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SUPERFUND

EPA Could Do More to Reduce Responsible Parties' Legal Expenses

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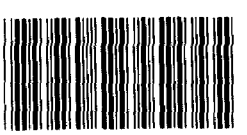

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Mr. Chairman and Members of the Subcommittee:

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. We testified on this subject in June before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, and we are currently reviewing EPA's use of tools authorized by the Superfund law for reducing transaction costs.

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 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. While our work is still ongoing, we have reached a number of preliminary conclusions.

In summary:

-- EPA has made little use of the settlement tools overall. As of June 1993, EPA had completed de minimis settlements at only 69 sites, prepared NBARs at 5 sites, used mixed-funding arrangements at 16 sites, and employed alternative dispute resolution techniques at 30 sites.

-- The tools have not been used much primarily because EPA has not made a sustained effort to encourage the regional offices to use the tools. EPA has been mainly concerned with getting as many responsible party-financed cleanups under way as quickly as possible and viewed the settlement tools as drawing enforcement resources from this effort. In addition, according to most regional officials we interviewed, use of the settlement tools has been limited by restrictive administrative procedures that make the tools difficult to implement.

-- Recently, following widespread complaints about high transaction costs, EPA began to give the settlement tools a higher priority. However, EPA's effort at this point is not fully operational but involves mostly pilot projects at selected regions. As we will discuss, further action is needed to make efforts to reduce transaction costs an integral part of agency 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 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 reimburse EPA for its cleanup costs. Currently there are 1,076 nonfederal sites on the National Priorities List, EPA's inventory of Superfund sites.

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 (PRPs) under this system of liability, with PRPs undertaking 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 cleanup responsibility; 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 they believe should contribute to their cleanup costs. These contribution suits can involve hundreds and, in some instances, over a thousand parties. 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. (See app. I for a description of these tools.)

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. As of June 1993, EPA has entered into de minimis settlements at only 69 sites, prepared NBARs at 5 sites, completed mixed-funding arrangements at 16 sites, and used ADR at 30 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 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 June 1993)

Region	De minimis	NBARS	Mixed funding	ADR
I	14	3	2	8
II	6	0	2	2
III	3	0	4	1
IV	7	0	1	1
V	20	0	2	13
VI	5	0	2	0
VII	2	0	2	0
VIII	4	0	0	1
IX	2	1	0	1
X	6	1	1	2
Total	69	5	16	29

Note: EPA headquarters used ADR at one additional site.

Of the tools, de minimis settlements have been used the most often. EPA has reached 101 de minimis settlements at 69 Superfund sites. Thirty-four percent of the settlements occurred in fiscal year 1992, 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. The study estimated that these settlements have been used in 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 101 settlements involve agreements with about 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 made its formal estimate of 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 partially substitute for 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 30 sites. Most of the ADR has been concentrated in two regions that were receptive to use of the tool.

SEVERAL FACTORS ACCOUNT FOR THE LIMITED USE OF THE SETTLEMENT TOOLS

Why have the statutorily authorized settlement tools been used at so few sites? Our work in this area is still ongoing, so our observations here are preliminary. 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 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 recommendation were never fully implemented.

In 1988 testimony before the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations,[1] 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,[2] we discussed our survey of EPA regional staff to determine why de minimis settlements and other settlement tools were not being used. Limited staff and funds and low priority were some of the factors 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 reemphasized 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. EPA has also begun studies to assess the potential for increasing use of NBARs. However, the agency is still a long way from using the tools routinely.

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

[2]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 and address significant impediments that remain to using the tools. While improvements to and expanded use of the tools depend on changes unique to each tool, EPA could take some overall management actions to foster an agency culture that values use of the tools. EPA could do more to publicize the availability of these tools, determine the maximum practical extent of their use, assess the resources the regions need to use the tools, target resources specifically for their use, share success stories across regions, and provide incentives and accountability for their sustained use.

De Minimis Settlements

The de minimis settlement tool is a good illustration of 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 drain on a region's resources. For example, an 1992 early de minimis settlement at a Region III site involving 170 parties cost $723,000 in contract support and 3,300 hours of EPA staff time. Nevertheless, EPA does not routinely collect information on the costs of de minimis settlements or regularly provide special funding to regions to facilitate them.

EPA officials also told us that certain de minimis policies have limited the frequency of the 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 have been eligible for de minimis treatment.

EPA's 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 eligible 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, the settlements can be costly for the government.

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

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 projects. 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 four early de minimis settlements and initiated pilot early de minimis projects in three regions. One pilot project is exploring the potential for completing a de minimis settlement even before the site is added to the National Priorities List.

More 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 the 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 the 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 produce a reduction in the number of contribution actions taken against de micromis parties. If these parties continue to be sued, statutory protection for de micromis parties may be needed.

Despite recent improvements, EPA has not fully addressed two key barriers to the use of 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 regions to divert resources from other activities to achieve new de minimis goals, but it has not indicated how it 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 sites on the National Priorities List 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 site cleanup.

EPA could also expand its effort to encourage non-de minimis parties to provide resources 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 the 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 also 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 can, like preparing a de minimis determination, divert the regional site team from site cleanup. And EPA has not provided additional resources specifically for developing NBARs. Finally, EPA guidance makes the use of an NBAR hinge on the availability of waste-in or volumetric data, limiting the use of an NBAR to the minority of sites where these 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 PRP's interest in NBARs if it abided by its own guidance and notified PRPs about the availability of this tool at every site. The guidance also makes the use of NBARs contingent on whether a significant percentage of PRPs request its use. At some sites, however, EPA may want to consider using an NBAR when negotiations have broken down. Finally, EPA's guidance on NBARs may be artificially restricting this use by making this use contingent on the availability of waste-in data for all parties at a site.

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; no applications are pending. The agency's reluctance to use mixed funding stems from concerns that use of 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 expanding the 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 were no viable nonsettlors against whom to recover EPA's costs, federal costs would rise sharply. Resources For the Future estimates that 73 percent of the nonfederal Superfund sites have orphan shares. If the aggregate orphan share at these sites is conservatively estimated at 10 percent, these shares could, according to Resources For the Future, represent $3.3 billion in cleanup expenses, or approximately 2 years' worth of appropriations for Superfund at current funding levels.

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 this, 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 use of mixed funding and discussed several mechanisms for increasing the use of mixed funding 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 this tool 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. Prior to 1991, 3 of

10 regions nominated Superfund cases, and only 2 regions actually used ADR in Superfund settlement negotiations.

Many regional officials believe that ADR entails additional work and expense that primarily benefits 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 government transaction costs. They reported that ADR has made it possible to obtain settlements in cases that would not otherwise 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 regional 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 7 out of 10 regions have now had some experience with ADR.

EPA is moving in the right direction by taking steps to increase the use of ADR. A recently announced pilot will involve use of ADR at about 20 sites, as well as some use of NBARs, where appropriate. EPA's challenge is to move from pilot efforts to 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 reducing 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 announced a number of Superfund initiatives. On June 23, 1993, EPA announced plans for overcoming many of the 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 simplifies 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

potential for using mixed funding and will consider streamlining mixed-funding procedures.

EPA's actions are evidence of a new concern for controlling Superfund transaction costs through the increased 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, management issues must be addressed. EPA needs to work toward creating an enforcement attitude that is concerned with containing the transaction costs of Superfund's responsible parties. Specific steps toward developing 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

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 during the settlement process, possibly exceeding 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.

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 other parties for contributions toward cleanup related to matters addressed in their settlements, thereby relieving them of transaction costs they might otherwise incur as defendants in contribution suits.

Nonbinding Allocations of Responsibility

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 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 settlement and reduce transaction costs, especially when a significant percentage of PRPs at a site request one. However, it is EPA's general practice that PRPs work out among themselves questions of 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, where PRPs perform the cleanup and EPA reimburses a portion of their costs; mixed-work agreements, where EPA performs a discrete portion of the

cleanup and PRPs perform the rest; and "cashout" mixed-funding agreements, where 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 a settlement for less than 100 percent of the costs 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 the claims are not in excess of $500,000. EPA has broader authority to use additional 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 latter mandates that attorneys representing the government utilize ADR techniques to expedite the prompt and proper settlement of federal disputes.

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