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SUPERFUND

Limited Use Made of Techniques to Reduce Legal Expenses

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Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to discuss possible ways to reduce the costs of resolving liability for cleaning up hazardous waste sites in the Environmental Protection Agency's (EPA) Superfund program. Parties responsible for cleaning up these sites have complained that these costs, which are sometimes called transaction costs, are excessive. At the request of this Subcommittee and other Committees and Members of Congress, we have reviewed and testified on EPA's use of the tools authorized by the Superfund laws for reducing transaction costs.[1]

These tools include (1) de minimis settlements--expedited settlements for parties that have contributed comparatively small amounts of low-toxicity waste; (2) nonbinding allocations of responsibility (NBAR) for cleanup costs by EPA to responsible parties; (3) mixed-funding agreements between EPA and responsible parties to share cleanup costs; and (4) alternative dispute resolution (ADR)-- the use of neutral third parties to help resolve liability and cost allocation problems. (See app. I for a description of these tools.)

In summary we found that:

-- EPA has made little use of the settlement tools overall. Out of 1,074 nonfederal sites,[2] as of September 1993, EPA had completed de minimis settlements at only 73 sites, prepared NBARs at 5 sites, used mixed-funding arrangements at 16 sites, and employed alternative dispute resolution techniques at 35 sites.

-- The tools have not been used much, primarily because EPA has not made a sustained effort to encourage its regional offices to use them. EPA has mainly been concerned with

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[1]Superfund: Little Use Made of Techniques to Reduce Legal Expenses (GAO/T-RCED-93-60, June 30, 1993), Superfund: EPA Could Do More to Reduce Responsible Parties' Legal Expenses (GAO/T-RCED-93-73, Sept. 28, 1993) and Superfund: Techniques to Reduce Legal Expenses Have Not Been Used Often (GAO/T-RCED-94-44, November 4, 1993).

[2]As of September 1993, 123 of the 1,197 final sites on the National Priorities List (EPA's inventory of Superfund sites) were federal sites, and 1,074 were nonfederal sites. The tools for controlling transaction costs are designed primarily for use at nonfederal sites.

getting as many responsible-party-financed cleanups under way as quickly as possible and has viewed the settlement tools as drawing enforcement resources away from this effort. In addition, according to most regional officials we interviewed, EPA's use of the settlement tools has been limited by restrictive administrative procedures that made the tools difficult to implement.

-- Recently, following widespread complaints about high transaction costs, EPA began to give the settlement tools higher priority. However, EPA's effort at this point is not fully operational but mostly involves pilot projects at selected regions. As we will discuss, further action is needed to make efforts to reduce transaction costs an integral part of the agency's operations.

-- While we generally support efforts to lower transaction costs through more effective use of the settlement tools, we caution that expanded use of one of these tools--mixed funding--could be expensive for the government and could complicate, rather than simplify, settlement negotiations.

BACKGROUND

Before discussing these issues in greater detail, I would like to briefly provide some background on the transaction cost problem.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) authorizes EPA to compel parties responsible for Superfund sites to clean them up or to reimburse EPA for its cleanup costs. Courts have interpreted responsible party liability under Superfund to be strict, joint and several, and retroactive. Under strict liability, a party may be liable for cleanup even though its actions were not considered negligent when it disposed of the wastes. Because liability is joint and several, when the harm done is indivisible, one party can be held responsible for the full cost of the remedy even though that party may have disposed of only a portion of the hazardous substances at the site. Retroactive liability means that liability applies to actions that took place before CERCLA was passed.

EPA has had considerable success in recent years in enforcing the cleanup responsibilities of potentially responsible parties (PRP) under this system of liability. For example, PRPs undertook 72 percent of the new cleanups started in fiscal year 1992. The liability standards may also promote careful handling of hazardous wastes and encourage voluntary restoration of contaminated property. At the same time, allocating responsibility for cleanup costs under the joint and several liability standard can be difficult and expensive. Data on wastes disposed of years ago by the parties may be limited; disputes can arise about how the

relative toxicity of wastes should affect responsibility for cleanup; and liability for wastes deposited by unknown contributors may have to be apportioned among known contributors. Negotiations take place both between EPA and the PRPs and among the PRPs. EPA encourages PRPs to organize committees at each site to address allocation issues. Individual PRPs and PRP committees hire counsel to represent them and technical consultants to support their negotiation or litigation positions. The costs associated with negotiation and litigation are sometimes referred to as transaction costs.

Transaction costs at some sites are compounded by lawsuits brought by PRPs against other parties that the PRPs believe contributed to the contamination and should help to pay for the cleanup. These contribution suits can involve hundreds and, in some instances, over a thousand parties.[3] At some sites, defendants in contribution suits have included contributors of minuscule amounts of wastes--such as fast food restaurants, a Little League, and even a local Elks Club--that EPA as a matter of policy does not normally pursue for cleanup costs. The agency refers to these small contributors as de micromis parties.

Another tier of transaction costs--outside of the scope of our review and not directly addressed by the Superfund settlement tools--derives from disputes between PRPs and their insurers. As PRPs are notified of their potential liabilities, many seek coverage under their insurance policies. Insurers may refuse to pay these claims, and complicated litigation may follow.

To help parties reach settlements with EPA and with each other, the Superfund Amendments and Reauthorization Act of 1986 (SARA) gave EPA the authority to use tools to reduce transaction costs, including de minimis settlements, NBARs, mixed funding, and ADR.

SETTLEMENT TOOLS HAVE BEEN USED INFREQUENTLY

Although almost 7 years have passed since SARA authorized settlement tools, EPA has used them at relatively few sites. Out of 1,074 Superfund nonfederal sites, as of September 1993, EPA had entered into de minimis settlements at only 73 sites, prepared NBARs at 5 sites, completed mixed-funding arrangements at 16 sites, and used ADR at 35 sites. Moreover, use of the tools tends to be concentrated in a few of EPA's 10 regional offices. (See table 1.) Two regions account for almost half of sites where the de minimis

[3]See app. II for a discussion of possible techniques for discouraging contribution suits by encouraging parties to settle with EPA.

settlements have been used; seven regions have never issued an NBAR; two regions have done most of the ADR.

Table 1: Total Number of Sites Where Settlement Tools Were Used, by Region (as of September 1993)

Region	Total number of NPL sites per region[a]	Number of sites where tools were used			
		De minimis	NBARS	Mixed funding	ADR
I	77	14	3	2	10
II	188	7	0	2	2
III	143	4	0	4	1
IV	141	8	0	1	1
V	248	21	0	2	13
VI	63	6	0	2	0
VII	54	2	0	2	1
VIII	34	3	0	0	1
IX	78	2	1	0	3
X	48	6	1	1	2
Total	1,074	73	5	16	34[b]

[a]The number of sites is shown to provide some perspective on how frequently the tools have been used; however, not every site is a candidate for the use of every tool. The numbers exclude federally owned sites.

[b]EPA headquarters used ADR at one additional site.

Of the tools, de minimis settlements have been used the most often. EPA has reached 125 de minimis settlements at 73 Superfund sites. Fifty-eight percent of the settlements occurred in fiscal years 1992 and 1993, when the agency made a special effort to increase its rate of de minimis settlements. A study prepared for the U.S. Administrative Conference found that de minimis settlements have been "greatly" underutilized. This study estimated that these settlements have been used at only 20 percent of the sites likely to benefit from them. Although EPA disagrees with some of the study's assumptions and it is clear that de minimis settlements are not appropriate for every site, EPA

officials concur with the overall theme of the study--that EPA should enter into more de minimis settlements.

EPA's experience with de minimis settlements indicates that they are potentially powerful techniques for resolving the liability and reducing the transaction costs of large numbers of parties. The 125 settlements involve agreements with over 5,200 parties. In Region IX, one de minimis settlement in the pipeline has about 3,200 eligible de minimis parties.

The Congress intended that EPA offer de minimis settlements to parties with small liability shares as early as possible in the cleanup process. This has not generally happened. According to the Administrative Conference report, the de minimis settlement at most sites did not occur until EPA had formally estimated the cleanup costs and resolved the liability of the major parties. Much of the potential of the de minimis tool for reducing transaction costs can be lost when small contributors are not removed from the settlement process early.

Use of NBARs and mixed funding has been very limited. EPA has prepared NBARs at five sites, one of which was part of a special pilot project. EPA has completed 16 mixed-funding agreements, including 12 preauthorized agreements and 4 mixed-work arrangements. However, two EPA enforcement practices have partially taken the place of NBARs and mixed funding. First, in about 172 instances, EPA has supplied PRPs with waste-in lists--lists showing EPA's data on the volume and type of wastes contributed by PRPs to a site. These lists can help PRPs resolve allocation issues but are not full substitutes for NBARs because they do not provide the government's opinion on cost allocation. In addition, EPA contributes to site cleanup costs, in effect providing mixed funding, whenever it settles with PRPs for less than full cleanup costs. Although the agency does not keep summary data on these compromises, regional officials told us that they occur in virtually every Superfund settlement.

EPA has used ADR in Superfund cases at 35 sites. Most of the ADR has been concentrated in two regions that have been receptive to the use of this tool. (See app. III for case studies on the settlement tools).

SEVERAL FACTORS ACCOUNT FOR THE LIMITED USE OF THE SETTLEMENT TOOLS

Why have the statutorily authorized settlement tools been used at so few sites? Although the reasons differ to some extent for each of the tools, there seems to be an overriding explanation: EPA has not managed the Superfund program to promote their use. For example, EPA has not fully surveyed sites to determine which might be candidates for the use of these tools or actively informed

PRPs of their availability in all cases. It has not determined what resources the regions need to implement the settlement tools or how to reconcile goals for achieving large numbers of settlements with concern for responsible parties' transaction costs.

In addition, regional officials we interviewed thought that administrative requirements for using some of the settlement techniques unnecessarily limited the cases in which they could be applied.

EPA's limited use of the settlement tools is a chronic problem. In its 1989 management review, EPA identified a number of obstacles to wider use of the tools, including the belief, held by some agency officials, that the tools were inconsistent with the Superfund liability doctrine, that they were expensive to use, or that they diverted EPA resources from efforts to achieve cleanups. The report stated that EPA may lack the control needed to ensure that regional decisions are consistent with national policy direction. The report recommended that EPA provide training for regional personnel, develop an incentive system for the regions to use these tools, and establish specific goals for regional use of the tools. These recommendations were never fully implemented.

In 1988 testimony before the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations,[4] we indicated that EPA had not given high priority to de minimis settlements, had limited staff available for this function, and had not established goals for these settlements. In a 1989 report,[5] we discussed our survey of EPA regional staff to determine why de minimis and other settlement tools were not being used. Limited staff and funds and low priority were some of the reasons most often cited by regional project managers and attorneys for not using de minimis settlements as frequently as possible. Regional project managers and attorneys also cited limited staff training and experience.

In the past year, as controversy over Superfund transaction costs has grown, EPA has given greater emphasis to the use of the statutory settlement tools. The most significant achievement from this effort so far has been an increase in the use of de minimis settlements and ADR techniques. Pilot studies were also begun to assess the potential for greater use of NBARs. However, the agency is still a long way from using the tools routinely.

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[4]Superfund De Minimis Settlements (GAO/RCED T-88-46, June 20, 1988).

[5]Superfund: A More Vigorous and Better Managed Enforcement Program Is Needed (GAO/RCED-90-22, Dec. 14, 1989).

EPA needs to sustain its current interest in the tools and address significant impediments that remain to its use of them. While improving and expanding the use of each tool depend on changes unique to that tool, EPA could nevertheless take some overall management actions to foster an agency culture that values the use of the tools. EPA could do more to publicize their availability, determine the maximum practical extent of their use, assess the resources that the regions need to use them, target resources specifically for their use, share success stories across regions, and provide incentives and accountability for their sustained use.

De Minimis Settlements

EPA's experience with the de minimis settlement tool illustrates the impediments that have restricted the use of the SARA tools.

EPA officials told us that the cost to the regions of de minimis settlements represents a major impediment to completing such settlements. They said that de minimis settlements compete for limited enforcement resources and can distract already overburdened regional site teams from site cleanup. The timing of these settlements intensifies this problem because they may occur about the time the regional site teams are preparing for cleanup negotiations with the major parties.

The costs of some de minimis settlements can be large and represent a heavy burden on a region's resources. For example, in 1992, an early de minimis settlement involving 170 parties at a Region III site cost $723,000 in contract support and took 3,300 hours of EPA staff time. Despite such sizeable expenses, EPA does not routinely collect information on the costs of de minimis settlements or regularly provide special funding to the regions to facilitate them.

EPA officials also told us that certain de minimis policies have limited the number of settlements by making it difficult for minor contributors of hazardous waste to qualify for de minimis settlements. For example, until recently, EPA guidance required that before a de minimis settlement could be reached, a waste-in list--a ranking of the waste contributions of all the PRPs--had to be prepared. In effect, this policy permitted a de minimis settlement only when the waste contributions of all parties were known. A party that contributed a small quantity of waste at a site where the contributions of all other parties were not known would not be eligible for de minimis treatment.

EPA's former requirement for a waste-in list restricted the potential application of the de minimis tool. First, it limited the number of sites that could be candidates for such settlements; EPA estimates that data sufficient to prepare a waste-in list are

not available at most sites. Second, because waste-in lists can be expensive to prepare, this requirement potentially increased the government's costs.

Inadequate EPA administrative guidance also limited the number of de minimis settlements, according to regional officials. SARA requires EPA to determine that the toxicity of the hazardous waste contributed by a prospective de minimis party is "minimal in comparison to other hazardous substances" deposited at a site. EPA officials believe that it was difficult to make defensible toxicity determinations under the general guidance the agency has published.

Moreover, the de minimis settlement tool did not fully protect contributors of minuscule amounts of waste, referred to as de micromis contributors, from contribution suits. In recent years, PRPs at some sites have threatened contribution suits against hundreds of such parties. Until recently, EPA did not have a policy to protect de micromis parties from contribution suits.

Recent Developments and Options for Further Action

Over the past few years, as complaints mounted that EPA was not making appropriate use of de minimis settlements, the agency took steps that appear to be increasing the use of this tool. EPA provided regions with resources, training, and guidance for de minimis settlements and supported innovative regional pilot efforts. The agency also made a small start at encouraging de minimis settlements earlier in the enforcement process, in accordance with SARA's intent. EPA has completed 10 early de minimis settlements. One pilot project is exploring the potential for completing a de minimis settlement even before the site is added to the National Priorities List (NPL).

Most recently, on July 30, 1993, EPA issued guidance that may simplify de minimis determinations and expand the use of these settlements. The guidance permits regions to make a de minimis determination without preparing a waste-in list or volumetric ranking. To determine whether a PRP is eligible for a de minimis settlement, a region need only assess the individual PRP's waste contribution relative to the volume of waste at a site. Regions may estimate the volume of waste present at the site by sampling contamination or by other methods. However, this guidance may not simplify toxicity determinations for de minimis settlements--it merely restates language from earlier guidance intended to provide a general standard for these determinations.

The July 30, 1993, guidance also identifies ways that regions can facilitate de minimis settlements. For example, they can settle with de minimis parties individually so that eligible parties will not incur transaction costs while waiting for a de minimis group to form. The guidance recommends that regions

develop a strategy to inform PRPs of the benefits that may accrue from a de minimis settlement.

Also, on July 30, 1993, EPA issued guidance that would allow regions to resolve the liability of de micromis parties and provide them with contribution protection under expedited settlement procedures. How effective this guidance will be in removing de micromis parties from the Superfund process remains to be seen. If successful, the guidance will reduce the number of contribution actions taken against de micromis parties. If these parties continue to be sued, special statutory protection for de micromis parties may be needed.

Despite recent improvements, EPA has not fully addressed two key barriers to de minimis settlements. The agency has not developed a plan for funding an increased number of these settlements over the long term. Nor has the agency fully determined how many sites are potential candidates for de minimis settlements.

In the short term, EPA has instructed the regions to divert resources from other activities to achieve new de minimis goals, but it is unclear how the agency intends to fund greater use of de minimis settlements over the long term. The agency's current de minimis goals are based on historical use of the tool. In order to establish rational de minimis goals and determine future resource needs, EPA needs to conduct a comprehensive inventory of the NPL sites to identify de minimis candidates.

Targeting resources specifically for de minimis settlements could increase their use. For example, EPA has detailed headquarters attorneys to some regions to help them reach de minimis settlements. Building on this experience, regional officials recommended that EPA assemble region- or headquarters-based task forces (or "SWAT" teams) to assist with the de minimis settlements while the remedial project manager and site attorney work on other aspects of the site cleanup.

EPA could also expand its effort to encourage non-de minimis parties to provide resource assistance for de minimis settlements. At a Region IX site that has thousands of eligible de minimis parties, the PRP steering committee has agreed to help EPA develop data that the agency needs for the de minimis determination. This sharing of effort will reduce the demand on EPA's resources and foster settlement with the major parties because the moneys obtained from the de minimis settlement can be used toward cleanup.

Nonbinding Allocations of Responsibility

Some of the same problems that have limited the use of de minimis settlements have discouraged the use of NBARs. First, EPA has not assigned a high priority to, or promoted, the use of NBARs among PRP groups. For example, although EPA guidance requires that PRPs be informed early in the process about NBARs, none of the model early notice letters used in the three regions we visited mentioned NBARs. Second, preparing an NBAR, like preparing de minimis determinations, can divert the regional site team from site cleanup. And EPA has not provided additional resources specifically for developing NBARs. Finally, although there are other allocation methods, EPA guidance recommends that the NBAR be based primarily on volumetric data. However, an EPA official stated that volumetric data are available at only a minority of sites. Furthermore, some regional officials believe that an NBAR can be prepared only when volumetric data are available.

Recent Developments and Options for Further Action

EPA has not assigned a high priority to NBARs primarily because it believes that most PRPs prefer to do their own cost allocation rather than rely on EPA's. However, there is some evidence that PRPs may be more willing to accept NBARs than EPA has assumed. For example, a recent EPA pilot study demonstrated that PRPs might use NBARs more if EPA actively promoted them. In addition, two national groups of PRPs we contacted believe that NBARS should be used more often to assist PRPs in reaching agreements on cost allocation.

EPA would be better informed about PRPs' interest in NBARs if it abided by its own guidance and notified PRPs at every site about the availability of this tool. The guidance also makes the use of NBARs contingent on EPA's receiving requests from a significant percentage of the PRPs at a site. At some sites, however, EPA may want to consider using an NBAR when negotiations have broken down. Finally, EPA guidance may be artificially restricting the use of NBARs because the agency bases its use of the tool, in part, on the availability of volumetric data, although other methods could be explored for allocating the percentage share of cleanup.

Mixed Funding

EPA has made limited use of formal mixed funding and has not promoted regional use of this tool. We agree that a cautious approach to the use of this tool is appropriate.

EPA regional staff are reluctant to use mixed funding. Although most regions have used preauthorized mixed funding, only two have done so more than once, and no applications are pending. The agency's reluctance to use mixed funding stems from concerns that this tool will compromise the Superfund program's joint and

several liability standard and EPA's ability to achieve settlements. Therefore, although EPA guidance does not prohibit the use of Superfund money in mixed-funding arrangements, EPA has not used this money to pay for "orphan shares" at sites. Orphan shares are costs associated with wastes deposited by unknown or nonviable parties. Many agency officials believe that this approach is consistent with the intent of the Superfund law. In addition, regional officials generally thought that they could facilitate settlement more efficiently through appropriate compromises with responsible parties--by, for example, waiving the right of the government to recoup all of its costs from the parties.

Regional officials also expressed concern that expanded use of mixed funding would increase transaction costs and be too expensive for the government. A regional official questioned whether greater use of mixed funding would expedite settlements or simply prolong negotiations by encouraging every PRP to seek mixed funding. Furthermore, if mixed funding were increasingly used at sites where there are no nonsettlors against whom to recover EPA's costs, federal costs would rise sharply. EPA estimates that paying for the orphan share of cleanup design and construction at sites where PRPs perform the cleanup would cost the Superfund up to $420 million annually, a sum almost equal to EPA's estimated fiscal year 1993 obligations for cleanup design and construction where EPA performed the cleanup.

Some regional officials thought that mixed funding had a limited role to play at sites where the only viable PRPs were minor contributors and where the major contributors were unknown or nonviable. But regional officials noted that even in such circumstances, when mixed funding may be warranted, cumbersome administrative procedures discourage its use. Because of these procedures, officials who had used preauthorized mixed funding were reluctant to do so again. A headquarters official acknowledged that the lengthy application, approval, and reimbursement process generates costs that reduce the apparent savings from an expedited settlement. EPA is addressing this problem by developing new guidance to streamline the application process.

Recent Developments and Options for Further Action

In the past year, EPA sponsored a study of mixed funding that identified goals--such as promoting the use of innovative technology and expediting cleanup--that might be furthered through the use of mixed funding and discussed several mechanisms for increasing the use of this tool without incurring excessive costs. EPA is considering whether any policy changes should be made as a result of this study and is developing mixed-funding pilot projects. We believe that a cautious approach to using mixed funding is appropriate, but we applaud EPA's effort to streamline

preauthorization procedures and reassess the agency's use of this tool.

Alternative Dispute Resolution

EPA regions have been reluctant to use ADR techniques in Superfund cases. In 1987, EPA issued final guidance on the use of ADR in Superfund and other enforcement cases and expected each region to nominate at least one case during that fiscal year. Regional response to the initiative was slow. Before 1991, 3 of 10 regions had nominated Superfund cases, and only 2 regions had actually used ADR in Superfund settlement negotiations.

Many regional officials believe that ADR entails additional work and expense that primarily benefit PRPs. Several officials in one region we visited said that EPA should not sponsor ADR services if settlements can be achieved through traditional enforcement efforts. However, officials in regions that have used ADR techniques at several sites were enthusiastic about this tool's potential to reduce the government's transaction costs. They reported that ADR had made it possible to obtain settlements in cases that would otherwise not have been settled. In addition, Region V officials believe that the use of ADR eliminated costs usually incurred in preparing a case for referral to the Department of Justice and in protracted negotiations.

Recent Developments and Options for Further Action

Within the last 4 years, EPA has created a headquarters liaison position to coordinate ADR activities agencywide and designated ADR leaders in the regional offices, established dedicated funding for ADR activities, developed a reporting system to monitor the regions' use of the tool, provided regional training, and sponsored an ADR pilot project. These efforts to promote ADR have had some success. ADR techniques are currently being used at 15 sites, and 9 out of 10 regions have now had some experience with ADR.

EPA is moving in the right direction by taking steps to explore the possibilities for greater use of ADR. A recently announced pilot project will use ADR at about 20 sites, as well as NBARs, where appropriate. EPA's challenge is to move from pilot projects to the routine use of this tool in all EPA regions.

CONCLUSION

For most of the 7 years since the Congress provided EPA with tools to expedite Superfund settlements, the agency has done little to promote their use and has placed little emphasis on the need to reduce transaction costs. As a result, the full potential of the tools to reduce transaction costs is unknown.

Within the past year, and particularly within the past few months, EPA has paid more attention to controlling transaction costs. On June 23, 1993, EPA announced plans for overcoming many obstacles to greater use of the settlement tools discussed in this statement. For example, EPA required regions to identify candidates for de minimis settlements, issued new de minimis guidance that simplified these determinations, and issued de micromis guidance. The agency also announced a pilot project, involving about 20 sites, to explore the use of ADR and NBARs. In addition, EPA will sponsor pilot projects to reexamine the possible roles of mixed funding and will consider streamlining mixed-funding procedures.

EPA's actions are evidence of a new concern for controlling Superfund transaction costs by increasing the use of the settlement tools. Whether the initiatives produce lasting improvement will depend on how well EPA manages full implementation of the effort. Before EPA can make more effective use of these settlement tools, it needs to address management issues. It needs to work toward creating an enforcement attitude that is concerned with reducing the transaction costs of Superfund's responsible parties. Specific steps toward the development of this approach include assessing the potential applicability of these settlement tools, creating regional accountability for their use, targeting resources, reviewing administrative procedures, and making PRPs more aware that these tools are available.

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Mr. Chairman, that concludes my prepared statement. I will be glad to respond to any questions that you or Members of the Subcommittee may have.

SUPERFUND SETTLEMENT TOOLS

DE MINIMIS SETTLEMENTS

During the settlement process, potentially responsible parties (PRP) that contributed only a relatively small amount of low-toxicity waste to a site--known as de minimis parties--can incur substantial transaction costs, which may exceed their share of the cleanup costs. To provide relief, the Congress, in the Superfund Amendments and Reauthorization Act of 1986 (SARA), gave the Environmental Protection Agency (EPA) the authority to enter into expedited settlements with such parties.

De minimis settlors can be large or small companies, government entities, or individuals. At some sites, these contributors number in the hundreds or thousands.

De minimis settlements can reduce transaction costs for all parties when completed early because they end the involvement of de minimis parties and reduce the number of parties with which EPA and the major PRPs must negotiate. De minimis settlements also protect small contributors against claims by third-party PRPs for any further contributions toward cleanups. This relieves small contributors of transaction costs they might otherwise incur as defendants in contribution suits.

NONBINDING ALLOCATIONS OF RESPONSIBLITY

SARA also provides EPA with discretionary authority to issue nonbinding preliminary allocations of responsibility (NBAR). These are allocations by EPA to individual PRPs of a percentage of the total cleanup costs. NBARs are advisory--they are not binding on the government or PRPs--and "preliminary"--PRPs can make adjustments to them. According to EPA guidance, the agency can prepare an NBAR when it will promote a settlement and reduce transaction costs, especially when a significant percentage of the PRPs at a site request one. However, EPA generally leaves PRPs to work out among themselves how much each will pay toward settlement at a site.

MIXED FUNDING

SARA also authorizes EPA to share cleanup costs with PRPs through mixed-funding agreements. There are three types of these agreements: "preauthorized" mixed-funding agreements, under which PRPs perform the cleanup and EPA reimburses a portion of their costs; mixed-work agreements, under which EPA performs a discrete portion of the cleanup and PRPs perform the rest; and "cashout" mixed-funding agreements, under which EPA accepts a cash payment and agrees to perform the cleanup. Of these three arrangements,

the agency prefers preauthorization because it requires the PRP, and not EPA, to perform the cleanup. In addition to these formal mixed-funding agreements, informal or "surrogate" mixed funding occurs at sites whenever EPA agrees to settle for less than 100 percent of the costs that it might be able to recover from settling parties.

ALTERNATIVE DISPUTE RESOLUTION

The Superfund law also authorizes EPA to use alternative dispute resolution (ADR), which involves a neutral third party to aid in the resolution of disputes without litigation. SARA provides that EPA may enter into arbitration for cost recovery claims, provided that the claims do not exceed $500,000. EPA has broader authority to use other ADR techniques--such as mediation, minitrials, and fact-finding--to resolve other disputes under the Administrative Dispute Resolution Act (P.L. 101-552) and the Executive Order on Civil Justice Reform (E.O. 12778). The executive order mandates that attorneys representing the government use ADR techniques to expedite the prompt and proper settlement of federal disputes.

OTHER STRATEGIES FOR REDUCING TRANSACTION COSTS

In addition to the tools created by the Superfund Amendments and Reauthorization Act of 1986, EPA has other means of reducing transaction costs, including strategies for reducing costs that arise when recalcitrant PRPs refuse to settle. "Recalcitrant" PRPs share responsibility for the cleanup but refuse to negotiate and settle their share of the costs.

Recalcitrant PRPs increase transaction costs for settling PRPs and the government. Settling PRPs incur the costs of negotiating and allocating among themselves the recalcitrant PRPs' shares of the cleanup costs. They may also incur the expense of suing recalcitrant PRPs for their shares of the costs. EPA's costs also increase when the agency is involved in protracted negotiations or is forced to take enforcement action against recalcitrant PRPs. The EPA regions we visited employ a number of strategies intended to decrease transaction costs by discouraging recalcitrance. In addition, certain court jurisdictions and states have adopted civil penalties for recalcitrance.

EPA Enforcement Practices to Discourage Recalcitrance

EPA regions have developed a variety of enforcement practices to discourage recalcitrance and thereby reduce transaction costs. These strategies penalize PRPs that refuse to settle and reward those that do settle. Some regions carve out a disproportionately large share of the cleanup costs for recalcitrant PRPs, rewarding the settlors with a smaller share.

In addition, some EPA regions penalize PRPs that are slow to settle by graduating the premiums that the agency charges on certain settlements. Graduated premiums, or "delay damages," are used when EPA accepts a cash payment in settlement instead of requiring the PRPs to perform the cleanup. Settlors that do not participate in the cleanup pay a premium--over and above their share of the cleanup costs--to cover unanticipated future costs. Regions that use graduated premiums require each successive round of settlors to pay a higher premium. For example, in one case, EPA charged the first group of settlors a premium that was 160 percent of the group's cleanup costs. It charged the second group a 260-percent premium. The remaining PRPs were required to pay a 900-percent premium. PRPs that settled early were thus rewarded for their cooperation.

Proposed Legal Strategies for Reducing Recalcitrance

Penalties for recalcitrance have also been imposed by state law and the courts. Some parties or groups have recommended that these and other penalties be authorized or required by the Superfund law. The various penalties would compensate PRPs that incur litigation expenses in order to pursue recalcitrant PRPs for their fair share of cleanup costs. By creating more severe consequences for being found liable in a contribution action, these penalties would also discourage recalcitrance.

Potentially recalcitrant PRPs would be more likely to participate in negotiations, according to some PRP attorneys, if they were obligated, upon being found liable in a contribution action, to pay the plaintiff's legal fees. One court has, in fact, allowed a plaintiff in a contribution suit to recover attorney fees. However, attorney fees are not consistently awarded--two other courts have declined to award attorney fees.[1] Some argue that awarding attorney fees would reduce recalcitrance if it were applied consistently in contribution actions. However, to ensure that every recalcitrant PRP risked incurring this cost, CERCLA would have to explicitly permit successful contribution plaintiffs to recover legal fees.

A paper published by Clean Sites, a nonprofit organization working to facilitate the cleanup of hazardous waste sites, advocates permitting successful contribution plaintiffs to recover up to 10 percent in excess of the defendant's fair share of the cleanup costs. For example, if a court found that a defendant's share of the cleanup costs amounted to $150,000, the plaintiff could collect up to $165,000. A statutory amendment to CERCLA would also be necessary to create this penalty.

The Clean Sites paper also discusses the potential use of civil penalties modeled after ones recently created by New Jersey and California. These states have enacted laws allowing parties that clean up state hazardous waste sites to collect treble damages from recalcitrant parties. The states retain a portion of the collected damages. To obtain damages, a party must clean up the site and then successfully sue a party that violated a state order to perform the cleanup. In addition, New Jersey requires the party

[1]In General Electric Co. v. Litton Industrial Automation Systems, Inc., 920 F.2d 1415 (8th Cir. 1990) recovery of legal fees was allowed. In Key Tronic Corp. v. the United States of America, 984 F.2d 1025 (9th Cir. 1993) and Stanton Road Associates v. Lohrey Enterprises, 984 F.2d 1015 (9th Cir. 1993) recovery of legal fees was denied.

to obtain state approval to seek treble damages. These laws were enacted primarily to create incentives for private parties to clean up hazardous waste sites voluntarily. Anyone--whether responsible or not for contaminating a site--can clean up the site and seek treble damages.

Officials in both states believe this penalty for losing a contribution action will also discourage recalcitrance, but it is too early to fully evaluate the impact of these laws. The New Jersey law was enacted in December 1990, and the California law went into effect in January 1993. As of August 1993, New Jersey had approved one request for damages, and in approximately five other cases the state had sent a letter to the recalcitrant parties warning that treble damages would be authorized if the parties failed to settle within a certain number of days. According to a New Jersey official, the recalcitrant parties agreed in two cases to participate in the cleanup after being threatened with treble damages.

Creating new civil penalties for PRPs that lose contribution actions in Superfund cases might discourage recalcitrance. However, such penalties might also increase transaction costs, at least in the short term, or unfairly penalize PRPs that are not recalcitrant. Some EPA officials and a PRP attorney we spoke to are concerned that allowing contribution plaintiffs to obtain damages might encourage contribution actions and spawn more Superfund litigation. Advocates of civil penalties counter that, in the long term, the penalties would encourage potentially recalcitrant PRPs to enter into cleanup negotiations with other PRPs, thereby reducing the number of contribution suits.

Some PRP attorneys are concerned, however, that increasing the penalties for being found liable in a contribution action might inadvertently reduce the fairness of the Superfund program. If threatened with damages--particularly treble damages--defendants in contribution suits might feel pressured to settle with the plaintiffs even if they had legitimate grounds to contest their liability.

The experiences of New Jersey and California may provide useful information on the effect of penalties for recalcitrance. If civil penalties discourage recalcitrance without increasing litigation or unfairly punishing nonrecalcitrant parties, it might be appropriate to consider civil penalties as a means to encourage participation in Superfund settlement negotiations.

SETTLEMENT TOOL CASE STUDIES

The following exemplify EPA's recent use of the settlements tools.

DE MINIMIS SETTLEMENT: TONOLLI SITE

At the Tonolli site in Nesquehoning, Pennsylvania, EPA Region III used its de minimis authority to resolve the liability of small contributors of hazardous waste and to reduce their transaction costs. Typically, Region III waits for de minimis parties to propose that EPA offer a de minimis settlement. In this instance, EPA selected Tonolli as a pilot project to assess the potential for itself initiating de minimis offers. EPA offered eligible PRPs an "early" de minimis settlement, allowing them to settle before the agency completed its final estimate of the cleanup costs. PRPs that accepted this offer avoided the transaction costs they would have incurred while awaiting the final estimate of cleanup costs and then participating in settlement negotiations.

Background

Tonolli is a 20-acre site where batteries were stripped for their lead content until 1985. Arsenic, cadmium, lead, and chromium from the former battery recycling facility have contaminated the site. EPA's final cleanup estimate was $17 million. EPA identified about 400 PRPs as eligible for a de minimis settlement--that is, EPA considered them to be small contributors because they had contributed less than 1 percent of the hazardous waste at the site--and named 19 PRPs as "major" contributors.

De Minimis Offer

Departing from its practice of waiting for PRPs to propose a de minimis settlement, Region III notified PRPs of their eligibility and invited them to a general meeting at which regional officials explained the de minimis process. Many small contributors that attended the meeting were unfamiliar with the Superfund program and de minimis settlements. In June 1992, EPA offered a de minimis settlement to about 400 PRPs.

Two rounds of de minimis settlements took place. In the first round, 170 de minimis PRPs agreed to pay their share of the cleanup costs plus a 65-percent premium for unanticipated future cleanup costs, for a total of $3.5 million. EPA allowed some settlors to pay in installments. Subsequently, some of the remaining eligible PRPs asked for a second opportunity to settle because they had not clearly understood the de minimis process. EPA made a second

offer, attaching a 10-percent premium over the terms of the first settlement as a disincentive for future settlors to delay. In this round, thirty-three PRPs settled for $542,000.

Results

According to regional officials and a PRP representative, the Tonolli pilot project reduced transaction costs. According to regional officials, 203 PRPs accepted a de minimis settlement--and most of these PRPs settled early--lowering their transactions costs from what these costs would have been if the PRPs had been compelled to participate in negotiations with the major parties or had been involved with third-party litigation because they had not settled. An attorney representing the de minimis parties stated that they had avoided significant transaction costs that they would have incurred if they had become defendants in a third-party contribution action. According to the PRP representative, EPA's settlement offer brought a larger number of PRPs into the settlement process than expected.

EPA obtained settlement agreements of over $4 million toward cleanup. With fewer parties, EPA believes it will be able to manage negotiations more efficiently with the major PRPs--thereby avoiding enforcement costs. Region III plans to initiate de minimis settlements at other sites.

According to regional officials, the settlement was resource intensive. The region estimates that it took 3,300 hours in staff time for these de minimis settlements and $720,000 in contractor support for preparing a waste-in list and performing administrative tasks. Region III believes that the de minimis settlement delayed cleanup at this site and other sites in the region because it diverted the site team.

NONBINDING ALLOCATION OF RESPONSIBILITY: HASSAYAMPA LANDFILL SITE

At the Hassayampa site, near Phoenix, Arizona, EPA Region IX assisted PRPs in their allocation negotiations by providing an NBAR--a nonbinding allocation of percentage shares of the cleanup costs among the PRPs at the site. Region IX, like other regions we visited, does not routinely notify PRPs of the availability of an NBAR. But, spurred by a headquarters pilot project to explore expanding the use of the NBAR tool, Region IX offered an NBAR at Hassayampa. According to a PRP representative, the PRPs based their allocation on the NBAR, which facilitated their allocation decisions and reduced their transaction costs.

Background

The Hassayampa Landfill site, located in Maricopa County 40 miles west of Phoenix, has operated as a municipal landfill since 1961. In addition to municipal wastes, the landfill accepted hazardous industrial wastes between April 1979 and October 1982. Site contaminants include volatile organic compounds, heavy metals, pesticides, and lime wastes. EPA's estimate of the cleanup costs was $6.1 million. The NBAR identified 138 PRPs.

NBAR Issued

Region IX notified the PRPs that EPA would offer an NBAR. According to a PRP representative, the PRPs were initially skeptical about the prospect of using an NBAR. But EPA worked with the PRPs and incorporated elements of the PRPs' existing allocation efforts in developing the NBAR.

PRPs at Hassayampa may have been receptive to EPA's allocation assistance because allocation disputes had taken place among the PRPs before cleanup negotiations began. PRPs that had studied treatment options at the site under EPA's direction and had reimbursed EPA for oversight costs had filed a contribution action against other PRPs. By the time negotiations for cleanup began, the PRP community had engaged in a legal dispute and had incurred significant transaction costs, according to a PRP representative.

EPA issued the NBAR on September 28, 1992, and revised it on May 21, 1993. The PRPs agreed to use EPA's NBAR as the basis for allocating percentage shares. As of September 1993, a final settlement had not been signed, but EPA anticipates final settlement soon.

Results

A PRP representative told us that the NBAR facilitated PRP allocation decisions at Hassayampa and reduced PRP transaction costs. The representative stated that the NBAR had reduced the potential for protracted PRP negotiations because the PRPs accepted the government's allocation advice as credible. He characterized the savings in transaction costs as marginal in comparison with the transaction costs already incurred as a result of the contribution suit at the site. Nevertheless, the representative believed that the NBAR had improved cooperation among the PRPs over final cleanup negotiations and had reduced transaction costs.

A regional official also told us that the NBAR had facilitated PRP allocation. But he noted that the NBAR was resource intensive. The site team was heavily involved in the developing the NBAR. For example, the regional site team had to conduct a time-consuming

document review to respond to the relatively few questions raised about the draft allocation. EPA has not yet calculated the cost of preparing the NBAR. The cost of preparing the NBAR will ultimately be borne by the PRPs as part of the settlement.

ALTERNATIVE DISPUTE RESOLUTION: SULLIVAN'S LEDGE SITE

EPA officials who have used ADR are generally enthusiastic about using these techniques, particularly in cases that might otherwise not be settled. A region I official said that using mediation during negotiations at the Sullivan's Ledge site in New Bedford, Massachusetts, saved the case attorney a substantial amount of time, allowed the agency to authorize the use of a less expensive remedy, and laid the groundwork for a good working relationship among parties that would have to cooperate for decades.

Background

Sullivan's Ledge is a 12-acre site in a residential area of New Bedford, Massachusetts, which was operated as a quarry until about 1932. After 1935, the city of New Bedford permitted the pits to be used for the disposal of hazardous materials and other wastes. Air and groundwater on and around the site are contaminated with volatile organic compounds, inorganic compounds, polycyclic aromatic hydrocarbons, and polychlorinated biphenyls.

The site consists of two sections, called "operable units." In 1992, when the case was nominated for mediation, 14 PRPs had already agreed to clean up the first operable unit, and EPA was seeking a commitment to clean up the second.

Use of ADR Techniques

Region I nominated the site for mediation because the case involved complex issues affecting numerous private parties and a municipality. EPA regional staff hoped that mediation would allow them to avoid resource-intensive litigation.

Several factors made the site particularly appropriate for the use of ADR. The city of New Bedford, which owned and operated the site, was among the PRPs that refused to participate in the first settlement. The presence of municipal PRPs at a site may complicate negotiations because municipalities often have limited cash resources to contribute toward the cost of cleanups and may be unfamiliar with Superfund's liability provisions.

In addition, the projected cost of cleaning up the second operable unit depended on coordinating the remedial tasks at this unit with the work being carried out at the first operable unit. If the PRPs from the two operable units could agree to coordinate their work, they stood to reduce their remedial costs at the second operable unit by $5 million, and EPA stood to lower its oversight and enforcement costs.

A mediator brought together the parties from both operable units, helped them fashion settlement offers, and eventually helped identify tasks the city could perform in lieu of cash payments. The total cost of using mediation during formal negotiations was approximately $30,000, half of which EPA paid.

Results

Two PRPs, including the city of New Bedford, agreed to clean up the second operable unit. The PRPs from both operable units agreed to coordinate their tasks, allowing EPA to authorize the use of a remedy at the second operable unit that was expected to cost $2.8 rather than $7.8 million. EPA is currently suing the other two PRPs for their liability at the site.

The parties that participated in the mediation were pleased with the results. EPA officials said that mediation kept the parties negotiating at several decision points when they would otherwise have pursued litigation and helped ensure that negotiations remained on schedule. In addition, regional officials said that the mediator took over difficult, time-consuming communications with PRPs, giving the officials more time for other case management activities. Finally, regional officials felt that mediation had laid the groundwork for good relationships among parties that would have to work together for decades to clean up the site.

According to EPA officials, PRPs from the first operable unit reported that mediation brought them to the negotiating table when they would otherwise not have come and kept them participating. In addition, the PRPs reportedly viewed EPA's participation in mediation as a sign of the agency's good faith.

PRPs from the second operable unit had similarly favorable views of the mediation process. A New Bedford official said that using a mediator made negotiations much more efficient, helped ensure that the municipality was treated fairly, and provided expertise that the city would otherwise have had to obtain from expensive Superfund attorneys and consultants. He added that he would not hesitate to use ADR again. A PRP attorney said that the mediator helped to structure the settlement and negotiate realistic schedules with EPA.

MIXED FUNDING:
HARVEY & KNOTT DRUM SITE

The perception that Superfund liability is unfair may discourage PRPs from settling, particularly when one PRP is asked to pay for an entire site because other financially viable PRPs have not settled. In such an event, settlement negotiations may be protracted or unproductive, increasing transaction costs for all the parties. At the Harvey & Knott Drum site in Delaware, Region III used mixed funding to expedite cleanup and make the settlement process more equitable.

Background

The Harvey & Knott Drum site is a 2-acre parcel of land in New Castle County, Delaware. The site, which was used as an open dump and burning ground, is contaminated with polychlorinated biphenyls, volatile organic compounds, and heavy metals. In addition to the owner and operator, two major PRPs sent waste to the site--General Motors (GM) and Chrysler Corporation.

Results

EPA used mixed funding to obtain a commitment from GM to clean up the site. GM was willing to undertake the cleanup but refused to pay for the entire site when Chrysler--a financially viable PRP--refused to join in the settlement discussions. Chrysler denied that the wastes it had contributed to the site were hazardous. To persuade GM to clean up the site, EPA promised to reimburse GM for one-third of its cleanup costs, or $3,086,000.

EPA is attempting to recover these and other costs from PRPs that have not settled. The Department of Justice has filed a cost recovery action against Chrysler and the owner of the site, seeking the reimbursement promised to GM, as well as one-third of the costs that EPA will incur in overseeing activities at the site.

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