to "HHW collection day programs" as well.[9]

This also means that such parties may be notified as PRPs if the MSW contains hazardous substances from non-household sources. Non-household sources include, but are not limited to, small quantity generator (SQG) wastes from commercial or industrial processes or activities, or used oil or spent solvents from private or municipally-owned maintenance shops.

Notwithstanding the above general policy, there may be truly exceptional situations where EPA may consider notifying generators/transporters of MSW which contains a hazardous substance derived only from households. Such notification may be appropriate where the total contribution of commercial, institutional, and industrial hazardous waste by private parties to the site is insignificant when compared to the MSW.[10] In this

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[9] The term "HHW collection day programs" refers to programs that have generally been sponsored by municipalities or community organizations whereby residents voluntarily remove their HHW from their household waste. The HHW is then typically disposed of in a RCRA Subtitle C hazardous waste facility and the household waste is typically disposed of in a RCRA Subtitle D solid waste facility.

[10] The Regions should consider both the volume and the toxicity of the commercial, institutional, and industrial hazardous waste when determining whether it is insignificant when compared to the MSW. In determining whether the volume is insignificant, the Regions should consider the total volume of such waste contributed by all private parties. In determining whether the toxicity is insignificant, the Regions should consider whether such waste is significantly more toxic than the MSW and whether such waste requires a disproportionately high treatment and disposal cost or requires a different or more costly remedial technique than that which otherwise would be

situation, the Regions should seriously consider notifying the generators/transporters of MSW containing a hazardous substance from households as PRPs and include them in the settlement process where it would promote either settlement or response action at the site.

2. Sewage sludge: Municipalities and private parties will be treated the same when determining whether to notify them as PRPs when they are generators/transporters of sewage sludge. Specifically, such parties will not generally be notified unless:

- o the Region obtains site-specific information that the sewage sludge contains a hazardous substance; AND
- o the Region has reason to believe that the hazardous substance is derived from a commercial, institutional, or industrial process or activity.

3. Trash from a commercial, institutional, or industrial entity: Parties who are generators/transporters of trash from a commercial, institutional, or industrial entity will not generally be notified as PRPs if such parties demonstrate to the Region that:

- o none of the hazardous substances contained in the trash are derived from a commercial, institutional, or industrial process or activity; AND

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technically adequate for the site.

- o the amount and toxicity of the hazardous substances contained in the trash does not exceed that which one would expect to find in common household trash.

4. Any other hazardous substance, including low-hazardous industrial wastes: Municipalities or private parties who are generators/transporters of "any other hazardous substance" will generally be notified as PRPs if the Region obtains information that the substance is hazardous or that it contains a hazardous substance. This includes notification of private parties who are the generators/transporters of low-hazardous industrial wastes. "Any other hazardous substance" in this category refers to any hazardous substance covered under Section 101(14) of CERCLA other than hazardous substances that may be contained in MSW, sewage sludge, or trash from a commercial, institutional, or industrial entity (as discussed under IV.B.1., IV.B.2., or IV.B.3. above). The generators/transporters of hazardous substances that may be contained as part of the waste streams discussed under IV.B.1., IV.B.2., or IV.B.3. should be addressed as specified above.

V. SETTLEMENTS

A) Settlement Process

Once the notification decision is made, the general goal and overall process for reaching settlement at sites involving municipalities or municipal wastes is the same as for other sites. The general goal remains to negotiate with PRPs to reach one settlement agreement that provides complete resolution of all

pending CERCLA claims, and is consistent with both applicable statutory requirements and EPA's Interim CERCLA Settlement Policy.[11] This means that at sites where both municipal and private PRPs exist, EPA will attempt to include both types of parties in one settlement agreement.

Although one settlement agreement is the goal for each site, separate settlement agreements may be used at any site to facilitate settlement, where appropriate. This includes sites involving municipalities or municipal wastes. Separate settlements are not automatically available to municipalities and are generally available to such parties under the same conditions as for private parties. Examples of separate settlements are Section 122(g) de minimis settlements and cash-outs which may be used when they are consistent with applicable statutory requirements and existing EPA guidance.[12]

B) Settlement Provisions That May Be Particularly Suitable for Certain Municipalities

As indicated, once parties are notified as PRPs, the overall process and goals for reaching settlement at sites involving municipalities or municipal wastes is the same as for other Superfund sites. Nonetheless, there are some settlement provisions (e.g., delayed payments, delayed payment schedules,

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[11] "Interim CERCLA Settlement Policy", February 5, 1985, 50 FR 5034.

[12] For example, see "Interim Guidance on Settlements with De Minimis Waste Contributors," June 30, 1987, 52 FR 24333.

and in-kind contributions) that may be particularly suitable for facilitating settlement with certain municipal PRPs because they take into account a municipality's status as a governmental entity.

Such settlement provisions are not routinely available to municipalities. As a general rule, they may be considered where a municipality has successfully demonstrated to EPA that they are appropriate (e.g., where valid ability to pay or procedural constraints that affect the timing of payment exist). These settlement provisions may be embodied in separate settlements or they may be folded into a larger settlement that includes private parties. In addition, although these settlement provisions may be particularly suitable for municipalities, they may also be available to private parties, such as certain small businesses, where appropriate.

The following discusses how delayed payments, delayed payment schedules, and in-kind contributions may be used:

Delayed payment: If a municipality has demonstrated difficulty providing a lump-sum payment upfront for past costs or

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[13] In some circumstances a municipality's governmental status may impose practical constraints on its ability to carry out its legal obligation as a PRP under CERCLA. For example, a municipality may need to hold a special vote involving its legislative body or its citizens to gain approval to issue a bond or arrange other financing to cover cleanup costs at a Superfund site where it is a PRP. These settlement provisions are designed to take into account these types of unavoidable constraints that may exist.

for cleanup needs, the settlement could be structured to allow the municipality to pay at a specified future date. This would allow the municipality time to raise the money needed to cover its contribution. This may include an interest payment.

2. Delayed payment schedules (payments over time): An alternative to a delayed payment is to allow a delayed payment schedule where the settlement is structured to allow the municipality to pay over time based upon a predetermined schedule of payments. The payment schedule would be adjusted in such a way that the discounted present value of the payment would be greater than or equal to the settlement.[14]

3. In-kind contributions: The settlement could be structured to allow for an in-kind contribution, especially where a municipality can provide only a portion of its share of costs or is unable to provide a monetary payment. In-kind contributions may be made in conjunction with or in lieu of cash. Factors the Regions may use in considering the appropriateness of an in-kind contribution may include the overall financial health of the municipality, the amount of the municipality's share, the

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[14] Delayed payment schedules may include "structured settlements" which are settlements paid over time generally through an annuity. EPA is currently developing guidance, titled "Interim Guidance on the Use of Structured Settlements Under CERCLA," which will establish criteria for evaluating whether a particular site is a good candidate for a structured settlement. EPA expects to issue this interim guidance in the Spring of 1990.

value of the in-kind contribution, and the effect of the in-kind contribution on the overall effort to achieve settlement.

One mechanism for allowing an in-kind contribution could be a "carve-out" order when, for example, the municipal PRP has agreed to provide the operation and maintenance at the facility. Other in-kind contributions could include the use of trucks and equipment to carry out cleanup activities, the installation of fences and the provision of other security measures to control public access to the site, or the use of the municipality's sewage treatment plant.

C) Contribution Protection

Nothing in this interim policy affects the rights of any party in seeking contribution from another party, unless such party has entered into a settlement with the United States or a State and obtained contribution protection pursuant to Section 113(f) of CERCLA.[15]

VI. DISCLAIMER

This interim policy is intended solely for the guidance of EPA personnel. It is 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

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[15] Under Section 113(f), where EPA determines that settlement is in the best interests of the Federal government, CERCLA provides contribution protection to the settling parties for matters covered by the settlement. This may include a party who has not been notified as a PRP by EPA but wishes to settle its potential CERCLA liability.

the right to act at variance with this policy and to change it at any time without public notice.

VII. FOR FURTHER INFORMATION

For further information or questions about this interim policy, the Regions may contact Kathleen MacKinnon in the Office of Waste Programs Enforcement at FTS-475-9812. Inquiries by other persons should be directed to Ms. MacKinnon at 202-475-6771.