



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:

- o The "Interim CERCLA Municipal Settlement Policy Fact Sheet" which summarizes certain key provisions of the interim policy.
- o 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.
- o 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:

- o the Region obtains site-specific information that the MSW 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.

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:

- 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.

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:

- o none of the hazardous substances contained in the trash are derived from a commercial, institutional, or industrial process or activity; AND

- o 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  
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OSWER DIRECTIVE  
#9834.13

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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.<sup>1</sup> 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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<sup>1</sup> 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:

- o 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?
- o Notification: Should municipalities be notified that they are PRPs? Should generators/transporters of MSW or sewage sludge be notified as PRPs?
- o 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?
- o 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<sup>2</sup>

The following defines the key terms used in this interim policy:

- o The term "municipalities" refers to any political subdivision of a State and may include cities, counties, towns, townships, and other local governmental entities.
- o 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

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<sup>2</sup> 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.<sup>3</sup> Many industrial solid wastes and some commercial and institutional solid wastes are managed separately from household wastes, but may enter the MSW waste stream.

- o The term "municipal landfill" refers to any landfill, whether publicly or privately owned, that has received municipal solid waste for disposal.
- o The term "sewage sludge" refers to any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage.<sup>4</sup>
- o The term "trash from a commercial, institutional, or industrial entity" refers to waste which is very

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<sup>3</sup> 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.

<sup>4</sup> 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.

- o 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"<sup>5</sup>], and
4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment

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<sup>5</sup> 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.<sup>6</sup>

#### 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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<sup>6</sup> 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<sup>7</sup>

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;<sup>8</sup> 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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<sup>7</sup> 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.).

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> In this

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<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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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<sup>11</sup> "Interim CERCLA Settlement Policy", February 5, 1985, 50 FR 5034.

<sup>12</sup> 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.<sup>13</sup>

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:

1. Delayed payment: If a municipality has demonstrated difficulty providing a lump-sum payment upfront for past costs or

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<sup>13</sup> 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.<sup>14</sup>

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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<sup>14</sup> 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.<sup>15</sup>

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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<sup>15</sup> 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.

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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.

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**FEDERAL REGISTER NOTICE**

**Superfund Program; Interim Municipal Settlement Policy**

**AGENCY:** Environmental Protection Agency

**ACTION:** Request for Public Comment

**SUMMARY:** The Agency is publishing the "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" (referred to as the Municipal Settlement Policy) today to inform the public about this interim policy and to solicit public comment. This interim policy focuses 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). 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 in the Superfund settlement process as well.

**DATE:** Comments must be provided no later than 60 days after publication of this interim policy.

**ADDRESS:** Comments should be addressed to Kathleen MacKinnon, U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, Guidance and Oversight Branch (OS-510), 401 M Street, S.W., Washington, D.C. 20460.

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FOR FURTHER INFORMATION CONTACT: Kathleen MacKinnon at the above address or at (202) 475-6771.

**SUPPLEMENTAL INFORMATION:**

The following supplemental information is provided to assist the public in reviewing and commenting on EPA's interim policy:

- I. Effective Date of Interim Policy and Role of Public Comment
- II. Purpose of Interim Policy
- III. Focus of Interim Policy
- IV. Why Settlement Involving Municipalities or Municipal Wastes Is An Issue
- V. Discussion of Interim Policy
  - A. Public Input
  - B. EPA Consideration of Competing Public Interests

I. Effective Date of Interim Policy and Role of Public Comment

This interim policy is effective immediately. However, the Agency emphasizes that this is an interim policy and that there is an important role for public comment. We are providing the public with 60 days to review and submit comments in writing. Based upon public comment or on our experience in implementing the interim policy, the Agency may address additional issues or revise the interim policy accordingly.

II. Purpose of Interim Policy

The primary purpose of this interim policy is to provide interim guidance to EPA Regional offices on how they should

exercise their enforcement discretion in dealing with municipalities and municipal wastes in the Superfund settlement process. An additional purpose is to provide municipalities and private parties who may be potentially liable under Section 107(a) of CERCLA with information about how EPA will handle them in the settlement process. We believe this interim policy is important for establishing a national framework that will help facilitate our ability to reach settlements and will ensure that sites involving municipalities or municipal wastes are addressed consistently throughout the country.

### III. Focus of Interim Policy

The interim policy focuses on how EPA will proceed in attempting to reach settlements at sites involving municipalities or municipal wastes. Focusing on settlements means the interim policy indicates how EPA will attempt to reach voluntary agreements for responsible party financing and/or cleanup of sites involving municipalities or municipal wastes. Nothing in the interim policy affects any party's potential legal liability under CERCLA. Any decision EPA makes in exercising its enforcement discretion under this interim policy does not mean that potential CERCLA legal liability no longer applies. In particular, nothing in the interim policy precludes a third party from initiating a contribution action.

Focusing on settlements involving municipalities or municipal wastes means that the primary intent of the interim



policy is to address questions about how EPA should handle municipalities or municipal wastes in the Superfund settlement process. However, in the process of addressing those questions we found it necessary to address other issues relating to private parties and certain kinds of commercial, institutional, or industrial wastes. We have addressed these related issues because private parties sometimes handle municipal wastes, private parties generate some waste streams that are similar in nature to municipal wastes, and municipal and industrial wastes are sometimes co-disposed at the same site (particularly municipal landfills).

Specific questions that have been examined by EPA as part of this interim policy relate to who should be included in the information gathering process, who should be notified as potentially responsible parties, how municipalities should be handled in the settlement process, and how the treatment of municipalities and municipal wastes affects the Agency's treatment of private parties and certain kinds of commercial, institutional, or industrial wastes.

IV. Why Settlement Involving Municipalities or Municipal Wastes Is An Issue

Involving municipalities and municipal wastes in the Superfund 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 there are a significant number of proposed and final sites on the National Priorities List (NPL) that involve municipalities or municipal wastes, and EPA expects more of these sites to be added to the NPL in the future.

EPA has identified 320 (about 25%) of the 1219 proposed and final NPL sites that may involve municipalities or municipal wastes. Of those sites, 236 (about 20%) have been classified as municipal landfills. EPA defines a municipal landfill as any landfill, either publicly or privately owned, which has received municipal solid waste. Although it is difficult to accurately predict how many of those sites involving municipalities or municipal wastes may be added to the NPL, historically about 20% of each NPL update has included municipal landfills. Municipal landfills are particularly complex sites to address because they typically involve multiple responsible parties (sometimes hundreds of different parties), multiple sources of wastes (often municipal and industrial wastes), as well as diverse waste streams (in terms of amount and toxicity).

V. Discussion of Interim Policy

In the development of this interim policy, EPA has examined a variety of issues and options for addressing these issues. We have also made an effort to provide meaningful opportunities for interested parties to participate in the debate about

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municipal settlements. EPA has listened to all sides of the debate and has attempted to develop an approach that is both fair and manageable.

A. Public Input

Throughout the development of this interim policy, EPA has established and maintained an extensive dialogue with a full range of interested parties. For example, in March of 1988 EPA sponsored a Municipal Settlement Conference attended by over 100 representatives from State and local governments and organizations; industry, environmental, and other groups; as well as Congressional staff. EPA sought input from all interested parties to facilitate our efforts to develop a fair assessment of the issues, particularly from municipal and industrial representatives who are most directly affected by the interim policy. Both municipalities and private parties are affected by this interim policy because, as mentioned above, both municipalities and private parties handle municipal waste, private parties generate waste streams that have similar characteristics to municipal waste streams, and municipal and industrial waste streams are often co-disposed at individual sites.

As a followup to this conference, EPA established the Municipal Settlement Discussion Group. The discussion group met in June, August, and October of 1988 and was generally comprised of the same groups and interests that participated in the March

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conference. All discussion group meetings were open to the public and a notice of each meeting was published in the Federal Register.

The purpose of this dialogue has been for EPA to inform the public about the issues that the Agency is addressing as part of our effort to develop the Municipal Settlement Policy. At the same time, the Agency has sought to stimulate the public debate about these issues by providing a public forum for the exchange of ideas. The conference and discussion group activities have been conducted as an information exchange and public debate exercise. EPA has not requested recommendations nor attempted to reach a consensus among the various parties. Minutes of all meetings have been prepared and are available to the public upon request.

A final meeting of the discussion group is expected to be held in January 1990, before the close of the 60 day public comment period. The purpose of this meeting will be to discuss the interim policy and to further facilitate public comment. A notice of this meeting will be published in the Federal Register. Minutes of this meeting will be kept and made available to the public upon request.

B. EPA Consideration of Competing Public Interests

Input from the public has played an important role in EPA's development of this interim policy. Within the context of CERCLA's statutory language and objectives, EPA has considered

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the competing interests and objectives of the various parties interested in this issue, especially municipalities and private parties who are directly affected by the interim policy. EPA has developed an interim policy which the Agency believes is appropriate, is in the interests of the public, and is fair to both municipalities and private parties as well as one which can be managed and implemented by EPA's Regional offices. The following examples highlight how EPA considered competing interests on key issues. The discussion below only summarizes (and sometimes paraphrases) certain key aspects of the interim policy; readers should refer to the interim policy itself for an indication or clarification of how EPA will proceed.

1. Treatment of municipalities as owners/operators: Some interested parties expressed uncertainty about whether potential CERCLA liability should apply to municipal owners/operators of facilities where hazardous substances are present. In addition, there are different views about how municipal owners/operators should be handled in the settlement process. For example, some municipal representatives have suggested that when potential owner/operator liability applies that municipalities should be given "special treatment" (e.g., provided with an early opportunity to meet with EPA to resolve their potential liability). Industry representatives have indicated that municipal owners/operators should be handled the same as other

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PRPs and should be part of the larger settlement process that may involve other parties, including private parties.

EPA's interim policy clarifies that municipal owners/operators may be potentially liable just like private parties, and that such parties will generally be notified and handled in the same manner during the settlement process as private parties.

2. Treatment of generators/transporters of municipal wastes and certain kinds of commercial, institutional, or industrial wastes: There are different views on whether the generators/transporters of municipal wastes (e.g., municipal solid waste and sewage sludge) (usually municipalities) should be notified that they are considered to be potentially responsible parties and brought into the Superfund settlement process. Municipalities and some States do not believe it is appropriate to include the generators/transporters of municipal wastes as potentially responsible parties. Industry representatives have generally taken the opposite view.

EPA's approach to this issue is as follows: when the source of the municipal waste is believed to come from households, regardless of whether household hazardous waste may be present, the general policy is to exclude such municipal wastes from the Superfund settlement process, unless the Region obtains site-specific information that the municipal solid waste or sewage sludge contains a hazardous substance from a commercial, institutional, or industrial process or activity.

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The only exception to this general policy is that EPA may consider bringing generators/transporters of municipal solid waste that contains a hazardous substance derived only from households into the settlement process as potentially responsible parties if the total privately generated commercial, institutional, and industrial waste at the site is insignificant compared to the municipal solid waste. EPA expects this exception to be sparingly applied.

When we are dealing with industrial wastes (including low-hazardous industrial wastes), the generators/transporters of the wastes will generally be notified as potentially responsible parties because the source of the waste is a commercial, institutional, or industrial process or activity.

One question raised by the interim policy relates to how EPA will handle trash from a commercial, institutional, or industrial entity which is very similar to municipal solid waste that is derived from households. Although the source of the waste in this situation is not households, when the generator/transporter shows EPA that its waste is very similar to that generated by households and that it is not the result of a commercial, institutional, or industrial process or activity, the generator/transporter generally will not be notified as a potentially responsible party by EPA and brought into the Superfund settlement process.

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In carrying out this approach, EPA is exercising its enforcement discretion in determining whether we will treat generators/transporters as potentially responsible parties for certain categories of wastes. EPA believes this approach is fair and manageable. For example, this approach treats municipalities and private parties that handle the same waste streams in the same manner (e.g., municipal generators/transporters of municipal solid waste are treated the same as private party generators/transporters of such waste).

This approach also treats different waste streams in a logical and consistent manner. A key factor in determining whether to notify generators/transporters of municipal solid waste, sewage sludge, trash from a commercial, institutional, or industrial entity, or low-hazardous industrial wastes is tied to whether a hazardous substance is present that is derived from a commercial, institutional, or industrial process or activity.

Finally, this approach is one that can be effectively managed and implemented by EPA's Regional offices. For example, based on our experiences at Superfund sites, especially municipal landfills, we believe that it is generally not a cost-effective use of our enforcement resources to pursue those generators/transporters whose only contribution at a Superfund site appears to have been substances that may have been contaminated only with relatively small quantities of household hazardous waste (e.g., municipal solid waste). The resource-intensive nature of



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obtaining sufficient evidence to demonstrate the presence of household hazardous waste as well as the potentially increased transaction costs of settlement and/or litigation far outweigh the possible benefit the Government may derive from obtaining cleanup costs from such parties. The Agency believes that its enforcement resources are better spent on pursuing other potentially responsible parties to achieve the cleanups needed to effectively implement the Superfund program and to protect human health and the environment.

3. Role of municipalities in the settlement process:

There are also different views on the appropriate treatment of municipalities vis-a-vis private parties in the settlement process (i.e., whether municipalities should receive "special treatment" because they are governmental entities).

Municipalities generally believe they should be treated differently than private potentially responsible parties while industry generally believes they should not.

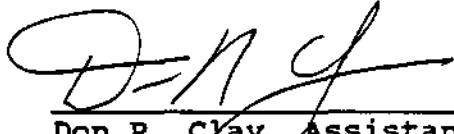
EPA believes that municipalities and private parties should generally be handled in the same manner in the settlement process. Handling municipalities and private parties the same means that EPA will seek information in appropriate circumstances from all parties, including municipalities. This also means that all parties who are owners/operators of facilities will generally be notified as potentially responsible parties.

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Relating to municipal solid waste or sewage sludge, all parties who are generators/transporters (either municipalities or private parties) are generally exempt from notification unless we obtain site-specific information that the waste contains a hazardous substance from a commercial, institutional, or industrial activity or process. In instances relating to notification as a potentially responsible party, we focus on the nature/source of the waste, not whether the party is a municipality or private party.

The interim policy also handles municipalities and private parties essentially in the same manner once they are notified as potentially responsible parties by attempting to negotiate and settle with such parties as one group, unless separate settlements such as de minimis settlements pursuant to Section 122(g) of CERCLA are appropriate. Nevertheless, EPA does recognize that municipalities have unique characteristics as governmental entities which EPA may take into account when designing specific settlements (e.g., by considering delayed payments, delayed payment schedules, or in-kind contributions under appropriate circumstances).

12/6/89  
Date

  
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