



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



SEP 30 1993

MEMORANDUM

SUBJECT: Communications Strategy for Settlements with
Small Volume Waste Contributors

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

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Office of Enforcement/Superfund

TO: Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X

Attached please find a "Model Communications Strategy for Settlements with Small Volume Waste Contributors;" a "Model First Point of Contact Letter" for use with de minimis PRPs; and "Superfund and Small Waste Contributors" an introductory brochure. These documents are intended to assist the Regions in informing and assisting de minimis parties who may be unfamiliar with the Superfund process.

The communications strategy recommends a variety of approaches to ensure successful communications with both de minimis and non-de minimis parties prior to, during, and following de minimis settlement negotiations. The model letter is intended to be the Agency's first point-of-contact with de minimis PRPs, and should be issued prior to a notice or offer letter. A model notice letter for use with de minimis parties will be forthcoming under separate cover. The attached brochure describes the basics of Superfund and the de minimis settlement process, and should be included in mailings to de minimis parties, distributed at PRP meetings, and provided to elected officials as introductory information about de minimis settlements.

If you have any questions or comments regarding these documents, please call Nicole Veilleux in the Office of Waste Programs Enforcement at (703) 603-8939, or Ken Patterson in the Office of Enforcement at (202) 260-3091.

Attachments



MODEL "FIRST POINT OF CONTACT" LETTER FOR USE
WITH DE MINIMIS PARTIES

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region []

[Address]

Re: [Site Name, Address or location of site]

Dear Sir or Madam:

The United States Environmental Protection Agency (EPA) is currently working to clean up the [name] facility, which is a Superfund site located in [county, state]. Superfund is a federal program administered by the EPA that is designed to clean up hazardous substances ("waste") that may pose a threat to human health or the environment. (The full name of the Superfund law is the Comprehensive Environmental Response, Compensation, and Liability Act, or "CERCLA.") Attached is a fact sheet with further information about the site and EPA's efforts to date. [Attach a site fact sheet and any available remedy selection information.]

EPA is sending this information to you because you are potentially responsible for (contributing or transporting) a small amount of the waste to the site. EPA has based this determination on [list sources of information utilized]. [Include attachments if appropriate.]

Under the Superfund program, EPA has the authority to take actions at sites such as the [name of site] site to protect public health, welfare, and the environment. In addition, this law permits EPA to request that parties who are responsible for the waste pay to clean up the site.

Potentially Responsible Parties

Those parties who may be responsible for the waste at sites are referred to as "potentially responsible parties" or Superfund "PRPs." PRPs include individuals, businesses, governmental agencies, and other types of organizations. You may be a PRP if you are:

- 1) a current owner or operator of the site;
- 2) a former owner or operator of the site during the period of waste disposal;
- 3) a party that arranged for the treatment, disposal, or transportation of hazardous substances to the site; or
- 4) a party that transported hazardous substances to a site you selected.

"De Minimis" Settlements

Because EPA believes you may have contributed only a small amount of waste in comparison to the total amount of waste at the site, you may be considered a "de minimis" PRP. Under Superfund, EPA may offer special settlements to de minimis PRPs, which provide many benefits to settling parties. Through a de minimis settlement, you receive:

1. "Covenant Not to Sue" - This provision is a promise that the EPA will not bring any future legal actions against you regarding the site and the specific matters named.
2. "Contribution Protection" - This provision offers you protection from being sued by other PRPs at the site. Frequently, major waste contributors will sue many small waste contributors to recover cleanup costs. A de minimis settlement provides protection from such suits that extends to all issues covered by the settlement.

The amount a de minimis settlor may pay as part of the settlement varies from site to site. In general, the payment amount is the sum of a basic payment and a premium payment. The basic payment is calculated from the estimated cost to clean up the site and the amount of the de minimis party's waste (as a percentage of the total waste at the site). The premium payment varies according to a variety of factors specific to both the site and the settlement. See the enclosed brochure entitled "Superfund and Small Waste Contributors" for more information. [Enclose brochure.]

Taken together, contribution protection, the covenant not to sue, and other de minimis settlement terms can provide you with a high level of certainty that your responsibility at a site is fulfilled, and that you are protected from future legal actions related to the matters addressed in the settlement. To date, nearly 5000 individuals, small businesses, and others have entered into de minimis settlements with EPA to resolve their Superfund liability at over 65 sites across the country.

Information to Assist Potentially Responsible Parties

EPA encourages good faith negotiations between PRPs and EPA, as well as among PRPs. To assist in this effort, we have attached a list of the names and addresses of individuals who have received this letter, or previous letters, because they are potentially responsible for cleaning up the waste at the [name of site] site. It may be useful to talk to or meet with other de minimis parties at the site before talking to EPA or to other non-de minimis PRPs. [In the attachment, note which PRPs are de minimis, to facilitate the formation of a de minimis group.] It is important to note that this list is preliminary; it is not a

final determination of the parties that may be responsible for the cost of cleaning up the site. EPA may modify this list of PRPs at any time.

[A Region should also attach the following, if available.] To the extent such information is available, EPA has also enclosed a list of the volume of the waste materials contributed by each party. Note that this list is also preliminary, and does not constitute a final determination of contribution or liability.

[A Region may incorporate this section where the use of ADR is either being contemplated or is already underway at this site.]
Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is a collection of methods commonly used to resolve legal disputes out of court. ADR normally involves the use of a neutral third party who is skilled in a variety of ADR approaches to increase the effectiveness of settlement discussions.

Due to [the particular circumstances of the case: e.g., large number of parties, history of unsuccessful negotiations, short timeframe, etc.], EPA believes that the services of a facilitator may be useful in this matter. A meeting is planned for [date, time] at [location] which will provide an opportunity for you to explore settlement options with other de minimis and non-de minimis PRPs. We hope you will attend.

To help you explore ADR options, we have asked [name of facilitator/mediator], a neutral professional from [name of ADR firm] (a national provider of alternative dispute resolution services) to be present at this meeting. [Name of facilitator/mediator] will be available to discuss ADR options and meet with you at your request. If you have questions about the use of ADR in this matter that you would like to ask prior to this scheduled meeting, you may reach [him, her] at [phone]. [The Agency's primary contract source for ADR neutrals is RESOLVE, a national provider of ADR services located in Washington, D.C. The EPA ADR liaison at Headquarters, David Batson, will help identify an appropriate neutral professional to reference in this letter.]

Information about the Site

EPA encourages you to become familiar with the site. To assist you in this effort, EPA has compiled certain key documents about the site. Copies of these documents are located at [EPA Regional Office] and [location on/near site], and are [will be] available to the public for inspection and comment.

[In closing, include a contact name and phone number for further information, as well as information about whatever next steps are

appropriate, e.g., upcoming meeting, date for participating in negotiations, etc.]

A de minimis settlement may be in your best interest. EPA encourages you to read carefully the enclosed fact sheet about the site and about de minimis settlements. [Please contact EPA by [date] to indicate your interest in participating in future negotiations at this site. You may respond individually or through a group or committee, if such a group has been formed.] If you have any questions concerning this letter, please contact (or direct your attorney to contact) [name of regional attorney].

COMMUNICATIONS STRATEGY FOR SETTLEMENTS
WITH SMALL VOLUME WASTE CONTRIBUTORS

This memorandum outlines a communications strategy for use in settlements with small volume waste contributors. Effective communication early in the settlement process with all concerned parties can serve many useful functions, including limiting transaction costs, improving the settlement offer's chances of acceptance, and fostering better relationships with Congress and the public.

The Purpose of a Communications Strategy

De minimis settlements are frequently offered to individuals or small businesses that are unfamiliar with Superfund. Indeed, de minimis parties may even be unaware of the difference between a demand letter from a settling PRP and an offer letter from the government. Members of Congress and local elected officials are also frequently concerned about the effect of a Superfund enforcement action on their constituents. Similarly, non-de minimis parties at the site will appreciate the Agency's efforts to keep them apprised of any de minimis settlements in the offing and may be of assistance in facilitating the de minimis settlement. A Region should consider the needs of each of these audiences before tendering a de minimis settlement. By taking steps to accommodate these types of interests, the Region can improve the likelihood that the Agency's de minimis settlements will be achieved more quickly and with fewer transaction costs expended.

An effective communications strategy has important benefits internal to EPA as well. By developing a strategy early in the settlement process, the Region can capitalize on existing Agency personnel, such as congressional liaisons and press officers. Congressional liaisons, for example, are in constant contact with the congressional staff and active members in each Region. Therefore, if a de minimis settlement offer generates the interest of a member of Congress, the liaison will likely be the first to receive a call. Without effective inter-office communication early in the process, an important audience may be provided information that is inadequate or incorrect.

¹ Although this memorandum frequently refers to de minimis parties, the communication strategies it recommends should also be used, where appropriate, in connection with de micromis settlements. See "Guidance on CERCLA Settlements with De Micromis Waste Contributors," OSWER Directive #9834.17 (July 30, 1993).

Communication Tools

Listed below are a collection of communication tools that may be used to improve the overall effectiveness of the settlement and to safeguard against the consequences of misinformation. Note, however, that the need to incorporate any or all of these tools into a communication strategy is necessarily site-specific. The breadth of an effective communication strategy will likely vary according to many factors, including the number and type of de minimis and non-de minimis PRPs at the site, the details of the settlement, the level of congressional interest, the extent of prior media attention, the degree of community involvement, etc. Therefore, each settlement involving small volume waste contributors should be preceded by a careful consideration of the likely reactions to the settlement offer and a determination of which of the following communication tools to utilize.

I. Facilitating the Agreement

1. Model Letter

Given that many de minimis parties are unfamiliar with Superfund, a Region should use the attached model letter as the Region's first point of contact with potentially de minimis PRPs. This letter provides basic information about Superfund and introduces the recipient to de minimis settlements in general terms. Following the mailing of this letter, the Region should provide de minimis parties with an opportunity to learn about their options prior to sending the actual settlement offer.

Similarly, offer letters that are sent to de minimis parties who may be unfamiliar with the Superfund program should also carefully explain the elements of the settlement. For example, the offer letter should provide ample explanation of the requirements for determining which parties qualify for a de minimis settlement, the cutoff used for eligibility at the site, the payment schedule, the premiums and reopeners included, the need for a certification of contribution, etc.²

2. Settlements with Individuals and Groups

A Region may settle with de minimis parties either individually or in a group. As part of the Agency's efforts to achieve more de minimis settlements earlier in the process, a Region is encouraged to actively assist in the formation of a de minimis group where appropriate, settle with individuals prior to the

² A model notice letter for use with de micromis parties will be forthcoming under separate cover.

formation of a group, or both.³

3. Involving the Non-De Minimis Settlers

The active involvement of the non-de minimis settlers is key to a successful de minimis settlement. In sites with many PRPs, non-de minimis parties have frequently assisted in the formation of a steering committee that includes a liaison counsel for the de minimis parties. The counsel can work with the non-de minimis parties to ensure that the concerns of the de minimis parties are represented, and that the de minimis parties receive all pertinent documents. In addition, information concerning proposed de minimis settlements should be provided to the non-de minimis parties.

4. Alternative Dispute Resolution

The use of neutral alternative dispute resolution professionals may be a constructive addition to the settlement process that benefits the small waste contributors, the major PRPs, and the Agency. ADR professionals, provided by EPA, can assist in the initial formation of de minimis groups, the dissemination of information, and the facilitation of discussions or negotiations.⁴

II. Disseminating Information⁵

1. General De Minimis Brochure

The distribution of general information to small waste contributors is essential to their understanding of Superfund and the de minimis (or de micromis) settlement process. A brochure entitled "Superfund and Small Waste Contributors" that describes the basics of Superfund and the de minimis settlement process is enclosed. A Region should include this brochure in the first mailings to de minimis PRPs, distribute it at PRP meetings, and include it in the Administrative Record. It may also be useful to provide this information to other offices in the Region, such as the community relations sections, the Press Office, and the

³ See "Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A)," OSWER Directive #9834.7-1D (July 30, 1993).

⁴ Regions that are considering utilizing alternative dispute resolution should contact the EPA ADR Liaison in the Office of Enforcement, David Batson (202-260-8173), to discuss this option further.

⁵ The importance of information dissemination is emphasized in the "Revised Policy on Discretionary Information Release Under CERCLA," OSWER Directive #9835.12-01a (March 31, 1993).

Congressional Office.

2. Site-specific Fact Sheets

The development and distribution of site-specific fact sheets has also proved to be an essential part of disseminating information both prior to and following the settlement offer. Such documents should be written in clear, simple language, and address such questions as: How and why did this site become a Superfund site? What is happening at the site now? What have been the (groundwater, soil, surface water) sampling results? What will happen next at the site? Who are the PRPs? Who is doing the cleanup? Where can I get more information? Similar to the generic de minimis brochure, a Region should make this type of information widely available to interested parties as well as to other EPA (Regional and Headquarters) personnel who may be asked similar questions about the site.

3. Public Meetings

Public meetings may be a useful way to inform interested parties about the site in general, as well as about the possibility of a de minimis settlement. Public meetings are an excellent opportunity for the Agency to inform de minimis parties, non-de minimis parties, and others about EPA's efforts to settle with small volume waste contributors. Wherever possible, the Region should make the government attorneys for the site available at such meetings to answer general questions. These meetings facilitate the distribution of information, provide an opportunity for de minimis and non-de minimis parties to meet, and may hasten the formation of a de minimis group -- all of which can serve to reduce overall transaction costs.

4. Informing Elected Officials

In some cases, it may be helpful to inform elected officials of impending de minimis settlements, prior to issuing the settlement offer. Because these officials receive letters from small businesses and other affected constituents, the Region must keep elected officials apprised of EPA's activities -- both enforcement and remedial -- at sites in their districts. Some regional congressional offices hold regular briefings with congressional staff on Superfund sites of interest. Congressional liaisons are also kept informed of opportunities to provide information to members through Headquarters' meetings with Capitol Hill. By providing information early in the process to the Agency's congressional liaisons, a Region can promote congressional support for the Superfund enforcement program and the Agency's use of the de minimis settlement tool in particular.

5. Press Releases

A Region should not wait to issue a press release until the Agency receives negative press on a site or an enforcement action. In some cases, it may be useful to issue a press release to the local and trade press to announce a successful de minimis

settlement. The generic De Minimis brochure can be attached to a press release to help educate reporters about this settlement tool. By contacting the regional press office early in the process, the Region can ensure timely reporting of the settlement.

6. Hotlines

It may be useful to establish a hotline or other mechanism to handle the numerous requests the Region frequently receives for general information about a particular site or settlement. Such a centralized information dissemination system can serve to provide answers to general questions about de minimis or de micromis settlements, or simple factual questions that address a pending settlement at a particular site. Once established, this type of system can greatly alleviate the burden borne by remedial project managers and regional attorneys who are frequently deluged with calls from recipients of §104(e) requests, notice letters, etc.

III. Internal Agency Notification

1. Congressional and Legislative Affairs

As mentioned above, it is imperative that the regional program office or Office of Regional Counsel provide information about impending de minimis settlements to the regional Office of Congressional and Legislative Affairs before that Office receives a call from an elected official. Frequently, elected officials hear of Agency enforcement actions from their constituents and call their Agency contacts who may be unfamiliar with the case. Many regional congressional offices have quarterly meetings with both the program and the regional counsel's office; these meetings are an excellent opportunity to inform the congressional liaisons of recent settlement offers, etc.

2. Public Affairs

Coordination with the regional press officers early in the process is important at sites whether or not there has been prior media attention. If the site, or specific PRPs, have gained the attention of the press, it is important for the Agency's press officers to be alerted to any upcoming enforcement actions. With sufficient foresight, pro-active efforts, and inter-office coordination, the increasing use and publicity of de minimis settlements can begin to change the public's view of Superfund's effect on small businesses.

Conclusion

This memorandum recommends numerous strategies for communicating prospective de minimis settlements to the small waste contributors at a site, non-de minimis parties, local elected officials, the press, interest groups, members of Congress, and others. While it is not necessary to employ each of these

communication tools for every de minimis settlement, it is strongly recommended that a Region, at a minimum, consider the anticipated reactions to a de minimis settlement offer, and determine which of these avenues of communication are appropriate.

If you have any questions or comments about the use of these communication tools in the context of a de minimis settlement, please call Nicole Veilleux at (703) 603-8939.

What is Superfund?

Superfund is a federal program, administered by the Environmental Protection Agency, that is designed to clean up hazardous substances (or "waste") that may pose a threat to human health or the environment. The full name of the law is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

Many Superfund sites are frequently areas or facilities where solvents, sludges, heavy metals, or other wastes have been disposed. These sites range in size from a 1/4-acre metal plating shop to a 250-square mile mining complex. Contamination from these sites is often found in the soil, groundwater, and/or nearby streams and lakes.

Who pays for cleanups?

When Congress enacted Superfund, it intended to "make the polluters pay" for the cost of cleaning up these sites. To achieve this goal, EPA seeks to hold those parties who contributed to the contamination responsible for the cost of cleanup. Such parties may be asked to help pay for the cleanup of a site even if they acted in full accordance with the law at the time they disposed of the waste.

Superfund encourages EPA to settle with these responsible parties outside of court, but also authorizes the Agency to bring actions in court to require responsible parties to pay for (or perform) the cleanup.

In some cases, when no responsible parties can be identified, the cost is borne by the taxpayers. At these sites, the cleanup is paid for out of a Trust Fund set up by Congress to address this problem.

What is Alternative Dispute Resolution?

Alternative Dispute Resolution (ADR) is a collection of methods to resolve legal disputes outside of court. ADR normally involves the use of neutral third parties who are skilled in a variety of ADR approaches to increase the effectiveness of settlement discussions.

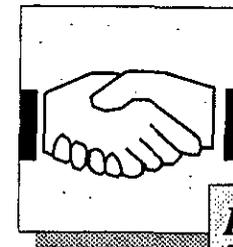
At sites where numerous *de minimis* parties have been identified, it may be most efficient for such parties to coalesce into a group and appoint a representative to negotiate with EPA and/or the other PRPs at the site. A neutral ADR professional can assist greatly in the formation of a *de minimis* group, in the dissemination of information, and most importantly, in the negotiations process.

Where can I get more information?

To find out more about *de minimis* settlements, and how you might be involved, contact the nearest Regional U.S. Environmental Protection Agency Superfund program office. Ask to speak to the attorney, project manager, or community relations representative assigned to your site.



EPA Superfund and Small Waste Contributors



*De Minimis
De Minimis
De Minimis
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De Minimis*



Have you been contacted by the U.S. Environmental Protection Agency or another party regarding your possible involvement with a Superfund site? If you believe the waste that you contributed to the site was minimal, you should learn about "de minimis settlements."

This pamphlet describes what Superfund is, who Potentially Responsible Parties are, and why a de minimis settlement may be to your advantage.



How did I become a potentially responsible party?

"Potentially responsible parties" (PRPs) are individuals or companies who may be responsible for all or part of the contamination at a site. PRPs include individuals, businesses, local, state, or federal governmental agencies, and other types of organizations. You may be identified as a PRP if you are:

- 1) a current owner or operator of the site;
- 2) a former owner or operator of the site during the period of disposal;
- 3) a party that arranged for the treatment, disposal, or transportation of hazardous substances to the site;
- 4) a party that transported hazardous substances to a site you selected.

If you fit one of these descriptions, you may be a PRP even if you were unaware that your waste was disposed of at the site, or did not dispose of it yourself.

What does "de minimis" mean?

At many sites there are PRPs who may have contributed only a very small amount of waste to a site. EPA may consider these parties "de minimis" because their contribution is minimal compared to the other waste at the site. For example, an individual who contributed one percent or less of the waste at a site may be considered a *de minimis* party.

In recognition of their relatively small contribution of waste, and to help ensure that these *de minimis* parties do not get drawn into lengthy and expensive lawsuits, EPA may offer a special type of settlement to these types of parties.

Whether and how individuals qualify for a *de minimis* settlement depends on a variety of site-specific factors. However, in general, you may qualify for a *de minimis* settlement if:

- the amount of waste you contributed is minimal in comparison to the other hazardous substances at the site;
- the toxic or other hazardous effects of the waste you contributed are minimal in comparison to the other hazardous substances at the site; and
- the settlement is in the public interest, and involves only a minor portion of the response costs at the site.

Or, if you are the owner of a site, you may qualify for another type of *de minimis* settlement if:

- as the owner of the site, you did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substances at the facility; and
- at the time of purchase, you did not know, or had no reason to know, that the property was used for the generation, transportation, storage, treatment, or disposal of a hazardous substance.

What are the benefits of this type of settlement?

Although EPA may go to court to require PRPs to pay for (or perform) a cleanup, the Agency often prefers to settle its claims without resort to expensive court action. Settlements save both time and money for all parties involved.

De minimis settlements can provide several benefits, including:

"Covenant Not to Sue" - This provision is a promise that the EPA will not bring any future legal actions against the *de minimis* party regarding the site and the specific matters named.

"Contribution Protection" - This provision offers protection to the *de minimis* settlor from being sued by other PRPs at the site. Frequently, major waste contributors will sue many small

waste contributors to recover their cleanup costs. A *de minimis* settlement provides protection from such suits that extends to all matters covered by the settlement.

Taken together, contribution protection, the covenant not to sue, and other *de minimis* settlement terms provide settlers with a high level of certainty that their responsibilities at the site are fulfilled, and that they are protected from future legal actions related to those matters addressed by the settlement. To date, nearly 5000 individuals, small businesses, and others have entered into *de minimis* settlements with EPA to resolve their Superfund liability at more than 65 sites across the country.

What other settlement provisions are important?

"Payments and Premiums" - Although the amount a *de minimis* settlor may pay varies from site to site, in general, the payment amount is calculated by combining a basic payment and a premium payment. The basic payment is based on the estimated cost to clean up the site and the amount of the *de minimis* party's waste as a percentage of the total waste at the site.

The premium payment is associated with the protection from further EPA lawsuits that is provided by the "covenant not to sue." Premium amounts vary according to a variety of factors specific to both the site and the settlement, but typically range from 50 - 100% of the basic payment.

"Reopeners" - If you enter into a *de minimis* settlement with the EPA, you will likely be asked to certify that your waste contribution is the amount (and type) that you claim. After the settlement is finalized, if new information indicates that your contribution is actually greater than you originally certified, the settlement may be "reopened" for renewed consideration. Other types of reopeners may also be included.