September 30, 1997

MEMORANDUM

SUBJECT: Transmittal of Addendum to the "Interim CERCLA Settlement Policy" Issued on December 5, 1984

FROM: Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

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TO: Regional Administrators,
Regions I - X
Regional Counsels, Regions I - X

This memorandum transmits an addendum to the "Interim CERCLA Settlement Policy" which was issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) on December 5, 1984. That policy sets forth the general principles governing settlements with potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and specific procedures for the Regions and Headquarters to use in assessing settlement proposals. On June 3, 1996, EPA issued an "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals." Because that guidance document does not apply to CERCLA cost recovery settlements in which the parties are not agreeing to perform remedial design/remedial action work or a non-time critical removal, EPA and DOJ are issuing the attached addendum to provide the Regions with direction for addressing potential compromises of CERCLA cost recovery claims due to the existence of a significant orphan share.

If you have any questions about the addendum, please contact Laura Bulatao (202-564-6028) or Deniz Ergener (202-564-4233) in EPA's Office of Site Remediation Enforcement, or Bob Brook (202-514-2738) in DOJ's Environmental Enforcement Section.

Attachment

cc: Timothy Fields, Acting Assistant Administrator for Solid Waste and Emergency Response, EPA
Barry Breen, Director, Office of Site Remediation Enforcement, EPA
Steve Luftig, Director, Office of Emergency and Remedial Response, EPA
Director, Office of Site Remediation and Restoration, Region I, EPA
Director, Emergency and Remedial Response Division, Region II, EPA
Director, Hazardous Waste Management Division, Regions III and IX, EPA
Director, Waste Management Division, Region IV, EPA
Director, Superfund Division, Regions V, VI, and VII, EPA
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII, EPA
Director, Environmental Cleanup Office, Region X, EPA
Superfund Branch Chiefs, Office of Regional Counsel, Regions I - X, EPA
Regional Enforcement Coordinators, Regions I - X, EPA
Lisa Friedman, Associate General Counsel, Office of General Counsel, EPA
John Cruden, Deputy Assistant Attorney General, DOJ
Joel Gross, Chief, Environmental Enforcement Section, DOJ
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Addendum to the "Interim CERCLA Settlement Policy" Issued on December 5, 1984

Background

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), liability is strict, joint and several unless the harm is shown to be divisible. Accordingly, viable potentially responsible parties (PRPs) sometimes have to absorb shares of responsibility that might otherwise be equitably attributed to PRPs who are insolvent or defunct and thus unable to contribute to the costs of cleanup. In order to reduce litigation, encourage PRPs to perform cleanup, and enhance the overall fairness of the Superfund program, the U.S. Environmental Protection Agency (EPA) announced in October 1995 its intention to compensate for a portion of this "orphan share" at sites where PRPs enter into settlements to perform cleanup.

To implement this reform, on June 3, 1996, EPA issued an "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals." Under that policy, EPA will "compensate" parties that agree to perform a remedial action or non-time-critical removal for a portion of the share specifically attributable to insolvent or defunct PRPs, up to 25% of the projected remedy or non-time-critical removal costs, or the total past and future oversight costs, whichever is less. These limitations were included because they moderate the impact on the Trust Fund and minimize the incurrence of additional transaction costs, particularly with respect to calculation of the orphan share.

Policy Statement

When assessing a proposed cost recovery settlement for less than 100% of response costs, the Regions should continue to consider inequities and aggravating factors, litigative risks in proceeding to trial, and the rest of the ten settlement criteria set forth in the "Interim CERCLA Settlement Policy." At sites involving potentially liable insolvent or defunct parties, the Regions may consider the existence of a significant orphan share as an "inequity" or "aggravating factor" within the meaning of the 1984 policy. Any exercise of the Government's discretion to accept a cost recovery settlement offer containing a compromise on this basis will necessarily be a case-by-case decision, to be made after examination of a variety of factors. Among the factors to be considered in determining whether and to what extent to compromise a claim based on the existence of insolvent or defunct parties are the following: (1) the size of the orphan share; (2) the settling PRP's cooperation with the government and other PRPs; and (3) fairness to other parties.

It is the intent of EPA and the Department of Justice that the United States should not enter into settlements that provide incentives or precedents for parties to refuse to enter into agreements for performance of work, believing they may get a better settlement at the time EPA pursues a cost recovery claim. EPA should provide strong incentive for parties to conduct cleanups rather than wait until EPA pursues cost recovery claims. Therefore, except in

extraordinary cases, EPA should not offer an orphan share compromise in a cost recovery settlement to a party that refused a previous settlement offer that included a compromise based on orphan share considerations.[1] Moreover, except in extraordinary cases, a party that does not perform work under a consent agreement should not receive a greater compromise of response costs in a cost recovery settlement based on the existence of an orphan share than it would have received if (1) the party had signed a consent agreement to perform the work, and (2) the orphan share policy had been applied.[2]

In resolving cost recovery claims, recognition of equitable considerations, including the existence of a significant orphan share, is for settlement purposes only. Where there is indivisible harm, EPA will continue to pursue non-settling parties jointly and severally for all response costs.

Use and Purpose of this Addendum

This policy addendum 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 addendum is not a rule and does not create any legal obligations. Whether and how EPA and the Department of Justice apply the guidance set forth in this addendum in any particular case will depend on the facts of the case.

For further information about this addendum, please contact Laura Bulatao (202-564-6028) or Deniz Ergener (202-564-4233) in EPA's Office of Site Remediation Enforcement, or Bob Brook in the Environmental Enforcement Section of the Department of Justice at (202) 514-2738.

[1] For purposes of this addendum and effective upon its issuance, the determination that a case is extraordinary requires the prior written approval of OECA. EPA intends that this requirement will be incorporated into the next set of revisions to the May 19, 1995 memorandum entitled "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (commonly known as the "Roles Memo").

[2] See footnote 1.