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Attachment XII

Interim CERCLA Settlement Policy

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

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MEMORANDUM

SUBJECT: Interim CERCLA Settlement Policy

FROM: Lee M. Thomas, Assistant Administrator
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TO: Regional Administrators, Regions I-X

This memorandum sets forth the general principles governing private party settlements under CERCLA, and specific procedures for the Regions and Headquarters to use in assessing private party settlement proposals. It addresses the following topics:

1. general principles for EPA review of private-party cleanup proposals;

2. management guidelines for negotiation;

3. factors governing release of information to potentially responsible parties;

4. criteria for evaluating settlement offers;

5. partial cleanup proposals;

6. contribution among responsible parties;

7. releases and covenants not to sue;

8. targets for litigation;

9. timing for negotiations;

10. management and review of settlement negotiations.

APPLICABILITY

This memorandum incorporates the draft Hazardous Waste Case Settlement Policy, published in draft in December of 1983. It is applicable not only to multiple party cases but to all civil hazardous waste enforcement cases under Superfund. It is generally applicable to imminent hazard enforcement actions under section 7003 of RCRA.

This policy establishes criteria for evaluating private party settlement proposals to conduct or contribute to the funding of response actions, including removal and remedial actions. It also addresses settlement proposals to contribute to funding after a response action has been completed. It does not address private-party proposals to conduct remedial investigations and feasibility studies. These proposals are to be evaluated under criteria established in the policy guidance from Lee M. Thomas, Assistant Administrator, Office of Solid Waste and Emergency Response, and Courtney Price, Assistant Administrator, Office of Enforcement and Compliance Monitoring entitled " Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies under CERCLA". (March 20, 1984)

I. General Principles

The Government's goal in implementing CERCLA is to achieve effective and expedited cleanup at as many uncontrolled hazardous waste facilities as possible. To achieve this goal, the Agency is committed to a strong and vigorous enforcement program. The Agency has made major advances in securing cleanup at some of the nation's worst hazardous waste sites because of its demonstrated willingness to use the Fund and to pursue administrative and judicial enforcement actions. In addition, the Agency has obtained key decisions, on such issues as joint and several liability, which have further advanced its enforcement efforts.

The Agency recognizes, however, that Fund-financed cleanups, administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites. The Agency is therefore re-evaluating its settlement policy, in light of three years experience with negotiation and litigation of hazardous waste cases, to remove or minimize if possible the impediments to voluntary cleanup.

As a result of this reassessment, the Agency has identified the following general principles that govern its Superfund enforcement program:

- The goal of the Agency in negotiating private party cleanup and in settlement of hazardous waste cases has been and will continue to be to obtain complete cleanup by the responsible parties, or collect 100% of the costs of the cleanup action.

- Negotiated private party actions are essential to an effective program for cleanup of the nation's hazardous waste sites. An effective program depends on a balanced approach relying on a mix of Fund-financed cleanup, voluntary agreements reached through negotiations, and litigation. Fund-financed cleanup and litigation under CERCLA will not in themselves be sufficient to assure the success of this cleanup effort. In addition, expeditious cleanup reached through negotiated settlements is preferable to protracted litigation.

- A strong enforcement program is essential to encourage voluntary action by PRPs. Section 106 actions are particularly valuable mechanisms for compelling cleanups. The effectiveness of negotiation is integrally related to the effectiveness of enforcement and Fund-financed cleanup. The demonstrated willingness of the Agency to use the Fund to clean up sites and to take enforcement action is our most important tool for achieving negotiated settlements.

- The liability of potentially responsible parties is strict, joint and several, unless they can clearly demonstrate that the harm at the site is divisible. The recognition on the part of responsible parties that they may be jointly and severally liable is a valuable impetus for these parties to reach the agreements that are necessary for successful negotiations. Without such an impetus, negotiations run a risk of delay because of disagreements over the particulars of each responsible party's contribution to the problems at the site.

- The Agency recognizes that the factual strengths and weaknesses of a particular case are relevant in evaluating settlement proposals. The Agency also recognizes that courts may consider differences among defendants in allocating payments among parties held jointly and severally liable under CERCLA. While these are primarily the concerns of PRPs, the Agency will also consider a PRP's contribution to problems at the site, including contribution of waste, in assessing proposals for settlement and in identifying targets for litigation.

- Section 106 of CERCLA provides courts with jurisdiction to grant such relief as the public interest and the equities of the case may require. In assessing proposals for settlement and identifying targets for litigation, the Agency will consider aggravating and mitigating factors and appropriate equitable factors.

- In many circumstances, cleanups can be started more quickly when private parties do the work themselves, rather than provide money to the Fund. It is therefore preferable for private parties to conduct cleanups themselves, rather than simply provide funds for the States or Federal Government to conduct the cleanup.

- The Agency will create a climate that is receptive to private party cleanup proposals. To facilitate negotiations, the Agency will make certain information available to private parties. PRPs will normally have an opportunity to be involved in the studies used to determine the appropriate extent of remedy. The Agency will consider settlement proposals for cleanup of less than 100% of cleanup activities or cleanup costs. Finally, upon settling with cooperative parties, the government will vigorously seek all remaining relief, including costs, penalties and treble damages where appropriate, from parties whose recalcitrance made a complete settlement impossible.

- The Agency anticipates that both the Fund and private resources may be used at the same site in some circumstances. When the Agency settles for less than 100% of cleanup costs, it can use the Fund to assure that site cleanup will proceed expeditiously, and then sue to recover these costs from non-settling responsible parties. Where the Federal government accepts less than 100% of cleanup costs and no financially viable responsible parties remain, Superfund monies may be used to make up the difference.

- The Agency recognizes the value of some measure of finality in determinations of liability and in settlements generally. PRPs frequently want some certainty in return for assuming the costs of cleanup, and we recognize that this will be a valuable incentive for private party cleanup. PRPs frequently seek a final determination of liability through contribution protection, releases or covenants not to sue. The Agency will consider releases from liability in appropriate situations, and will also consider contribution protection in limited circumstances. The Agency will also take aggressive enforcement action against those parties whose recalcitrance prevents settlements. In bringing cost recovery actions, the Agency will also attempt to raise any remaining claims under CERCLA section 106, to the extent practicable.

The remainder of this memorandum sets forth specific policies for implementing these general principles.

Section II sets forth the management guidelines for negotiating with less than all responsible parties for partial settlements. This section reflects the Agency's willingness to be flexible by considering offers for cleanup of less than 100% of cleanup activities or costs.

Section III sets forth guidelines on the release of information. The Agency recognizes that adequate information facilitates more successful negotiations. Thus, the Agency will combine a vigorous program for obtaining the data and information necessary to facilitate settlements with a program for releasing information to facilitate communications among responsible parties.

Sections IV and V discuss the criteria for evaluating partial settlements. As noted above, in certain circumstances the Agency will entertain settlement offers from PRPs which extend only to part of the site or part of the costs of cleanup at a site. Section IV of this memo sets forth criteria to be used in evaluating such offers. These criteria apply to all cases. Section V sets forth the Agency's policy concerning offers to perform or pay for discrete phases of an approved cleanup.

Sections VI and VII relate to contribution protection and releases from liability. Where appropriate, the Agency may consider contribution protection and limited releases from liability to help provide some finality to settlements.

Section VIII sets forth criteria for selecting enforcement cases and identifying targets for litigation. As discussed above, effective enforcement depends on careful case selection and the careful selection of targets for litigation. The Agency will apply criteria for selection of cases to focus sufficient resources on cases that provide the broadest possible enforcement impact. In addition, targets for litigation will be identified in light of the willingness of parties to perform voluntary cleanup, as well as conventional litigation management concerns.

Section IX sets forth the requirements governing the timing of negotiations and section X the provisions for Headquarters review. These sections address the need to provide the Regions with increased flexibility in negotiations and to change Headquarters review in order to expedite site cleanup.

II. Management Guidelines for Negotiation

As a guideline, the Agency will negotiate only if the initial offer from PRPs constitutes a substantial proportion of the costs of cleanup at the site, or a substantial portion of the needed remedial action. Entering into discussions for less than a substantial proportion of cleanup costs or remedial action needed at the site, would not be an effective use of government resources. No specific numerical threshold for initiating negotiations has been established.

In deciding whether to start negotiations, the Regions should weigh the potential resource demands for conducting negotiations against the likelihood of getting 100% of costs or a complete remedy.

Where the Region proposes to negotiate for a partial settlement involving less than the total costs of cleanup, or a complete remedy, the Region should prepare as part of its Case Negotiations Strategy a draft evaluation of the case using the settlement criteria identified in section IV. The draft should discuss how each of the factors in section IV applies to the site in question, and explain why negotiations for less than all of the cleanup costs, or a partial remedy, are appropriate. A copy of the draft should be forwarded to Headquarters. The Headquarters review will be used to identify major issues of national significance or issues that may involve significant legal precedents.

In certain other categories of cases, it may be appropriate for the Regions to enter into negotiations with PRPs, even though the offers from PRPs do not represent a substantial portion of the costs of cleanup. These categories of cases include:

- administrative settlements of cost recovery actions where total cleanup costs were less than $200,000;
- claims in bankruptcy;
- administrative settlements with de minimis contributors of wastes.

Actions subject to this exception are administrative settlements of cost recovery cases where all the work at the site has been completed and all costs have been incurred. The figure of $200,000 refers to all of the costs of cleanup. The Agency is preparing more detailed guidance on the appropriate form of such settlement agreements, and the types of conditions that must be included.

Negotiation of claims in bankruptcy may involve both present owners, where the United States may have an administrative costs claim, and other parties such as past owners or generators, where the United States may be an unsecured potential creditor. The Regions should avoid becoming involved in bankruptcy proceedings if there is little likelihood of recovery, and should recognize the risks involved in negotiating without creditor status. It may be appropriate to request DOJ filing of a proof of claim. Further guidance is provided in the Memorandum from Courtney Price entitled "Information Regarding CERCLA Enforcement Against Bankrupt Parties," dated May 24, 1984.

In negotiating with de minimis parties, the Regions should limit their efforts to low volume, low toxicity disposers who would not normally make a significant contribution to the costs of cleanup in any case.

In considering settlement offers from de minimis contributors, the Region should normally focus on achieving cash settlements. Regions should generally not enter into negotiations for full administrative or judicial settlements with releases, contribution protection, or other protective clauses. Substantial resources should not be invested in negotiations with de minimis contributors, in light of the limited costs that may be recovered, the time needed to prepare the necessary legal documents, the need for Headquarters review, potential res judicata effects, and other effects that de minimis settlements may have on the nature of the case remaining to the Government.

Partial settlements may also be considered in situations where the unwillingness of a relatively small group of parties to settle prevents the development of a proposal for a substantial portion of costs or the remedy. Proposals for settlement in these circumstances should be assessed under the criteria set forth in section IV.

Earlier versions of this policy included a threshold for negotiations, which provided that negotiations should not be commenced unless an offer was made to settle for at least 80% of the costs of cleanup, or of the remedial action. This threshold has been eliminated from the final version of this policy. It must be emphasized that elimination of this threshold does not mean that the Agency is therefore more willing to accept offers for partial settlement. The objective of the Agency is still to obtain complete cleanup by PRPs, or 100% of the costs of cleanup

III. Release of Information

The Agency will release information concerning the site to PRPs to facilitate discussions for settlement among PRPs. This information will include:

- identity of notice letter recipients;

- volume and nature of wastes to the extent identified as sent to the site;

- ranking by volume of material sent to the site, if available.

In determining the type of information to be released, the Region should consider the possible impacts on any potential litigation. The Regions should take steps to assure protection of confidential and deliberative materials. The Agency will generally not release actual evidentiary material. The Region should state on each released summary that it is preliminary, that it was furnished in the course of compromise negotiations (Fed. Rules of Evidence 408), and that it is not binding on the Federal Government.

This information release should be preceded by and combined with a vigorous program for collecting information from responsible parties. It remains standard practice for the Agency to use the information gathering authorities of RCRA and CERCLA with respect to all PRPs at a site. This information release should generally be conditioned on a reciprocal release of information by PRPs. The information request need not be simultaneous, but EPA should receive the information within a reasonable time.

IV. Settlement Criteria

The objective of negotiations is to collect 100% of cleanup costs or complete cleanup from responsible parties. The Agency recognizes that, in narrowly limited circumstances, exceptions to this goal may be appropriate, and has established criteria for determining where such exceptions are allowed. Although the Agency will consider offers of less than 100% in accordance with this policy, it will do so in light of the Agency's position, reinforced by recent court decisions, that PRP liability is strict, joint and several unless it can be shown by the PRPs that injury at a site is clearly divisible.

Based on a full evaluation of the facts and a comprehensive analysis of all of the listed criteria, the Agency may consider accepting offers of less than 100 percent. Rapid and effective settlement depends on a thorough evaluation, and an aggressive information collection program is necessary to prepare effective evaluations. Proposals for less than total settlement should be assessed using the criteria identified below.

1. Volume of wastes contributed to site by each PRP

Information concerning the volume of wastes contributed to the site by PRPs should be collected, if available, and evaluated in each case. The volume of wastes is not the only criterion to be considered, nor may it be the most important. A small quantity of waste may cost proportionately more to contain or remove than a larger quantity of a different waste. However, the volume of waste may contribute significantly and directly to the distribution of contamination on the surface and subsurface (including groundwater), and to the complexity of removal of the contamination. In addition, if the properties of all wastes at the site are relatively equal, the volume of wastes contributed by the PRPs provides a convenient, easily applied criterion for measuring whether a PRP's settlement offer may be reasonable.

This does not mean, however, that PRPs will be required to pay only their proportionate share based on volume of contribution of wastes to the site. At many sites, there will be wastes for which PRPs cannot be identified. If identified, PRPs may be unable to provide funds for cleanup. Private party funding for cleanup of those wastes would, therefore, not be available if volumetric contribution were the only criteria.

Therefore, to achieve the Agency's goal of obtaining 100 percent of cleanup or the cost of cleanup, it will be necessary in many cases to require a settlement contribution greater than the percentage of wastes contributed by each PRP to the site. These costs can be obtained through the application of the theory of joint and several liability where the harm is indivisible, and through application of these criteria in evaluating settlement proposals.

2. Nature of the wastes contributed

The human, animal and environmental toxicity of the hazardous substances contributed by the PRPs, its mobility, persistence and other properties are important factors to consider. As noted above, a small amount of wastes, or a highly mobile waste, may cost more to clean up, dispose, or treat than less toxic or relatively immobile wastes. In addition, any disproportionate adverse effects on the environment by the presence of wastes contributed by those PRPs should be considered.

If a waste contributed by one or more of the parties offering a settlement disproportionately increases the costs of cleanup at the site, it may be appropriate for parties contributing such waste to bear a larger percentage of cleanup costs than would be the case by using solely a volumetric basis.

3. Strength of evidence tracing the wastes at the site to the settling parties

The quality and quantity of the Government's evidence connecting PRPs to the wastes at the site obviously affects the settlement value of the Government's case. The Government must show, by a preponderunce of the evidence, that the PRPs are connected with the wastes in one or more of the ways provided in Section 107 of CERCLA. Therefore, if the Government's evidence against a particular PRP is weak, we should weigh that weakness in evaluating a settlement offer from that PRP.

On the other hand, where indivisible harm is shown to exist, under the theory of joint and several liability the Government is in a position to collect 100 % of the cost of cleanup from all parties who have contributed to a site. Therefore, where the quality and quantity of the Government's evidence appears to be strong for establishing the PRP's liability, the Government should rely on the strength of its evidence and not decrease the settlement value of its case. Discharging such PRPs from liability in a partial settlement without obtaining a substantial contribution may leave the Government with non-settling parties whose involvement at the site may be more tenuous.

In any evaluation of a settlement offer, the Agency should weigh the amount of information exchange that has occurred before the settlement offer. The more the-Government knows about the evidence it has to connect the settling parties to the site, the better this evaluation will be. The information collection provisions of RCRA and/or CERCLA should be used to develop evidence prior to preparation of the evaluation.

4. Ability of the settling parties to pay

Ability to pay is not a defense to an action by the Government. Nevertheless, the evaluation of a settlement proposal should discuss the financial condition of that party, and the practical results of pursuing a party for more than the Government can hope to actually recover. In cost recovery actions it will be difficult to negotiate a settlement for more than a party's assets. The Region should also consider allowing the party to reimburse the Fund in reasonable installments over a period of time, if the party is unable to pay in a lump sum, and installment payments would benefit the government. A structured settlement providing for payments over time should be at a payment level that takes into account the party's cash flow. An excessive amount could force a party into bankruptcy, which will of course make collection very difficult. See the memorandum dated August 26, 1983, entitled "Cost Recovery Actions under Section 107 of CERCLA" for additional guidance on this subject.

5. Litigative risks in proceeding to trial

Litigative risks which might be encountered at trial and which should weigh in consideration of any settlement offer include traditional factors such as:

a. Admissibility of the Government's evidence

If necessary Government evidence is unlikely to be admitted in a trial because of procedural or substantive problems in the acquisition or creation of the evidence, this infirmity should be considered as reducing the Government's chance of success and, therefore, reducing the amount the Government should expect to receive in a settlement.

b. Adequacy of the Government's evidence

Certain aspects of this point have already been discussed above. However, it deserves mention again because the the government's case depends on substantial quantities of sampling, analytical and other technical data and expert testimony. If the evidence in support of the Government's case is incomplete or based upon controversial science, or if the Government's evidence is otherwise unlikely to withstand the scrutiny of a trial, the amount that the Government might expect to receive in a settlement will be reduced.

c. Availability of defenses

In the unlikely event that one or more of the settling parties appears to have a defense to the Government's action under section 107(b) of CERCLA, the Government should expect to receive less in a settlement from that PRP. Availability of one or more defenses to one PRP which are not common to all PRPs in the case should not, however, lower the expectation of what an entire offering group should pay.

6. Public interest considerations

The purpose of site cleanup is to protect public health and the environment. Therefore, in analyzing a settlement proposal the timing of the cleanup and the ability of the Government to clean up the site should be considered. For example, if the State cannot fund its portion of a Fund-financed cleanup, a private-party cleanup proposal may be given more favorable consideration than one received in a case where the State can fund its portion of cleanup costs, if necessary.

Public interest considerations also include the availability of Federal funds for necessary cleanup, and whether privately financed action can begin more quickly than Federally-financed activity. Public interest concerns may be used to justify a settlement of less than 100% only when there is a demonstrated need for a quick remedy to protect public health or the environment.

7. Precedential value

In some cases, the factual situation may be conducive to establishing a favorable precedent for future Government actions. For example, strong case law can be developed in cases of first impression. In addition, settlements in such cases tend to become precedents in themselves, and are examined extensively by PRPs in other cases. Settlement of such cases should always be on terms most favorable to the Government. Where PRPs will not settle on such terms, and the quality and quantity of evidence is strong, it may be in the overall interest of the Government to try the case.

8. Value of obtaining a present sum certain

If money can be obtained now and turned over to the Fund, where it can earn interest until the time it is spent to clean up a site, the net present value of obtaining the sum offered in settlement now can be computed against the possibility of obtaining a larger sum in the future. This calculation may show that the net present value of the sum offered in settlement is, in reality, higher than the amount the Government can expect to obtain at trial. EPA has developed an economic model to assess these and other related economic factors. More information on this model can be obtained from the Director, Office of Waste Programs Enforcement

9. Inequities and aggravating factors

All analyses of settlement proposals should flag for the decision makers any apparent inequities to the settling parties inherent in the Government's case, any apparent inequities to others if the settlement proposal is accepted, and any aggravating factors. However, it must be understood that the statute operates on the underlying principle of strict liability, and that equitable matters are not defenses.

10. Nature of the case that remains after settlement

All settlement evaluations should address the nature of the case that remains if the settlement is accepted. For example, if there are no financially viable parties left to proceed against for the balance of the cleanup after the settlement, the settlement offer should constitute everything the Government expects to obtain at that site. The questions are: What does the Government gain by settling this portion of the case? Does the settlement or its terms harm the remaining portion of the case? Will the Government have to expend the same amount of resources to try the remaining portion of the case? If so, why should the settlement offer be accepted?

This analysis is extremely important and should come at the conclusion of the evaluation.

V. Partial Cleanups

On occasion, PRPs may offer to perform or pay for one phase of a site cleanup (such as a surface removal action) but not commit to any other phase of the cleanup (such as ground water treatment). In some circumstances, it may be appropriate to enter into settlements for such partial cleanups, rather than to resolve all issues in one settlement. For example, in some cases it is necessary to conduct initial phases of site cleanup in order to gather sufficient data to evaluate the need for and type of work to be done on subsequent phases. In such cases, offers from PRPs to conduct or pay for less than all phases of site cleanup should be evaluated in the same manner and by the same criteria as set forth above. Settlements must be limited to the phase or phases of work actually to be performed at the site. This provision does not cover preparation of an RI/FS, which is covered by a separate guidance document: Lee Thomas and Courtney Price's "Participation of Potentially Responsible Parties in RI/FS Development" (March 20, 1984).

VI. Contribution Protection

Contribution among responsible parties is based on the principle that a jointly and severally liable party who has paid all or a portion of a judgment or settlement may be entitled to reimbursement from other jointly or severally liable parties. When the Agency reaches a partial settlement with some parties, it will frequently pursue an enforcement action against non-settling responsible parties to recover the remaining costs of cleanup. If such an action is undertaken, there is a possibility that those non-settlors would in turn sue settling parties. If this action by nonsettling parties is successful, then the settling parties would end up paying a larger share of cleanup costs than was determined in the Agency's settlement. This is obviously a disincentive to settlement.

Contribution protection in a consent decree can prevent this outcome. In a contribution protection clause, the United States would agree to reduce its judgment against the non-settling parties, to the extent necessary to extinguish the settling party's liability to the nonsettling third party.

The Agency recognizes the value of contribution protection in limited situations in order to provide some measure of finality to settlements. Fundamentally, we believe that settling parties are protected from contribution actions as a matter of law, based on the Uniform Contribution Among Tortfeasors Act. That Act provides that, where settlements are entered into in "good faith", the settlors are discharged from "all liability for contribution to any other joint tortfeasors." To the extent that this law is adopted as the Federal rule of decision, there will be no need for specific clauses in consent agreements to provide contribution protection.

There has not yet been any ruling on the issue. Thus, the Agency may still be asked to provide contribution protection in the form of offsets and reductions in judgment. In determining whether explicit contribution protection clauses are appropriate, the Region should consider the following factors:

- Explicit contribution protection clauses are generally not appropriate unless liability can be clearly allocated, so that the risk of reapportionment by a judge in any future action would be minimal.

- Inclusion should depend on case-by-case consideration of the law which is likely to be applied.

- The Agency will be more willing to consider contribution protection in settlements that provide substantially all the costs of cleanup.

If a proposed settlement includes a contribution protection clause, the Region should prepare a detailed justification indicating why this clause is essential to attaining an adequate settlement. The justification should include an assessment of the prospects of litigation regarding the clause. Any proposed settlement that contains a contribution protection clause with a potential ambiguity will be returned for further negotiation.

Any subsequent claims by settling parties against non-settlors must be subordinated to Agency claims against these non-settling parties. In no event will the Agency agree to defend on behalf of a settlor, or to provide direct indemnification. The Government will not enter into any form of contribution protection agreement that could require the Government to pay money to anyone.

If litigation is commenced by non-settlors against settlors, and the Agency became involved in such litigation, the Government would argue to the court that in adjusting equities among responsible parties, positive consideration should be given to those who came forward voluntarily and were a part of a group of settling PRPs.

VII. Releases from Liability

Potentially responsible parties who offer to wholly or partially clean up a site or pay the costs of cleanup normally wish to negotiate a release from liability or a covenant not to sue as a part of the consideration for that cleanup or payment. Such releases are appropriate in some circumstances. The need for finality in settlements must be balanced against the need to insure that PRPs remain responsible for recurring endangerments and unknown conditions.

The Agency recognizes the current state of scientific uncertainty concerning the impacts of hazardous substances, our ability to detect them, and the effectiveness of remedies at hazardous waste sites. It is possible that remedial measures will prove inadequate and lead to imminent and substantial endangerments, because of unknown conditions or because of failures in design, construction or effectiveness of the remedy.

Although the Agency approves all remedial actions for sites on the National Priorities List, releases from liability will not automatically be granted merely because the Agency has approved the remedy. The willingness of the Agency to give expansive releases from liability is directly related to the confidence the Agency has that the remedy will ultimately prove effective and reliable. In general, the Regions will have the flexibility to negotiate releases that are relatively expansive or relatively stringent, depending on the degree of confidence that the Agency has in the remedy.

Releases or covenants must also include certain reopeners which preserve the right of the Government to seek additional cleanup action and recover additional costs from responsible parties in a number of circumstances. They are also subject to a variety of other limitations. These reopener clauses and limitations are described below.

In addition, the Agency can address future problems at a site by enforcement of the decree or order, rather than by action under a particular reopener clause. Settlements will normally specify a particular type of remedial action to be undertaken. That remedial action will normally be selected to achieve a certain specified level of protection of public health and the environment. When settlements are incorporated into consent decrees or orders, the decrees or orders should wherever possible include performance standards that set out these specified levels of protection. Thus, the Agency will retain its ability to assure cleanup by taking action to enforce these decrees or orders when remedies fail to meet the specified standards.

It is not possible to specify a precise hierarchy of preferred remedies. The degree of confidence in a particular remedy must be determined on an individual basis, taking site-specific conditions into account. In general, however, the more effective and reliable the remedy, the more likely it is that the Agency can negotiate a more expansive release. For example, if a consent decree or order commits a private party to meeting and/or continuing to attain health based performance standards, there can be great certainty on the part of the Agency that an adequate level of public health protection will be met and maintained, as long as the terms of the agreement are met. In this type of case, it may be appropriate to negotiate a more expansive release than, for example, cases involving remedies that are solely technology-based.

Expansive releases may be more appropriate where the private party remedy is a demonstrated effective alternative to land disposal, such as incineration. Such releases are possible whether the hazardous material is transported offsite for treatment, or the treatment takes place on site. In either instance, the use of treatment can result in greater certainty that future problems will not occur.

Other remedies may be less appropriate for expansive releases, particularly if the consent order or agreement does not include performance standards. It may be appropriate in such circumstances to negotiate releases that become effective several years after completion of the remedial action, so that the effectiveness and reliability of the technology can be clearly demonstrated. The Agency anticipates that responsible parties may be able to achieve a greater degree of certainty in settlements when the state of scientific understanding concerning these technical issues has advanced.

Regardless of the relative expansiveness or stringency of the release in other respects, at a minimum settlement documents must include reopeners allowing the Government to modify terms and conditions of the agreement for the following types of circumstances:

- where previously unknown or undetected conditions that arise or are discovered at the site after the time of the agreement may present an imminent and substantial endangerment to public health, welfare or the environment;

- where the Agency receives additional information, which was not available at the time of the agreement, concerning the scientific determinations on which the settlement was premised (for example, health effects associated with levels of exposure, toxicity of hazardous substances, and the appropriateness of the remedial technologies for conditions at the site) and this additional information indicates that site conditions may present an imminent and substantial endangerment to the public health or welfare or the environment.

In addition, release clauses must not preclude the Government from recovering costs incurred in responding to the types of imminent and substantial endangerments identified above.

In extraordinary circumstances, it may be clear after application of the settlement criteria set out in section IV that it is in the public interest to agree to a more limited or more expansive release not subject to the conditions outlined above. Concurrence of the Assistant Administrators for OSWER and OECM (and the Assistant Attorney General when the release is given on behalf of the United States) must be obtained before the Government's negotiating team is authorized to negotiate regarding such a release or covenant.

The extent of releases should be the same, whether the private parties conduct the cleanup themselves or pay for Federal Government cleanup. When responsible parties pay for Federal Government cleanup, the release will ordinarily not become effective until cleanup is completed and the actual costs of the cleanup are ascertained. Responsible parties will thereby bear the risk of uncertainties arising during execution of the cleanup. In limited circumstances, the release may become effective upon payment for Federal Government cleanup, if the payment includes a carefully calculated premium or other financial instrument that adequately insures the Federal government against these uncertainties. Finally, the Agency may be more willing to settle for less than the total costs of cleanup when it is not precluded by a release clause from eventually recovering any additional costs that might ultimately be incurred at a site.

Release clauses are also subject to the following limitations:

° A release or covenant may be given only to the PRP providing the consideration for the release.

° The release or covenant must not cover any claims other than those involved in the case.

° The release must not address any criminal matter.

° Releases for partial cleanups that do not extend to the entire site must be limited to the work actually completed.

° Federal claims for natural resource damages should not be released without the approval of Federal trustees.

° Responsible parties must release any related claims against the United States, including the Hazardous Substances Response Fund.

° Where the cleanup is to be performed by the PRPs, the release or covenant should normally become effective only upon the completion of the cleanup (or phase of cleanup) in a manner satisfactory to EPA.

° Release clauses should be drafted as covenants not to sue, rather than releases from liability, where this form may be necessary to protect the legal rights of the Federal Government.

A release or covenant not to sue terminates or seriously impairs the Government's rights of action against PRPs. Therefore, the document should be carefully worded so that the intent of the parties and extent of the matters covered by the release or covenant are clearly stated. Any proposed settlement containing a release with a possible ambiguity will be returned for further negotiation.

VIII. Targets for Litigation

The Regions should identify particular cases for referral in light of the following factors:

- substantial environmental problems exist;

- the Agency's case has legal merit;

- the amount of money or cleanup involved is significant;

- good legal precedent is possible (cases should be rejected where the potential for adverse precedent is substantial);

- the evidence is strong, well developed, or capable of development;

- statute of limitations problems exist;

- responsible parties are financially viable.

The goal of the Agency is to bring enforcement action wherever needed to assure private party cleanup or to recover costs. The following types of cases are the highest priorities for referrals:

- 107 actions in which all costs have been incurred;
- combined 106/107 actions in which a significant phase has been completed, additional injunctive relief is needed and identified, and the Fund will not be used;
- 106 actions which will not be the subject of Fund-financed cleanup.

Referrals for injunctive relief may also be appropriate in cases when it is possible that Fund-financed cleanup will be undertaken. Such referrals may be needed where there are potential statute of limitation concerns, or where the site has been identified as enforcement-lead, and prospects for successful litigation are good.

Regional offices should periodically reevaluate current targets for referral to determine if they meet the guidelines identified above.

As indicated before, under the theory of joint and several liability the Government is not required to bring enforcement action against all of the potentially responsible parties involved at a site. The primary concern of the Government in identifying targets for litigation is to bring a meritorious case against responsible parties who have the ability to undertake or pay for response action. The Government will determine the targets of litigation in order to reach the largest manageable number of parties, based on toxicity and volume, and financial viability. Owners and operators will generally be the target of litigation, unless bankrupt or otherwise judgment proof. In appropriate cases, the Government will consider prosecuting claims in bankruptcy. The Government may also select targets for litigation for limited purposes, such as site access.

Parties who are targeted for litigation are of course not precluded from involving parties who have not been targeted in developing settlement offers for consideration by the Government.

In determining the appropriate targets for litigation, the Government will consider the willingness of parties to settle, as demonstrated in the negotiation stage. In identifying a manageable number of parties for litigation, the Agency will consider the recalcitrance or willingness to settle of the parties who were involved in the negotiations. The Agency will also consider other aggravating and mitigating factors concerning responsible party actions in identifying targets for litigation.

In addition, it may be appropriate, when the Agency is conducting phased cleanup and has reached a settlement for one phase, to first sue only non-settling companies for the next phase, assuming that such financially viable parties are available. This approach would not preclude suit against settling parties, but non-settlors would be sued initially.

The Agency recognizes that Federal agencies may be responsible for cleanup costs at hazardous waste sites. Accordingly, Federal facilities will be issued notice letters and administrative orders where appropriate. Instead of litigation, the Agency will use the procedures established by Executive Orders 12088 and 12146 and all applicable Memoranda of Understanding to resolve issues concerning such agency's liability. The Agency will take all steps necessary to encourage successful negotiations.

IX. Timing of Negotiations

Under our revised policy on responsible party participation in RI/FS, PRPs have increased opportunities for involvement in the development of the remedial investigations and feasibility studies which the Agency uses to identify the appropriate remedy. In light of the fact that PRPs will have received notice letters and the information identified in section III of this policy, prelitigation negotiations can be conducted in an expeditious fashion.

The Negotiations Decision Document (NDD), which follows completion of the RI/FS, makes the preliminary identification of the appropriate remedy for the site. Prelitigation negotiations between the Government and the PRPs should normally not extend for more than 60 days after approval of the NDD. If significant progress is not made within a reasonable amount of time, the Agency will not hesitate to abandon negotiations and proceed immediately with administrative action or litigation. It should be noted that these steps do not preclude further negotiations.

Extensions can be considered in complex cases where there is no threat of seriously delaying cleanup action. Any extension of this period must be predicated on having a good faith offer from the PRPs which, if successfully negotiated, will save the Government substantial time and resources in attaining the cleanup objectives.

X. Management and Review of Settlement Negotiations

All settlement documents must receive concurrence from OWPE and OECM-Waste, and be approved by the Assistant Administrator of OECM in accordance with delegations. The management guideline discussed in Section II allows the Regions to commence negotiations if responsible parties make an initial offer for a substantial proportion of the cleanup costs. Before commencing negotiations for partial settlements, the Regions should prepare a preliminary draft evaluation of the case using the settlement criteria in section IV of this policy. A copy of this evaluation should be forwarded to Headquarters.

A final detailed evaluation of settlements is required when the Regions request Headquarters approval of these settlements. This written evaluation should be submitted to OECM-Waste and OWPE by the legal and technical personnel on the case. These will normally be the Regional attorney and technical representative.

The evaluation memorandum should indicate whether the settlement is for 100% of the work or cleanup costs. If this figure is less than 100%, the memorandum should include a discussion of the advantages and disadvantages of the proposed settlement as measured by the criteria in section IV. The Agency expects full evaluations of each of the criteria specified in the policy and will return inadequate evaluations.

The Regions are authorized to conclude settlements in certain types of hazardous waste cases on their own, without prior review by Headquarters or DOJ. Cases selected for this treatment would normally have lower priority for litigation. Categories of cases not subject to Headquarters review include negotiation for cost recovery cases under $200,000, and negotiation of claims filed in bankruptcy. In cost recovery cases, the Regions should pay particular attention to weighing the resources necessary to conduct negotiations and litigation against the amounts that may be recovered, and the prospects for recovery.

Authority to appear and try cases before the Bankruptcy Court would not be delegated to the Regions, but would be retained by the Department of Justice. The Department will file cases where an acceptable negotiated settlement cannot be reached. Copies of settlement documents for such agreements should be provided to OWPE and OECM.

Specific details concerning these authorizations will be addressed in delegations that will be forwarded to the Regions under separate cover. Headquarters is conducting an evaluation of the effectiveness of existing delegations, and is assessing the possibility of additional delegations.

Note on Purpose and Uses of this Memorandum

The policies and procedures set forth here, and internal Government procedures adopted to implement these policies, are intended as guidance to Agency and other Government employees. They do not constitute rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable by any other person. The Government may take action that is at variance with the policies and procedures in this memorandum.

If you have any questions or comments on this policy, or problems that need to be addressed in further guidance to implement this policy, please contact Gene A. Lucero, Director of the Office of Waste Programs Enforcement, (FTS 382-4814), or Richard Mays, Senior Enforcement Counsel, (FTS 382-4137).