United States General Accounting Office

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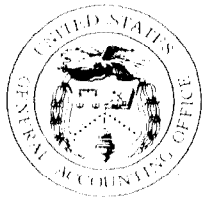
Report to the Chairman, Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives

July 1991

SUPERFUND

More Settlement Authority and EPA Controls Could Increase Cost Recovery



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Resources, Community, and
Economic Development Division

B-243943

July 18, 1991

The Honorable Mike Synar
Chairman, Environment, Energy, and
Natural Resources Subcommittee
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

As you know, GAO has recently implemented a special audit effort to help ensure that areas vulnerable to fraud, waste, abuse, and mismanagement are identified and that appropriate corrective actions are taken. This effort focuses on 16 areas, 1 of which is the Environmental Protection Agency's (EPA) Superfund program. Your request to examine the Superfund settlement process is one of several assignments we have initiated or planned for this area.

This report discusses EPA's success in obtaining cleanups and recovering costs, the adequacy of EPA's controls over the settlement process, and additional opportunities for more fully recovering Superfund's costs. The report contains two recommendations to the Congress and a number of recommendations to the Administrator, EPA, to improve controls over settlements and recover more costs.

Unless you publicly release its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies of this report to the appropriate congressional committees; the Administrator, EPA; and the Director, Office of Management and Budget. We will also make copies available to others upon request.

This work was performed under the direction of Richard L. Hembra, Director, Environmental Protection Issues, (202) 275-6111. Major contributors are listed in appendix I.

Sincerely yours,

J. Dexter Peach
Assistant Comptroller General

Executive Summary

Purpose

Billions of dollars will be required to clean up the nation's worst hazardous waste sites, which currently number nearly 1,200. The parties responsible for this pollution will perform some of these cleanups, while the Environmental Protection Agency (EPA) will perform others and later seek to recover its costs. In fiscal year 1990, EPA obtained settlements with responsible parties to perform $731 million in cleanup work and to repay EPA $87 million in costs.

Because of the large sums of money involved, the Chairman, Environment, Energy, and Natural Resources Subcommittee, House Committee on Government Operations, asked GAO to determine (1) the extent to which EPA's negotiated settlements achieve program goals, (2) whether the internal controls EPA currently has in place for the settlement process are adequate to safeguard the government's interests, and (3) whether opportunities exist for EPA to reach settlements that more fully recover Superfund's costs.

Background

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), also known as Superfund, authorizes EPA to clean up the nation's worst hazardous waste sites. Specifically, section 106 of the act authorizes EPA to order responsible parties to clean up sites, and section 107 makes these parties liable for the government's response costs in cleaning up sites. This liability can include a share of EPA's costs to administer Superfund. If necessary, EPA can obtain court intervention to compel cleanup and cost recovery. As amended, CERCLA provides a $15.2-billion fund to administer the program and to pay for cleanups when willing and able responsible parties cannot be found.

Rather than use its enforcement authorities, EPA relies largely on negotiations to reach settlements with responsible parties. In negotiating cleanup settlements, EPA issues special notice letters requesting the responsible parties to present a good faith offer expressing their willingness to perform the cleanup work and reimburse Superfund's costs. If EPA determines that the parties are acting in good faith, it negotiates specific settlement terms with them. Cost recovery negotiations generally follow EPA's issuance of a demand letter to responsible parties or EPA's filing of a complaint in federal district court. GAO's review was largely limited to settlements in fiscal year 1989—the most recent entire fiscal year at the time of the review.

Results in Brief

Since fiscal year 1987, EPA has increased the number and dollar value of its negotiated settlements; however, EPA does not have performance

measures to show the extent to which its settlements achieve program goals. The performance measures GAO computed for EPA's fiscal year 1989 settlements showed that EPA had neither obtained full implementation of EPA's cleanup remedies nor recovered 100 percent of Superfund's costs. In all, EPA had not obtained or recovered about 13 percent, or about $89 million, of the total funds required or expended for cleanups, including related Superfund program costs.

EPA may have valid reasons to substantiate its settlements; however, for the 19 settlements GAO reviewed, it had little or no documentation of significant events, such as negotiation sessions with responsible parties, or of key decisions regarding offers and counteroffers. Documentation of significant settlement-related events is necessary to assure the Administrator of EPA and the Congress that Superfund settlements are in the government's best interest. Furthermore, documentation is required to comply with the Comptroller General's internal control standards.

CERCLA's interest rate provisions prevent EPA from seeking the recovery of hundreds of millions of dollars in interest. If EPA had always been allowed to accrue interest from the date funds were expended and to charge a commercial interest rate, GAO estimates that $105 million in interest could have been accrued in 1990 on the funds EPA expended in fiscal year 1989 alone. By increasing the Superfund costs that EPA can recover, these additional interest charges would provide further incentive for responsible parties to perform cleanups.

Principal Findings

Evaluating Settlement Success

Since fiscal year 1987, both the number and value of EPA's settlements with responsible parties have increased; however, these measures do not show the extent to which settlements have achieved program goals. GAO's survey of fiscal year 1989 settlements showed that EPA had succeeded in getting responsible parties to perform 98 percent of the identified cleanup work valued at $494 million and to pay 59 percent of the $197 million in Superfund costs that EPA had identified for the sites covered by these settlements. In all, EPA's fiscal year 1989 settlements did not obtain or recover $89 million, or about 13 percent, of the total amount required or expended for cleanups, including related Superfund costs. Performance measures like these provide not only a context for evaluating settlements but also a basis for accountability. They allow

comparisons by sites and regions and provide criteria for assessing policy changes.

Internal Controls Over Settlements

Executive branch agencies are required to follow the internal control standards prescribed by the Comptroller General. These standards require every transaction and other significant event to be clearly documented, including the initiation, progress, and final classification. GAO's review of 19 settlements showed, however, that this documentation standard was generally not met because EPA does not require its regions to document the settlement process.

In one of the settlements GAO reviewed, the responsible parties had agreed to perform EPA's remedy—valued at $19 million—but had refused to pay any of the $1.25 million in EPA costs for this site. However, before starting negotiations, the EPA negotiating team had not documented a bottom-line position setting forth its expectations. Neither had it documented its negotiating sessions with the responsible parties or its internal meetings with regional management.

EPA requires a written postsettlement analysis to justify some of its settlements, but it does not require them for all settlements. Furthermore, EPA does not require these analyses to compare the settlement outcomes to initial expectations or, where appropriate, to state EPA's rationale for accepting less than it had originally expected.

Because EPA did not have sufficient documentation for GAO to fully evaluate the reasonableness of the 19 settlements reviewed, GAO questions whether EPA can provide reasonable assurance that these settlements protect the government's interests.

Cost Recovery Opportunities

CERCLA restricts EPA in assessing responsible parties interest charges on its program costs. CERCLA allows EPA to accrue interest on program costs from the date funds are expended or the date repayment is demanded, whichever is later. Currently, EPA generally demands repayment of its costs well after the date funds are expended, sometimes as much as 6 years later—a practice that effectively limits the amount of interest EPA can pursue. However, interest is a cost of raising capital and, as such, it should be accrued in EPA accounts from the date funds are expended and pursued for recovery along with other costs to maximize returns to the government. According to GAO estimates, EPA could have accrued $80

million in interest in fiscal year 1990 on its fiscal year 1989 expenditures alone. An even larger amount of interest could be accrued by compounding interest annually.

EPA could also increase the costs it seeks from responsible parties and, in turn, its cost recoveries if it had the authority to charge interest at commercial lending rates. CERCLA requires interest to be accrued at a rate tied to the government's borrowing rate, which is substantially lower than commercial lending rates. For example, EPA charged 8.39 percent in fiscal year 1989 when the prime lending rate averaged about 11 percent. But unlike lending to the private sector, lending to the government entails no default risk. Thus, when responsible parties are charged a government rate, they receive a subsidy equal to the difference between the government and the commercial interest rate. On its fiscal year 1989 expenditures, GAO estimates that EPA could have accrued an additional $25 million in interest by using a commercial interest rate.

Recommendations to the Congress

To link settlement accomplishments to goals, GAO recommends that the Congress require the Administrator, EPA, to adopt performance measures (ratios) that show the extent to which settlements have implemented EPA's chosen remedy and reimbursed EPA for Superfund's costs. To enable EPA to recover the government's costs more fully, GAO recommends that the Congress amend CERCLA to allow EPA always to accrue interest on its costs from the date funds are expended and to charge an interest rate commensurate with commercial lending rates.

Recommendations to the Administrator, EPA

To improve internal controls, GAO recommends that the Administrator, EPA, implement explicit procedures to document the settlement process and, until these procedures are in place, list the lack of sufficient documentation as a material weakness in its Federal Managers' Financial Integrity Act report. GAO also makes other recommendations to enhance EPA's cost recoveries.

Agency Comments

GAO discussed the report's contents with responsible EPA officials and included their comments where appropriate. However, as requested, GAO did not obtain official agency comments on a draft of this report.

Contents

Figures

Abbreviations

ATSDR	Agency for Toxic Substances and Disease Registry
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CERCLIS	Comprehensive Environmental Response, Compensation, and Liability Information System
DOJ	Department of Justice
EPA	Environmental Protection Agency
GAO	General Accounting Office
OIG	Office of Inspector General
OMB	Office of Management and Budget
PRPs	potentially responsible parties
SCAP	Superfund Comprehensive Accomplishments Plan
STARS	Strategic Targeted Activities for Results System

Introduction

Hazardous waste contamination continues to plague our nation and complicate the Environmental Protection Agency's (EPA) efforts to rid our country of toxic substances that threaten public health and the environment. Billions of dollars will be needed to clean up the nation's worst hazardous waste sites. In enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, also known as Superfund, the Congress recognized that federal finances alone could not suffice to tackle this serious and costly pollution problem. Accordingly, CERCLA envisioned that the parties responsible for causing the pollution would clean up these contaminated sites or reimburse EPA for its costs to clean them up. For the most part, these cleanups and cost recoveries are accomplished through settlements EPA negotiates with the potentially responsible parties (PRPs).

Background

CERCLA authorized the federal government to respond directly to releases or threatened releases of hazardous substances and pollutants or contaminants that might endanger public health or the environment. It established a 5-year, $1.6-billion trust fund (Superfund), financed primarily with a tax on crude oil and certain chemicals, such as arsenic and mercury. CERCLA also authorized the federal government to recover its response costs from the parties that had caused the problem or compel them to clean up the hazardous site at their own expense. By executive order, the President assigned EPA primary responsibility for operating the program.

In October 1986, the Congress amended CERCLA to reauthorize the program for 5 years and to increase the fund by $8.5 billion. The law also set specific cleanup goals and provided EPA with new enforcement authorities to help obtain responsible party cleanups of hazardous waste sites.

In the Omnibus Budget Reconciliation Act of 1990, the Congress reauthorized Superfund for another 3 years and increased the fund by another $5.1 billion, for a total of $15.2 billion. The reauthorization included no other major changes to the statute.

Site Designation and Cleanup Process

EPA ranks hazardous waste sites according to the severity of their waste problems and places only the worst on its national priorities list for Superfund cleanup. After a site is brought to EPA's attention, EPA conducts a preliminary study to determine the severity of its contamination and its eligibility for priority listing.

There are two types of Superfund-financed cleanups: removal actions and remedial actions. Removal actions are short-term responses to immediate and significant threats at a hazardous waste site, regardless of whether the site is a national priority. Remedial actions are long-term cleanups to mitigate or permanently eliminate hazardous conditions at only priority-listed sites. Sites requiring long-term cleanup but not priority listing could be eligible for cleanup under state programs.

To ensure appropriate remedial cleanup actions, EPA either conducts, or negotiates with responsible parties to conduct, cleanup studies for priority sites. These studies identify the types and quantities of hazardous waste and consider alternative remedies for cleaning it up. EPA then chooses the cleanup remedy and performs the actual cleanup or negotiates a settlement with responsible parties for them to finance and perform the cleanup.

Enforcement Program

Effective EPA enforcement and cost recovery are important to maximize the amount of cleanup work that can be performed and to avoid depleting Superfund's resources, particularly since EPA estimates that the cost of cleanup at priority-listed sites will far exceed the $15.2 billion in the fund. According to EPA estimates, the 1,200 sites currently on the national priority list will cost about $40 billion to clean up. EPA further anticipates that the number of priority-listed sites will increase to about 2,100 by the year 2000, thus adding tens of billions more to the cleanup bill.

Under Superfund, responsible parties are liable for either cleaning up hazardous waste sites themselves or reimbursing the government for its response costs. These response costs can include such things as the cost to EPA of cleanup studies, removal actions, and program administration as well as costs incurred by other agencies, such as the Department of Justice (DOJ), in helping to administer the Superfund program. To compel responsible parties to assume responsibility for cleanups, EPA may use its authority under sections 106 and 107 of CERCLA. Section 106 authorizes EPA to issue an order to compel a responsible party to clean up a site that poses an imminent and substantial threat to human health or the environment. If the order is violated, EPA can seek enforcement through the courts. Under section 107, EPA may use Superfund money for site cleanup and then recover Superfund response costs from PRPs through the courts. EPA also may negotiate with PRPs to reach a settlement in which PRPs agree to conduct or pay for cleanups and/or reimburse EPA for Superfund response costs.

Under CERCLA, federal courts have held that PRPs are jointly and severally liable for cleaning up the site. This standard means that in cases where the harm is not divisible, the government can proceed against one party for 100 percent of the cleanup, even though other PRPs also caused pollution at the site. Alternatively, the government can proceed against some or all PRPs.

Overview of the Settlement Process

Although EPA can order cleanups and seek court action to enforce orders and cost recovery, EPA largely relies on negotiations to settle with PRPs, thereby avoiding lengthy and costly litigation. In fact, CERCLA was amended in 1986 to encourage EPA to negotiate with PRPs when such negotiations would expedite cleanup action. When negotiations for cleanups are appropriate, EPA will issue a special notice letter, which provides a work moratorium at the site and allows PRPs 60 days to present a "good faith" offer. This offer expresses the willingness of PRPs to perform the work and to reimburse EPA for its past costs. EPA and PRPs then have at least another 60 days to agree on how

- EPA's chosen cleanup will be carried out,
- EPA will be reimbursed for Superfund response costs as well as for costs EPA expects to incur in overseeing PRPs' cleanup of the site, and
- potential disputes between EPA and PRPs will be resolved.

Besides negotiating cleanup settlements, EPA also negotiates separate cost recovery settlements to recover Superfund's costs when EPA has cleaned up a hazardous waste site or conducted a cleanup study or removal action. CERCLA requires DOJ to approve cost recovery settlements for sites whose total costs exceed $500,000. Cost recovery negotiations are preceded either by EPA's issuance of a demand letter for cost reimbursement or, in some cases, by DOJ's filing of a complaint in federal court.

Any negotiated settlement between EPA and PRPs is incorporated in either an administrative consent order or a consent decree. Under CERCLA, all settlements that provide for PRP cleanup of hazardous waste sites must be in the form of a consent decree. Consent decrees are more formal than administrative consent orders in that they must be referred to and approved by DOJ and entered in federal district court. Settlements for cost recovery only are incorporated into an administrative consent order unless a complaint has been filed in court, in which case the settlement takes the form of a consent decree. After reaching a settlement, EPA also can pursue nonsettlers for any unrecovered costs.

According to EPA's September 1989 Superfund Enforcement Strategy and Implementation Plan, the government's goal in negotiating settlements is to obtain 100 percent recovery of response costs (cleanups and past and oversight costs) or, when circumstances prevent full recovery, to maximize returns to the fund.

Superfund Enforcement Program Administration

EPA administers the Superfund enforcement program through its Office of Solid Waste and Emergency Response, Office of Enforcement, and 10 regional offices. Within the Office of Solid Waste and Emergency Response, the Office of Waste Programs Enforcement is responsible for providing agencywide policy, guidance, and direction for Superfund enforcement.

The Office of Enforcement provides direction and guidance to the Office of Solid Waste and Emergency Response and to the regions on legal issues, including case development, administrative actions, and compliance. It also reviews enforcement cases referred to DOJ from EPA's regions.

At the site level, primary responsibility for Superfund enforcement rests with EPA's 10 regions. In negotiating settlements with PRPs, EPA is usually represented by

- attorneys from its Offices of Regional Counsel responsible for legal aspects, and
- project managers who are responsible for technical issues and overseeing PRP cleanup work.

As noted, DOJ ultimately approves and processes consent decrees, so Department attorneys often participate in negotiations.

EPA monitors work and events at hazardous waste sites using the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). CERCLIS is a national inventory of information on hazardous waste sites, which serves as the central source of data on cleanup and enforcement action at these sites. EPA managers use CERCLIS data to monitor accomplishments and plan future actions. Regions are responsible for updating CERCLIS on cleanup and enforcement events and status, and for ensuring data quality.

Settlement Accomplishments

As table 1.1 shows, EPA's fiscal year 1990 settlements provided for PRPs to perform approximately $731 million worth of cleanup activities and to reimburse EPA $87 million in past costs.[1] As the table also shows, these figures represent an increase in the number of settlements achieved in recent years.

Table 1.1: Cleanup and Cost Recovery Settlements for Fiscal Years 1987 to 1990

Dollars in millions

	Cleanup settlements		Cost recovery settlements	
Fiscal year	Number[a]	Value of PRP work	Number[b]	Amount recovered
1987	9	$128	68	$27
1988	30	268	163	128
1989	49[c]	621	142[c]	103
1990	60	731	193	87

[a]Excludes settlements for cleanup studies and removals.

[b]Includes both cleanup settlements that provided for the recovery of costs and special settlements with small waste contributors.

[c]Includes some settlements that, according to our questionnaire results, should have been classified as settlements in other fiscal years.

Source: GAO presentation of EPA data.

Objectives, Scope, and Methodology

On September 22, 1989, the Chairman, Environment, Energy, and Natural Resources Subcommittee, House Committee on Government Operations, asked us to review EPA's Superfund enforcement program to determine the effectiveness of the negotiated settlement process. We subsequently agreed to determine (1) the extent to which EPA's negotiated settlements achieve program goals (2) whether EPA has adequate internal controls to protect the government from fraud, waste, and mismanagement, and (3) whether additional opportunities exist for EPA to recover its costs more fully in negotiating settlements with PRPs.

We performed our work at EPA headquarters in Washington, D.C., and at EPA's 10 regional offices. We visited Regions I (Boston), V (Chicago), and VI (Dallas). These three regions were judgmentally selected to obtain geographic distribution and a mix in the volume of enforcement work.

To determine the extent to which EPA's negotiated settlements achieve program goals, we interviewed EPA headquarters enforcement officials regarding EPA's procedures for measuring its success in obtaining

[1]Besides this cleanup work, PRPs will perform $357 million in cleanups in response to 37 of the 45 orders EPA issued for cleanups in fiscal year 1990.

response costs from PRPs through settlement. We also reviewed EPA's system for measuring Superfund accomplishments. We used EPA's CERCLIS system to identify information about response costs and settlement financial provisions and to develop regional lists of fiscal year 1989 settlements. EPA officials cautioned us that this information system is being updated and that current CERCLIS data would not be adequate to determine the extent to which responsible parties had agreed to pay EPA's response costs. But EPA officials also advised us that CERCLIS is the best central source of data on cleanup and enforcement activities at hazardous waste sites.

Using CERCLIS to identify fiscal year 1989 settlements, we sent a questionnaire to all EPA regions to verify the CERCLIS-generated list of settlements and to add and delete data as necessary to provide an accurate list of settlements. This survey produced a list of settlements that differed both in number and value from the settlements EPA reported for fiscal year 1989. (See table 1.1 for the figures EPA reported.)

The questionnaire focused only on cleanup and cost recovery settlements consistent with the request scope. We did not include special settlements with PRPs that had contributed small amounts of hazardous waste to sites because, unlike most other settlements, these settlements are not intended to fully recover EPA's response costs. This distinction also contributed to differences in the number of fiscal year 1989 settlements we identified for our review and the number reported by EPA.

We limited the questionnaire to settlements for fiscal year 1989—the most recent entire fiscal year at the time of our review. The questionnaire asked regional staff to identify hazardous waste site response costs and the amounts EPA had recovered. We did not determine whether respondents had included all program costs that would have been appropriate for recovery. We used the questionnaire data to evaluate EPA's performance in achieving program goals. We received responses to questionnaires on 89 settlements.

To assess the adequacy of EPA's internal controls in the settlement process, we interviewed enforcement officials in EPA headquarters and regions to identify the internal controls applicable to the settlement process. We also used a case study approach to review the internal controls that were in place for 19 settlements at the three regions we visited. These 19 settlements were selected judgmentally to obtain a mix of settlements based on type and size for each region reviewed. To obtain an appropriate mix of settlements in the regions visited, we included some

settlements that had been completed early in fiscal year 1990 for our case studies. We reviewed EPA's Federal Managers' Financial Integrity Act reports, which identify agency internal control weaknesses and corrective actions, and compared EPA's internal controls to the internal control standards of the U.S. Comptroller General and of the Office of Management and Budget (OMB).

To determine whether additional opportunities exist to recover costs more fully, we reviewed Superfund legislation and EPA policies and procedures for recovering interest and other federal agency costs financed from Superfund and for pursuing nonsettlers for unrecovered costs. We also interviewed EPA headquarters and regional officials and regional attorneys and remedial project managers to learn their policies and procedures for pursuing interest and other agency Superfund costs during settlements and their plans for pursuing nonsettlers. We used our questionnaire on fiscal year 1989 settlements to determine how far EPA had pursued interest and, if interest had not been pursued, to calculate the amount of potential interest lost. We also used our questionnaire to identify settlements with unrecovered costs and to learn the regions' plans for pursuing financially viable nonsettlers for these costs.

Additionally, in connection with each review objective, we reviewed our earlier reports and reports issued by EPA, its Office of Inspector General, and others.

Our review was conducted between November 1989 and January 1991 in accordance with generally accepted government auditing standards. We sought the views of EPA officials responsible for Superfund activities and policies and incorporated their views into the report where appropriate. However, in keeping with the Chairman's request, we did not ask EPA officially to review and comment on this report.

EPA Measures Do Not Show the Extent to Which Settlements Accomplish Program Goals

EPA's enforcement goals are to compel responsible parties to clean up hazardous waste sites and to reimburse EPA for all of its Superfund response costs. EPA has a system in place to measure the number of settlements reached and the value of past costs recovered. But these measures do not show the extent to which settlements are obtaining cleanups or recovering program costs. Our analysis of fiscal year 1989 settlements showed that EPA had succeeded in getting PRPs to perform 98 percent of the cleanup work set out in EPA's chosen remedy. The remainder of this work was to be performed by EPA, and the agency's costs were to be recovered later from nonsettling parties. In contrast, EPA had succeeded in getting PRPs to pay only 59 percent of program costs,[1] leaving about $80 million in costs unrecovered.

To better link accomplishments to goals, EPA could use performance measures such as we have computed; however, the Office of Solid Waste and Emergency Response has yet to adopt recommendations by GAO, EPA management, and an EPA consultant to use such measures. Furthermore, if EPA should decide to use such performance measures, it would need to include accurate information on settlement values and past response and future oversight costs for all settlements in its information systems. EPA's current information systems are neither complete nor wholly accurate, and it is therefore difficult for EPA to determine how well its settlements are achieving its goals.

Superfund Enforcement Objectives and Measures

Although the government's goal is to recover 100 percent of program costs, Office of Enforcement and Office of Solid Waste and Emergency Response officials said that EPA's first priority in responsible party settlements is to obtain PRP cleanups. Its second priority is to recover the program's past response costs and EPA's future oversight costs. However, EPA's current procedures for monitoring and reporting settlements are not clearly related to these objectives and do not readily permit the Congress and the agency to evaluate the effectiveness of enforcement efforts.

EPA establishes specific goals and measures for the Superfund program through the Strategic Targeted Activities for Results System (STARS) and Superfund Comprehensive Accomplishments Plan (SCAP) planning and

[1]Program costs include Superfund's past response costs and, where appropriate, any future costs EPA expects to incur in overseeing site cleanup by PRPs.

information management systems. Using the STARS system, EPA establishes yearly targets for the highest priority activities in all its environmental programs, including Superfund. STARS targets are drawn from measures the SCAP program already has in place to monitor annual regional Superfund actions. The SCAP program sets numerical targets for specific Superfund actions in regions, allocates resources on the basis of these targets, and monitors how well regions attain their targets.

For the fiscal year 1989 Superfund program, for example, STARS and SCAP set targets of 49 EPA consent decrees referred to DOJ to obtain cost recovery for EPA-performed removals, and 57 consent decrees for PRPs to perform cleanups. Although EPA measures showed that regions had succeeded in meeting both numerical enforcement targets, none of the STARS and SCAP targets or measures indicate the extent to which settlements provided for private party cleanup or recovery of program costs.

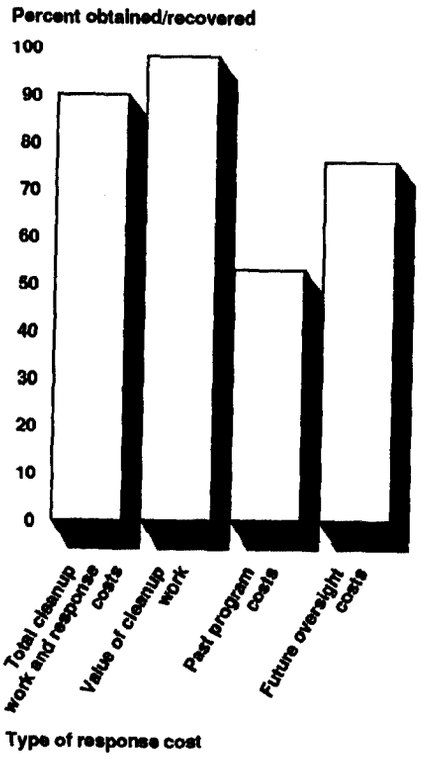
Besides monitoring STARS and SCAP targets, EPA also tracks dollars recovered and the value of work PRPs have agreed to perform through settlements. For example, as noted in chapter 1, EPA reported for fiscal year 1989 that PRPs had agreed to perform $621 million worth of site cleanup work and to reimburse the agency $103 million in program costs. Although such information can demonstrate that cleanups and cost recoveries have generally increased in recent years (see ch. 1), it does not indicate the extent to which responsible parties have assumed responsibility for cleanups or reimbursed EPA for Superfund costs.

Better Measures of Settlement Success Are Available

The questionnaire responses for the 89 cleanup and cost recovery settlements in our survey of fiscal year 1989 settlements showed that EPA had succeeded in getting PRPs to perform $486 million in cleanup work, or 98 percent of the cleanup work identified in EPA's chosen remedy. In the area of cost recovery, PRPs had agreed to reimburse EPA $116 million, or 59 percent of program costs, leaving about $80 million in costs unrecovered. In all, these 89 settlements did not recover $89 million, or 13 percent, of the total funds required or expended for cleanups, including related Superfund program costs.

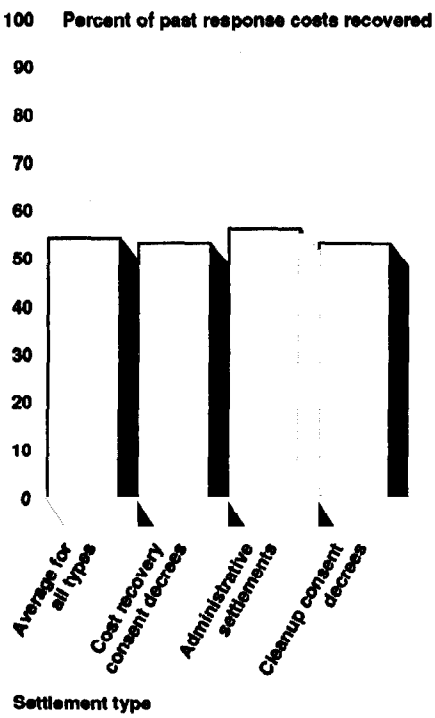
Besides these overall ratios, other performance measures could be computed for fiscal year 1989 settlements. For example, figure 2.1 shows EPA's rate of success in recovering various response costs on its 44 cleanup settlements alone, and figure 2.2 shows its rate of success in recovering only past response costs on various types of settlements.

Figure 2.1: Measures of Success for Fiscal Year 1989 Cleanup Settlements



Source: GAO analysis of EPA data.

Figure 2.2: Measures of Success for Fiscal Year 1989 Cost Recovery Settlements



Source: GAO analysis of EPA data.

Using a performance ratio, such as the percentage of response costs that responsible parties agree to pay EPA on each year's settlements, would have several benefits for the agency and the public. It would provide

- a consistent measure of enforcement success to provide accountability and focus for EPA and its regions in achieving enforcement goals and
- a context for EPA, the Congress, and the public to evaluate settlement activities.

In addition, performance measures could be used to help evaluate the effect of new or revised policies and procedures on settlements. For example, regional enforcement officials told us that EPA is correcting problems in documenting site costs to improve its recovery of these costs. Over time, the use of appropriate performance measures would allow EPA to evaluate the impact of these corrections on its rate of recovery.

New Efforts to Define Goals and Measures Not Sufficient

Over the years, GAO has repeatedly recommended that EPA use better measures to monitor accomplishments in its enforcement program. In three separate reports since 1987, we recommended that EPA develop measurable objectives and consistent indicators of program accomplishments.[2] In the December 1989 report on Superfund enforcement, we recommended that EPA develop measurable goals for the enforcement program to implement its overall objectives, including maximizing the reimbursement of Superfund monies expended in site cleanups. We also recommended that EPA develop improved indicators of enforcement success, and we provided examples of such indicators, including the extent to which settlements with responsible parties obtain all past and future response costs, the ratio between employee hours and settlement dollars, and the relationship between recovered dollars and costs that are ready for recovery.[3] EPA responded that work initiated in response to its June 1989 Superfund management review would identify measurable objectives and new indicators.[4]

EPA's own consultant and managers also recommended that EPA include improved goals and performance settlement measures in the agency's STARS and SCAP systems. At EPA's request, the Environmental Law Institute reviewed Superfund enforcement,[5] and in March 1989 it recommended that STARS targets be amended as "performance measures that focus on ultimate outcomes instead of interim steps." For example, the Institute suggested that EPA set regional targets in terms of quality. In addition to requiring regions to negotiate a specific number of settlements, the target could define an outcome for these negotiations to meet minimum settlement values. The Institute also suggested that an appropriate measure for settlements could be "percentage of site costs recovered," including the value of work responsible parties agreed to perform and the extent to which PRPs agreed to pay EPA's response costs.

In 1989, EPA conducted a management review of the Superfund program, which called for policy changes to improve Superfund enforcement as

[2]Superfund: A More Vigorous and Better Managed Enforcement Program is Needed (GAO/RCED-90-22, Dec. 14, 1989); Environmental Protection Agency: Protecting Human Health and the Environment Through Improved Management (GAO/RCED-88-101, Aug. 16, 1988); and Superfund: Improvements Needed in Work Force Management (GAO/RCED-88-1, Oct. 26, 1987).

[3]EPA defines costs that are "ready for recovery" as costs incurred at sites with completed removals and at remedial action sites where on-site construction has begun.

[4]A Management Review of the Superfund Program, EPA (Washington, D.C.: June 1989).

[5]Toward a More Effective Superfund Enforcement Program, Environmental Law Institute (Washington, D.C.: March 1989).

well as other aspects of the Superfund program. This review concluded that, among other things, EPA needs to establish challenging goals and realistic measures of success for the cost recovery program. In response, the Office of Waste Programs Enforcement was to identify ambitious and realistic goals for the cost recovery program and to develop understandable, commonly held measures of program performance by June 1990. According to the management review, "success should be defined by comparison between amounts recovered and amounts actually available for cost recovery." As of May 1991, the Office of Waste Programs Enforcement was still preparing the final version of this study for the approval of the Assistant Administrator for Solid Waste and Emergency Response.

Despite these previous recommendations, EPA's study of cost recovery goals will not develop measurable goals and performance measures. According to Office of Waste Programs Enforcement officials working on the goals study, EPA will continue to measure enforcement performance using the number and value of settlements. They said that the recommended annual performance measure, which compares dollars recovered with program costs, is an irrelevant measure because it does not account for cost recoveries requiring multiple settlements over the lifetime of a cleanup.[6] Considering that many sites will probably have multiple settlements, we believe that in addition to annual performance measures EPA should have separate performance measures to assess its cumulative success over time. But EPA has not developed and is not using performance measures to evaluate its cumulative success.

EPA enforcement officials also said that they were somewhat reluctant to use cost recovery performance measures for fear that PRPs could use this information to negotiate more favorable settlements in the future. However, we believe that if EPA has an appropriate negotiation strategy (see ch. 3) and is willing to issue orders or pursue litigation when negotiations fail, then PRP knowledge of EPA's past cost recovery performance should do little to sway EPA from its strategy during future negotiations. Moreover, reluctant PRPs are always subject to subsequent enforcement action if negotiations fail.

[6]Some sites have two or more operable units that are to be cleaned up in phases or require one or more removal action, each of which could be the subject of a separate settlement. Separate settlements also can be entered into with small waste contributors to obtain their share of cleanup costs or with nonsettlers to recover previously unrecovered costs.

EPA Lacks Essential Data for Using Performance Measures

Even if EPA did decide to use performance measures for settlements, it does not currently have the necessary information to monitor and assess settlements because

- CERCLIS data on settlement values are sometimes inaccurate,
- past cost data are not easily available from CERCLIS or other sources,
- STARS/SCAP systems provide information on the number of settlements but not on their value, and
- EPA settlement analyses are not prepared for all settlements and vary in the extent of their discussion of financial terms.

Because EPA expressed concerns about the accuracy of CERCLIS data (see ch. 1), we provided the regions with a list of fiscal year 1989 settlements from CERCLIS and asked them to verify this information. As a result of this survey, we found that CERCLIS reported a lower settlement value than the regions in 22 of 89 settlements and a higher value in 30 settlements. For example, on one Region V settlement, CERCLIS reported that PRPs will perform a cleanup worth $9 million, whereas, according to Region V officials, PRPs will perform a cleanup worth $24 million. On another settlement in Region I, CERCLIS reported that PRPs will pay over $3 million in past costs; however, this figure exceeds by $1.7 million the amount that PRPs actually agreed to pay, according to Region I officials. In addition, the regions and CERCLIS did not agree on the fiscal year classification for 14 settlements.

According to Office of Waste Program Enforcement staff responsible for CERCLIS, discrepancies in dollar values may exist between CERCLIS and regional data for the following reasons:

- Regional staff may enter incorrect settlement information because they were not responsible for negotiating the settlement or conducting site activities and are therefore not familiar with the information.
- CERCLIS data may not be updated as settlements develop, and outdated figures may remain in the system.
- Quality assurance for CERCLIS generally does not focus on dollar values because regions achieve STARS/SCAP targets by meeting other goals, such as conducting a particular number of settlements.

Another factor limiting EPA's ability to develop effective settlement measures is its lack of accurate, readily available data on past costs. Although CERCLIS contains past cost information that the regions enter when developing cost documentation packages, this information, according to EPA headquarters officials, is often not current or does not

isolate those activities for which EPA seeks cost recovery. As a result, EPA cannot accurately compare cost recoveries from its settlements to past costs to determine its success.

EPA's Office of Inspector General (OIG) reviewed CERCLIS and found that "material errors have arisen in CERCLIS reports and that any information currently being reported by the system must be considered suspect and employed cautiously."[7] OIG attributed this deficiency to the absence of good controls over documentation, software changes, and testing. OIG reported that EPA had taken action to implement all of OIG's recommendations and indicated that a special review would be performed later to verify that all recommendations had been implemented.

The postsettlement analysis, or written justification of a settlement, which EPA requires negotiation teams to prepare for consent decrees in which EPA does not achieve 100 percent of cleanup and past costs, could provide an alternative to CERCLIS for financial settlement information. However, at the time of our review, these analyses varied in their presentation of financial terms, thereby impairing EPA's ability to use them effectively to measure settlement success. For example, one postsettlement analysis we reviewed never identified EPA's total past costs at the site or indicated whether PRPs would pay either past costs or future oversight costs. In contrast, in another postsettlement analysis we reviewed, the region specifically identified the past costs, including interest accrued thereon, the portion of these costs to be paid by PRPs, and the specific terms for reimbursing EPA for its future oversight costs.

EPA's postsettlement analyses also do not consistently provide all the information EPA would need to calculate performance ratios such as we computed from our survey of fiscal year 1989 settlements. EPA recognizes that its regions have not always uniformly included the same information in their postsettlement analyses, and in August 1989, it issued a memorandum to its regions to correct this problem. This action should improve the quality of the postsettlement analyses. By providing more complete financial information on the terms of the settlement, including EPA's past costs, the analyses will enable EPA to measure performance for these settlements. But additional action will be needed if EPA is to have comparable information for cost recovery settlements processed as administrative consent orders, of which there were 23 in fiscal year 1989. At present, only settlements processed as consent

[7]Report on CERCLIS Reporting Audit No. E1SFF9-15-0023-0100187, Office of Inspector General, EPA (Washington, D.C.: Mar. 12, 1990).

decrees are required to have a postsettlement analysis. EPA's requirements for a postsettlement analysis and its actions to improve their quality are discussed in more detail in chapter 3.

Conclusions

Without performance measures to link accomplishments with goals and without the baseline information needed to calculate these ratios, EPA cannot fully measure the extent to which its negotiated settlements meet CERCLA's objectives of obtaining PRP cleanups and cost recovery. EPA's practice of measuring the success of its settlements by counting the number and dollar value of settlements attained provides only a partial picture of its progress toward achieving these objectives. In contrast, our survey demonstrates that better performance measures can help the agency to plan and evaluate the enforcement program and to provide the Congress and the public with meaningful information on Superfund settlements. Nevertheless, EPA continues to use measures that do not link accomplishments with goals, and despite repeated recommendations from GAO and others, Superfund enforcement officials still see no need for better indicators of program success.

Despite the opposition of program officials to the use of performance measures that link accomplishments to program goals, EPA has taken steps to improve the accuracy of CERCLIS' data and to obtain other essential data on the value of the remedy and recoverable program costs. When these actions are completed, EPA should be able to provide performance measures similar to those we computed for fiscal year 1989 settlements for most of its settlements. However, for settlements that do not require a postsettlement analysis, the data required to calculate ratios will not be available. The need for a written analysis of these settlements is discussed in more detail in chapter 3.

Recommendation to the Congress

To link EPA's settlement accomplishments more effectively with its goals, we recommend that the Congress require the Administrator, EPA, to use performance measures (ratios) that show the extent to which individual and multiple settlements have, during past and previous years, implemented EPA's chosen remedy and reimbursed EPA for Superfund's costs and to report these measures periodically to the Congress and the public.

Better Internal Controls Needed Over Settlements

Although EPA is charged, through its Superfund enforcement program, with negotiating and settling billions of dollars in privately funded cleanup actions and cost recoveries, EPA does not have adequate internal controls for its settlements. In carrying out its activities, EPA is required to comply with the Federal Managers' Financial Integrity Act of 1982, which requires federal agencies to follow the internal control standards of the U.S. Comptroller General.[1] Among other things, these standards require all transactions and other significant events to be documented. However, for the settlements we reviewed, EPA had little or no documentation for most of the significant events that had led to and concluded proposed settlements, including negotiation strategies, changes in negotiation position, and other related decisions, key events, and supervisory reviews.

For some of its settlements, EPA requires a written postsettlement analysis, which EPA management uses to evaluate and approve the settlement. However, EPA does not require a postsettlement analysis for all of its settlements. Furthermore, when prepared, these analyses have often lacked important evaluative information, such as a comparison of the settlement outcome to the initial bottom-line strategy.

Although EPA has initiated or planned actions to address the material internal control weaknesses cited in its fiscal year 1989 Federal Managers' Financial Integrity Act report, none of these actions address the documentation problems we found. Without better documentation, EPA can not provide reasonable assurance that its settlements protect the government's interest.

Internal Controls Applicable to Superfund Settlements

The Federal Managers' Financial Integrity Act of 1982 requires executive branch agencies to develop and maintain an adequate system of management controls. One of the purposes of such a system, according to OMB Circular A-123, is to provide management with reasonable assurance that assets are safeguarded against waste, loss, unauthorized use, and misappropriation. Given the billions of dollars in cleanup costs that EPA is responsible for negotiating and the discretion that EPA attorneys and remedial project managers exercise in reaching settlements with PRPs, the adequacy of EPA's system of internal controls is especially important.

[1] Standards for Internal Controls in the Federal Government, GAO (Washington, D.C.: 1983).

One of the specific internal control standards prescribed by the Comptroller General and listed in Circular A-123 states that "all transactions and other significant events are to be clearly documented, and the documentation is to be readily available for examination." Another standard prescribes that "transactions and other significant events are to be promptly recorded and properly classified." This second standard further states that "this standard applies to (1) the entire process or life cycle of a transaction or event and includes the initiation and authorization, (2) all aspects of the transaction while in process, and (3) its final classification in summary records." [Emphasis added.]

Another standard prescribed by the Comptroller General requires qualified and continuous supervision of staff to ensure that internal control objectives are achieved. Assignment, review, and approval of staff work should result in the proper processing of transactions and events, including

- following approved procedures and requirements;
- detecting and eliminating errors, misunderstandings, and improper practices; and
- discouraging wrongful acts from occurring or from recurring.

According to EPA headquarters and regional enforcement officials, the agency uses the following internal controls to protect resources during PRP negotiations:

- management controls at the regional level, which include establishing prenegotiation strategies;
- appropriate levels of supervisory review by EPA regions and headquarters;
- the presence of a DOJ representative during negotiations and the requirement that DOJ approve the settlement;
- adequate training providing attorneys and remedial project managers with the necessary skills to conduct negotiations and settlements;
- monthly conference calls between headquarters and regional staff to review site activities and discuss negotiation strategies and significant events; and
- regional use of a model consent decree that establishes predetermined language for many settlement provisions.

EPA's internal controls, however, do not provide for documenting key decisions or events leading up to and concluding negotiated settlements.

Documentation Throughout the Settlement Process Is Generally Absent

EPA generally did little to document key decisions and significant events in the negotiated settlements we reviewed. Bottom-line positions or strategies, reflecting EPA's expectations for the negotiations, were often not developed or documented. Similarly, we found little documentation of negotiation meetings with PRPs or of internal meetings with EPA management in which negotiation positions, offers, and counteroffers were either discussed or approved.

Upon reaching a settlement with PRPs, EPA did not always prepare a post-settlement analysis for management's use in approving the settlement. When analyses were prepared, they generally did not include important evaluative information, primarily a comparison of the settlement to EPA's initial expectations, or bottom-line position.

Documenting Negotiation Activities

Management theory advocates the use of a negotiating strategy that includes a bottom-line (or minimum) negotiating position, which is to be established before negotiations begin. In the settlement process, such a strategy could be used to

- demonstrate that the settlement outcome served the government's best interest and met the agency's enforcement objectives and
- provide a settlement case history tracking the evolution of EPA's initial objective during negotiations.

EPA, however, often does not develop or document a minimum settlement target at any point in the negotiation process. For 5 of the 19 settlements we reviewed, EPA did not develop either informal or written bottom-line strategies. For the remaining 14 settlements, EPA negotiators told us that they had established bottom-line strategies, but we could find written evidence of this for only 4 of the settlements. Regional enforcement staff told us that they did not develop written bottom-line strategies because EPA policy does not require them to do so.

In 9 of the 14 settlements for which EPA negotiators had established a bottom-line strategy, EPA's strategy was limited to restating EPA's overall enforcement goal of requiring PRPs to perform cleanups and reimburse the agency for 100 percent of its costs. However, we question whether these largely undocumented bottom-line strategies were realistic. In only two of the nine settlements did EPA succeed in recovering 100 percent of its program costs. In fact, EPA recovered 100 percent of its costs in only 20 percent of its fiscal year 1989 settlements.

Upon receipt of a good faith offer indicating the willingness of PRPs to perform the cleanup and reimburse EPA for its program costs, EPA meets periodically with PRPs to negotiate specific settlement terms. At these meetings, offers and counteroffers may be made and discussed and information exchanged on such things as waste contributed to the site and other potentially liable parties. Some of this information may cause EPA to alter its bottom-line strategy. Besides these meetings, EPA negotiators may meet with their supervisors and EPA management to discuss and reach decisions on such matters as negotiation strategies, offers, and counteroffers.

Nevertheless, for 14 of the 19 settlements we reviewed, EPA had no documentation of what had occurred at negotiation sessions between EPA and PRPs, even when offers and counteroffers were made and discussed. Similarly, in 14 of the 19 settlements, there was no documentation of internal meetings between EPA attorneys and project managers and their supervisors or other EPA management on such issues as EPA's position on any specific counteroffers tendered by PRPs, leaving no evidence of key negotiation decisions and supervisory review. For the few settlements that did have some documentation, the records were often in the form of handwritten notes in the attorney's personal file.

Recording key decisions and significant events, such as EPA's rationale for negotiating away some of its response costs, provides an historical perspective on the settlement, evidence of management's participation in negotiation decisions, and support for the negotiating team's actions. Although EPA may, in some instances, have been justified in accepting less than 100 percent of its response costs or in otherwise deviating from its bottom-line strategy, the agency had little or no written evidence in the case file to support its negotiation decisions at the time they were made.

Documentation of negotiations would also smooth the transition for personnel newly assigned to a case. As we noted in an earlier report, EPA has had an employee turnover problem in the Superfund program.[2] In fact, in 7 of 19 settlements we reviewed, the attorney initially assigned to the settlement did not remain on the case for the entire negotiation period. Moreover, in our discussions with replacement attorneys, most were able to recall only basic details of the negotiations from their discussions with other attorneys rather than from any case documentation.

[2]Superfund: Improvements Needed in Work Force Management (GAO/RCED-88-1, Oct. 26, 1987).

EPA attorneys and project managers said that they do not document negotiation activities because EPA policy does not require it. EPA regional enforcement staff also mentioned time constraints as limiting their ability to promptly record and document multiple negotiation meetings and discussions with other EPA staff.

In addition, some EPA regional and headquarters enforcement officials believe that too much documentation could damage EPA's negotiations with PRPs. These EPA officials told us that they were often reluctant to document and retain anything in writing pertaining to negotiation activities, decisions, and strategies because they feared this information might fall into the hands of PRP counsel and give PRPs an advantage in settlement negotiations. EPA attorneys told us of two Superfund litigation cases in which the judge had ruled that EPA must turn over some sensitive documents, and they expressed concern that such rulings could impair subsequent negotiations or enforcement actions with respect to other activities at the site, including the pursuit of nonsettlers for unrecovered costs. However, GAO believes that EPA should be able to protect confidential information by devising internal control procedures that sufficiently document significant settlement-related events.

Postsettlement Analysis

Although EPA may require postsettlement analyses to justify settlements, these analyses often lack important evaluative information, and their quality varies among regions and preparers. EPA has taken some action to improve the quality of its postsettlement analyses; however, this action does not go far enough.

According to EPA's settlement guidance, EPA negotiating teams must prepare a written postsettlement analysis for any cleanup and cost recovery settlement processed as a consent decree unless the settlement recovers all response costs from PRPs.[3] EPA policy states that the postsettlement analysis should, among other things, include information on

- the strength of evidence tracing hazardous waste at the site to settling PRPs;
- the financial ability of settling PRPs to pay, including the practical results of pursuing a party for more than the government can actually hope to recover;

[3]Interim CERCLA Settlement Policy, Office of Solid Waste and Emergency Response, EPA (Washington, D.C.: Aug. 1984).

- the litigative risks of proceeding to trial, including the admissibility and adequacy of the government's evidence and the defenses available to one or more settling PRPs; and
- the case remaining against nonsettlers. For example, if no financially viable parties are left to proceed against for the outstanding balance after the settlement, the settlement offer should include everything the government expects to obtain at that site.

Although the postsettlement analysis provides valuable information for EPA managers to review and approve settlements, it lacks important evaluative information such as (1) a comparison of the settlement outcome to a realistic bottom-line strategy set early in negotiations, (2) reasons for any deviations from the bottom-line strategy, and (3) alternative offers made and EPA's responses. For example, in one Region VI cleanup settlement, PRPs had not agreed to reimburse EPA for any of its past costs, leaving $780,000 unrecovered. However, the postsettlement analysis neither indicated how this settlement met EPA's bottom-line position for recovering costs nor presented any explanation to justify any deviations from EPA's bottom-line strategy. Besides lacking evaluative data, the postsettlement analysis varies considerably among regions and preparers with respect to such things as the clarity of the settlement's financial terms and the extent of explanations for any changes made in the cleanup remedy during negotiations.

Moreover, EPA does not require a postsettlement analysis or any other kind of written document for administrative settlements because most of these settlements, according to an EPA headquarters enforcement official, do not require approval at EPA headquarters or by DOJ. This policy left EPA with no written evaluation or justification on 23 fiscal year 1989 administrative settlements we surveyed in which EPA recovered $13 million in costs but left $10 million unrecovered. Although EPA may have had valid reasons for leaving $10 million unrecovered, it had no written documentation to demonstrate or explain its actions on these settlements.

Postsettlement analyses are important for several reasons:

- EPA regions usually have no other documentation of significant negotiation events.
- New attorneys assigned to a case because of turnover have few other means to acquaint themselves with the site's history.
- The analysis serves as the main vehicle for transmitting proposed settlements to higher level EPA management for approval.

- Data from the analysis are used by EPA to pursue nonsettlers for unrecovered costs (see ch. 4 for a discussion of EPA's nonsettler information tracking system).

In August 1989, EPA's Office of Enforcement and Office of Waste Programs Enforcement jointly issued a memorandum emphasizing the need for the regions to provide them with thorough, concise, and logically written postsettlement analyses. The memorandum stressed that EPA uses the analyses as its main source of information on Superfund enforcement sites and as a basis to concur with settlements. The memorandum states that a negotiating team should present a clear summary of a settlement's financial terms, including all relevant information, and a strategy for pursuing nonsettlers that indicates when subsequent actions will be taken. While this memorandum strives to improve the content and consistency of the postsettlement analysis, it does not address the need to have written justifications for administrative settlements. Nor does it specifically state that the analysis should include a comparison of the settlement outcome to EPA's bottom-line strategy and a statement of EPA's rationale for any deviations from its original strategy.

Better Documentation Is Possible

Our case studies showed that some negotiating teams, primarily those in EPA's Region I, more effectively documented significant events than did others. EPA's Region I had developed a more extensive case management planning system than had other regions. EPA's requirement to document settlement activities in other environmental programs further shows that better documentation is possible.

The two examples of cleanup settlements shown in table 3.1 compare and contrast the extent to which negotiating teams documented strategies and significant events.

Table 3:1 Use of Documentation in Two Fiscal Year 1989 Cleanup Settlements

Negotiation stage/activity	Provided documentation Case #1	Case #2
Prenegotiation		
Strategy Development	No	Yes
During negotiations		
Meetings with PRPs	No	Yes
Management approval	No	No
Postsettlement		
Financial terms	Yes	Yes
Comparison of outcome to strategy	No	No
Plan for pursuing nonsettlers for unrecovered costs	No	Yes

Source: GAO analysis of EPA documents.

Case Number 1

According to the Region V attorney on this case, PRPs negotiated with EPA for 7 months. After approximately 12 meetings between PRPs and EPA, 15 of 19 PRPs withdrew from negotiations, leaving only 4 companies willing to settle and only 1 financially viable. The viable PRP agreed to perform EPA's remedy, which was valued at $19 million, but refused to pay for any of EPA's past costs, which amounted to $1.25 million. EPA had no written plans to pursue nonsettlers for the unrecovered costs, although the case attorney told us that some follow-up action is planned for later this year.

We found that the negotiating team did not document a bottom-line strategy. We also found no documentation for any of the meetings with PRPs, including those in which PRP settlement offers were made. The case file contained neither evidence of regional management and supervisory approval of negotiating positions nor information about negotiations to provide a case history.

The Region V attorney on this case verbally provided additional information that we did not find documented in the case file or in the postsettlement analysis. He told us, for example, that EPA's cost documentation for the site was so poor that EPA would have difficulty defending the cost if challenged. Accordingly, in this case EPA would have been justified in setting a bottom-line position for cost recovery at something less than 100 percent. But the regional attorney said that he did not document a bottom-line strategy because EPA's position was always changing during negotiations in response to PRP offers. However, had EPA established a bottom-line position before negotiations, it would have been in a

position to justify each change in position as the negotiations progressed. Without adequate documentation, we could not fully evaluate the reasonableness of this settlement.

Case Number 2

In this Region I settlement, 11 PRPs agreed to perform EPA's cleanup remedy, which was estimated to cost $3.4 million, and to pay $2.2 of $3 million in past costs. The negotiating team established and documented a strategy that took into account cost documentation weaknesses. EPA's bottom-line target was to obtain from PRPs at least $2 million in past costs and full performance of the cleanup. Documentation included the following memos prepared by the Region I attorney:

- a summary of the current PRP settlement offer and EPA's view of its acceptability;
- a briefing to a newly assigned attorney discussing the specifics of the case, including EPA's current negotiating position;
- recommendations on EPA strategies for responding to the PRP's good faith offer; and
- an evaluation of various alternative settlements and their value to the agency.

Several of these memos were addressed to supervisors and regional management to keep them informed of settlement progress. This written documentation and the postsettlement analysis stressed the importance of obtaining a high percentage of response costs from settling PRPs in the absence of other financially viable PRPs.

Case Management Planning

EPA allows its regions considerable autonomy in managing site cleanups. For example, the regions have the authority to review and approve most cleanup and cost recovery settlements without concurrence from headquarters. Using its discretionary authority, Region I developed an extensive case management system to

- provide management with key information throughout the cleanup and enforcement process,
- establish goals and objectives for that process,
- obtain management approval of planned cleanup and enforcement strategies, and
- ease transition of newly assigned case attorneys and remedial project managers.

Although EPA's Enforcement Project Management Handbook contains elements of a case management planning system, an EPA enforcement official told us that use of the system varies across regions and Region I has the most fully implemented system. Although EPA is now in the process of developing additional guidance on case management planning, several EPA enforcement officials stated that this guidance will not include a requirement to document the settlement process.

In addition to detailed written case management plans, Region I requires periodic meetings between regional management and site staff. For example, after PRPs have submitted a good faith offer, the region convenes a management review meeting to evaluate the offer's adequacy as a basis for settlement negotiation. The negotiating team prepares a briefing package outlining the agency's proposed position and recommending a negotiating strategy. The team is also expected to document the meeting in a memo for the record. The memo and briefing package are maintained in regional case files.

Documentation Requirements for Other Environmental Programs

EPA recognizes that some enforcement documentation can and should be maintained for settlements with private parties. An August 1990 memorandum from the Assistant Administrator of the Office of Enforcement to EPA regions institutes a uniform system for documenting penalty negotiations in connection with other EPA enforcement programs. The memorandum requires EPA attorneys to document all discussions regarding the agency's settlement position and the current bottom-line strategy developed by the negotiating team. The purpose of this memorandum is to assure regional and Office of Enforcement management that EPA-negotiated settlements comply with applicable policies and to provide documentation for management review. However, EPA headquarters officials told us that negotiating penalty violations was much less complicated than negotiating a Superfund settlement. In our view, the complexity of negotiating a Superfund settlement provides all the more reason for careful documentation.

Because of Superfund's large financial exposure, EPA included the Superfund program as a material weakness in its fiscal year 1989 Federal Managers' Financial Integrity Act report and proposed 50 internal control corrective action work plans. In its fiscal year 1990 report, EPA continued to list the program as a material weakness and provided a status report on its 50 internal control corrective action work plans. Although these 50 work plans address weaknesses in various parts of

the Superfund program, none of them address the internal control weaknesses we found in documenting the settlement process.

Conclusions

Documentation of significant events relating to Superfund settlements is necessary both to provide assurance that these settlements are in the government's and the public's best interest and to comply with the internal control standards of the Comptroller General and OMB. Documentation is especially crucial, given the billions of dollars in Superfund cleanup work and costs at stake and the discretionary nature of settlements.

EPA, however, lacks sufficient documentation for many of the major events leading up to and concluding its negotiated settlements. Because of this insufficient documentation, we could not fully evaluate the reasonableness of the Superfund settlements we reviewed, and we question whether EPA can provide reasonable assurance that its settlements protect the government's interest. But better documentation is possible, as evidenced by Region I's case management planning activities and EPA's requirement to document the settlement process in other environmental programs. However, until this noncompliance with standards is corrected, it should be included in EPA's Federal Managers' Financial Integrity Act report as a material weakness in its internal controls for the Superfund program.

Recommendations to the Administrator, EPA

To improve internal controls in the Superfund program, we recommend that the Administrator, EPA, implement explicit procedures for documenting the settlement process. At a minimum, these procedures should

- include requirements to document (1) a realistic bottom-line position before beginning negotiations and (2) key decisions and significant events occurring during negotiations, especially negotiating sessions with PRPs, changes in bottom-line positions and the reasons for them, and the results of internal meetings; and
- require the postsettlement analysis to include a comparison of the settlement outcome to bottom-line positions, including EPA's rationale for any deviations in these positions.

We also recommend that the Administrator, EPA, require a written justification, or postsettlement analysis, for all proposed administrative settlements. Moreover, until corrective actions have been implemented, we recommend that the Administrator, EPA, include the lack of adequate

documentation in the Superfund settlement process as a material weakness in its Federal Managers' Financial Integrity Act report.

Strengthened Authority and Better Practices Could Increase Cost Recovery

When EPA does not pursue all costs during responsible party negotiations, the agency loses an opportunity to maximize cost recoveries for Superfund. Limitations in EPA's authority and inconsistent EPA settlement practices have precluded EPA from seeking the recovery of hundreds of millions of dollars in interest costs. For example, CERCLA limits the time period over which EPA can charge PRPs for interest and requires the agency to use a low interest rate. We estimate that EPA could have accrued at least $105 million in interest in 1990 on its fiscal year 1989 expenditures alone if it had always been allowed to accrue interest from the date of program expenditures and to charge a commercial lending interest rate. The amount of interest that could be accrued would be over seven times higher if interest were compounded annually during the maximum period that can elapse between expenditure and cost recovery.

Other opportunities also exist for EPA to increase its cost recoveries. EPA could have increased the program costs it sought to recover from PRPs if its fiscal year 1989 settlements had included $4.5 million in interest currently allowable under CERCLA on past program costs and millions of dollars in Superfund costs incurred by other federal agencies. Additionally, although EPA is legally entitled to pursue nonsettlers for Superfund costs that were not recovered through earlier settlements, EPA's nonsettler tracking system did not include 23 fiscal year 1989 settlements in which EPA left unrecovered $10 million out of a total of $23 million in past response costs.

CERCLA and EPA Settlement Practices Limit Interest Sought From PRPs

Interest on the funds that EPA spends to clean up a hazardous waste site is a cost that EPA is entitled to collect. However, CERCLA provisions and inconsistent settlement practices prevent EPA from seeking millions of dollars in interest on its past costs from PRPs each year, thereby allowing these PRPs to pay less than the full cost of a Superfund cleanup. CERCLA prevents EPA from seeking full interest from PRPs by restricting the time period over which EPA can charge interest and by requiring the agency to use a low interest rate. In addition, EPA does not always include interest as a collectible cost during settlement negotiations. When all costs, including full interest, are not included, the true costs of cleaning up Superfund sites are understated and EPA loses an opportunity to seek their recovery in settlement negotiations. Such practices may increase incentives for PRPs to leave cleanups to EPA, delay reimbursing the agency for its costs, and use less protective hazardous waste disposal practices.

CERCLA Prevents EPA From Seeking Full Interest

CERCLA requires EPA to calculate interest from the date the agency expends funds or the date EPA demands payment from PRPs, whichever is later. But CERCLA also gives EPA 3 to 6 years following cleanup expenditure to seek recovery of its costs by demanding payment through filing a complaint in federal district court.[1] Thus, although up to 6 years could elapse between the date EPA expends dollars for cleanup activities from the interest-bearing Superfund and the date the agency demands payment through filing a complaint, CERCLA precludes EPA from accruing interest during this interval. But interest is a cost to the government of raising capital, and, as such, it should be accrued from the date EPA expends funds to clean up hazardous waste sites regardless of when payment can be demanded.

The interest that could be accrued between the dates of expenditure and demand can be sizable. For example, EPA's fiscal year 1989 settlement for a site in Region V sought $81,287 in accrued interest on past costs from the date EPA demanded payment. However, if EPA could have accrued interest from the dates it expended money at the site, Region V estimated that the accrued interest would have totalled $322,414 — almost four times as much and an increase of $241,127.

On a broader basis, we estimated that EPA could have accrued about $80 million in interest in 1990 on the $958 million it expended for Superfund for fiscal year 1989. Moreover, if interest were compounded annually for the full 6 years that can elapse between expenditure and demand for payment, the total accrued interest would be substantially larger. For example, if interest were compounded for 6 years on the $958 million EPA expended in fiscal year 1989, the total accrued interest would amount to about $600 million, or over seven times the interest accrued in any one year.[2]

CERCLA Limits the Interest Rate EPA Can Charge

CERCLA requires that interest on past costs accrue at the same rate as interest on Superfund investments. However, this rate, which is tied to the yield on Treasury bills, is substantially lower than the rate charged by commercial lending institutions. For example, EPA charged 8.39 percent in fiscal year 1989, whereas the prime lending rate averaged about

[1]CERCLA created different statutes of limitations for cost recovery. Generally, cost recovery must be initiated within 3 years of completing a fund-financed removal action and within 6 years of starting a fund-financed remedial cleanup action.

[2]Accrued interest was calculated on the basis of EPA's fiscal year 1989 interest rate for Superfund debts.

11 percent. The difference in interest rates recognizes the varying risks of default in lending to the government and to private parties: Lending to the U.S. government entails no risk of default, whereas lending to private parties bears a high risk of default.

In other programs, the federal government charges an interest rate above the government borrowing rate. The Internal Revenue Service charges an interest rate 3 percent above the Treasury borrowing rate for late tax payments. Similarly, the Federal Claims Collection Standards allow federal agencies to charge interest rates on debts owed the government at rates above Treasury borrowing rates when the agencies determine that such rates are necessary to protect the government's interests (4 CFR 102.13). This authority, however, does not supersede EPA's authority under CERCLA, which limits EPA to charging Treasury borrowing rates.

The difference between what PRPs pay when charged the government interest rate and what they would pay to borrow money from commercial lending institutions to clean up hazardous waste sites represents, in effect, a subsidy for PRPs. By charging an interest rate closer to commercial lending rates, EPA could not only eliminate this subsidy, but also increase the incentive for PRPs to perform cleanups, expeditiously reimburse the government's cleanup costs, and adopt responsible waste disposal practices.

On its fiscal year 1989 expenditures, we estimate that EPA could have accrued an additional $25 million in interest by using the going commercial rather than the government lending rate. As stated earlier, this figure could be over seven times greater if interest were compounded from the date of program expenditure to the date payment is demanded.

Settlement Negotiations Should Include Interest

Although CERCLA allows EPA to accrue interest on past costs from the date EPA demands payment from PRPs, our questionnaire survey showed that EPA had not sought interest from PRPs on 67 of its 89 fiscal year

1989 cleanup and cost recovery settlements. Even with CERCLA's limitations on interest, EPA could have included at least an additional $4.5 million in interest in fiscal year 1989 negotiations for cost recovery.[3,4] For the remaining 22 settlements whose cost recovery negotiations did include interest, EPA added $6 million for interest charges to the amount it sought from PRPs.

Some regional attorneys and project managers said that they were unsure of the procedures they should use to calculate interest for inclusion in PRP settlement negotiations. An Office of Waste Program Enforcement official said that the agency is planning to issue demand letter guidance to the regions in May 1991 that will identify a source in the Superfund's cost accounting system for calculating interest.

When regional staff receive sufficient direction and guidance, they can successfully include interest in cost recovery negotiations. For example, in conducting our case study reviews, we found that Region I's Waste Management Division had developed a software program for computing interest on past costs. In contrast to the other regions reviewed in our case studies, almost all Region I fiscal year 1989 settlement negotiations included interest in costs sought from PRPs. In fact, Region I was responsible for pursuing $3.4 million of the $6 million in interest that EPA sought in fiscal year 1989 negotiations.

Other Site Costs Not Consistently Sought

In addition to not routinely calculating and seeking interest, EPA has not consistently sought other past costs incurred at hazardous waste sites in cost recovery actions. According to our case study reviews, EPA did not always seek to recover Superfund costs incurred by the Agency for Toxic Substances and Disease Registry (ATSDR) and by DOJ.

Under CERCLA, ATSDR, an agency of the Department of Health and Human Services, is required to perform health assessments at national priority list sites before the cleanup. ATSDR performs health assessments of hazardous waste sites to determine the potential risk to human health, at an average cost of $30,000 per assessment. EPA regions are responsible for

[3]GAO calculated the accrued interest on the past costs in fiscal year in 1989 settlements by determining (1) the average length of time between EPA's demand for payment and settlement date, and (2) the average amount of past costs for those settlements for which EPA regions did not pursue interest. We multiplied these figures by the lowest annual interest rate that EPA charged over the life of the Superfund program.

[4]If it had used a commercial rather than the government interest rate, we estimate that EPA could have included a total of $7 million in interest in its fiscal year 1989 cost recovery negotiations.

requesting ATSDR cost documentation from the ATSDR liaison for use in negotiating cost recovery settlements. In as many as 15 of 16 settlements we reviewed, ATSDR costs were not included in the total past costs presented during negotiations.[5] In the one case for which ATSDR costs were sought, the regional attorney could not provide any documentation to substantiate the claim that these costs had been sought.

EPA regional and headquarters staff told us that formerly ATSDR was generally unable to provide cost information for specific national priority list sites because it had no system to track site-specific costs. Recently, however, ATSDR developed a site-specific mechanism for documenting costs incurred since 1989. For costs incurred before that time, the agency cannot provide this information. An EPA Superfund accounting official told us that ATSDR has no plans to document or pursue costs incurred before 1989 because the outlay of resources required to do so would exceed the benefit of recovering the costs.

DOJ incurs settlement costs by participating in EPA negotiations and by reviewing and processing consent decrees between EPA and PRPs. However, our case study reviews showed that although EPA project managers are required to include DOJ's costs in cost recovery actions, EPA has not always pursued these costs from responsible parties.

Of 16 settlements we reviewed that had incurred DOJ costs, 10 did not include DOJ costs during PRP negotiations. In eight of these settlements, regional attorneys or project managers told us that they did not pursue DOJ settlement costs because the costs were not available or were judged too small to pursue. In the remaining two cases, the regional staff were unsure whether DOJ costs had been included in the costs that EPA had sought from PRPs.

Most of the case files we reviewed did not substantiate the presence of DOJ costs. Both a DOJ and an EPA official told us that DOJ costs incurred while negotiating cleanup settlements are generally low compared to litigation costs, and therefore DOJ may not prepare any cost documentation. Although DOJ negotiation costs may be relatively low, DOJ's budget under Superfund for fiscal year 1989 amounted to $25.8 million, and we believe all reasonable efforts should be made to fully recover these costs.

[5]Only 16 of the 19 settlements reviewed were national priority list sites required to have an ATSDR health assessment.

Pursuit of Unrecovered Costs From Nonsettlers

Although EPA left $80 million in program costs unrecovered on the 89 fiscal year 1989 settlements that we reviewed (see ch. 2), these monies are subject to recovery from any liable, financially viable nonsettlers. EPA encourages regions to develop plans to pursue nonsettlers by requiring negotiating teams to discuss potential follow-up actions in postsettlement analyses and by using a nonsettler tracking system to target future cost recovery actions. However, according to EPA's response to our settlement questionnaire, EPA had no specific plans to pursue nonsettlers for $21 million in unrecovered costs on 25 of the 50 fiscal year 1989 settlements in which there were liable, financially viable nonsettlers. In addition, EPA's nonsettler tracking system did not contain all settlements with unrecovered costs.

Regional enforcement staff said that plans for recovering costs from nonsettlers may become more specific during their annual enforcement planning process. This process targets enforcement actions on the basis of the potential value of the recovery, the enforcement resources available in the region, and the strength of evidence against PRPs. As the staff explained, EPA does not always have the resources to pursue complete cost recovery. However, we found that this constraint was seldom, if ever, discussed in the postsettlement analyses we reviewed. Accordingly, managers have not received all the information they need to review and approve proposed settlements having substantial unrecovered costs.

To assist the regions and headquarters in pursuing nonsettlers for unrecovered costs, the Office of Waste Program Enforcement has developed a nonsettler tracking system to help establish yearly SCAP targets for cost recovery. According to EPA officials, the system lists sites with unrecovered costs and generates two reports to identify sites with and without remaining financially viable nonsettlers and includes proposed actions against these parties. Information for the system comes from CERCLIS and the postsettlement analyses that regions prepare for headquarters.

However, our review showed that, in its current form, the nonsettler tracking system has several inherent weaknesses that can limit its effectiveness. Because the system relies on postsettlement analyses, it will not include administrative settlements for which unrecovered costs remain. As previously noted, postsettlement analyses are not prepared for administrative settlements because they require neither review nor approval from EPA headquarters. According to EPA's responses to our questionnaire, 23 of the 89 fiscal year 1989 settlements we reviewed,

accounting for $10 million in unrecovered costs, were administrative settlements. Chapter 3 discusses the need for written justifications for administrative settlements.

In addition, because the nonsettler tracking system relies on CERCLIS for some settlement information, it may contain errors in numerical data. As noted in chapter 2, EPA's OIG found some CERCLIS reports to be inaccurate. Not surprisingly, we found that some of the data in reports generated from the nonsettler tracking system were also suspect in that they differed from the data reported by the regions in response to our survey. EPA's implementation of OIG's recommendations should help to prevent numerical errors in the future.

Conclusions

To effectively implement its enforcement program and to maximize returns to the Superfund, EPA must have the legal tools and administrative procedures and practices needed to recover cleanup and response costs incurred at hazardous waste sites. However, legislative provisions that preclude EPA from always accruing interest from the date costs are incurred and from accruing interest at an appropriate interest rate have prevented, and will continue to prevent, EPA from recovering hundreds of millions of dollars. These costs are legitimate costs incurred by the government to study and clean up the worst sites—costs that should be borne by those responsible for the pollution.

Moreover, EPA's inability to establish and implement prudent settlement procedures and practices, such as pursuing allowable interest on past costs, costs incurred by other federal agencies, and unrecovered costs from nonsettlers, further limit the government's cost recoveries. With the number of Superfund sites expected nearly to double in the next 10 years and the costs of cleaning up these sites expected to be in the tens of billions of dollars, EPA must maximize available Superfund resources. To do this, EPA's settlement procedures and practices must ensure that every effort is made to recover cleanup costs from the parties responsible for creating the hazardous conditions at these waste sites.

Recommendation to the Congress

To enable EPA to recover the government's costs more fully, we recommend that the Congress amend CERCLA to allow EPA always to accrue interest on its costs from the date funds are expended and to charge an interest rate commensurate with commercial lending rates.

Recommendations to the Administrator, EPA

To enable EPA to pursue all potentially recoverable costs from responsible parties, we recommend that the Administrator, EPA,

- issue guidance to the regions for calculating interest appropriate for inclusion in settlement negotiations under its existing authority;
- ensure that regions consistently request and include all other agency Superfund costs, including those of ATSDR and DOJ, in the costs that EPA seeks to recover in settlements with PRPs; and
- include administrative settlements with unrecovered costs and financially viable nonsettlers in the nonsettler tracking system.

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