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Resources, Community, and
Economic Development Division

B-280890

September 29, 1998

The Honorable Michael Oxley
Chairman, Subcommittee on Finance
and Hazardous Materials
Committee on Commerce
House of Representatives

Subject: Superfund: Chronology of Efforts to Resolve Liability for the
American Chemical Services, Inc., Site

Dear Mr. Chairman:

As the Congress attempts to reauthorize the Superfund program, which was designed to clean up the nation's worst hazardous waste sites, much debate has focused on whether to revise the program's stringent provisions that hold private parties responsible for cleanup costs. The Congress has been concerned that many small or innocent parties are subject to unaffordably high costs and that the process of determining which parties to hold liable at an individual site and for how much of the costs could be adding considerable time and legal costs to cleanups.

To better understand the Superfund liability issues parties encounter during the course of a cleanup, you asked us to select a Superfund site as a case study and to develop a chronology of its cleanup process, highlighting the liability decision points throughout that process. In response, we worked with the Environmental Protection Agency's (EPA) cleanup managers in Region V, the region with the largest number of Superfund sites, to select a site. To illustrate how many liability decision points could occur at certain complex sites with multiple parties involved, we requested a subset of sites in that region (1) where construction of the cleanup method was imminent or under way and (2) where a large number of responsible parties were involved. From this subset of sites, we selected the American Chemical Services (ACS), Inc., site, a former chemical manufacturing and recycling facility in Griffith, Indiana, for our case study. EPA had added the site to its list of priority sites

GAO/RCED-98-270R Superfund Site Chronology

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for cleanup in 1984. The site had progressed through the cleanup process to the point where the agency had selected a cleanup method and had estimated that cleanup costs for the site could approach \$70 million. However, EPA is in the process of revising its selected method, based on different assumptions about how the land will be used, and expects that the costs will decline.

In summary, we found that the process of determining liability at the ACS site has involved more than 1,000 parties to date. In addition, 14 years after the site was brought into the Superfund program, final determinations of liability for a number of parties have not yet been made, and EPA is revising its cleanup decision. In 1988, after 4 years in the program, 140 private parties entered into the first major settlement at the site by agreeing to pay for and conduct a study that determined the nature and extent of contamination and to pay for the development of alternative cleanup approaches. Five years later, EPA identified 26 of these parties as the major contributors of the contamination at the site and specified that they must pay for the design and construction of the final cleanup method. The parties would not negotiate a settlement with EPA to perform the cleanup; therefore, EPA had to order the parties to clean up the site. In the meantime, EPA entered into liability settlements with about 1,000 other parties that had made minimal contributions to the contamination. These parties paid a total of about \$25 million in exchange for agreements from EPA and the state environmental agency specifying that they would not sue these parties for additional cleanup costs in the future. These actions still have not resolved all Superfund liability at the ACS site, and the pending decisions could extend for some time into the future. For example, the group of 26 major parties have in turn recently sued 56 other parties for portions of the cleanup costs in actions known as third-party suits. Also, some parties have filed claims against their insurance companies. Enclosure I contains a more detailed chronology of the efforts to resolve liability at the ACS site.

To respond to your request, we primarily interviewed the EPA Region V attorneys and the cleanup program manager responsible for the ACS site. We also interviewed the attorney representing the group of 26 major parties involved in the cleanup. We reviewed legal and program documents pertaining to the history and activities at the site. We completed our initial audit work on liability actions at the site in January 1998 and provided your staff with an oral summary of those actions at that time. Subsequently, you asked us to document this information in a report. Therefore, we updated the status of the cleanup and developed this chronology. We conducted our audit work in accordance with generally accepted government auditing standards.

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We provided a draft of this report for review and comment to the EPA Superfund program manager, site program manager, and attorney in Region V. They generally agreed with the facts provided in our report and suggested several technical clarifications, which we have incorporated.

We are sending copies of this report to the appropriate congressional committees; the Administrator, EPA; and other interested parties. We will also make copies available to others on request.

If you or your staff have any questions or need further information, please call me at (202) 512-6111. Major contributors to this report were Eileen Larence, Assistant Director; Michael Hartnett, Senior Evaluator; and Richard Johnson, Senior Attorney.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Peter F. Guerrero', with a long horizontal flourish extending to the right.

Peter F. Guerrero
Director, Environmental
Protection Issues

AMERICAN CHEMICAL SERVICES SUPERFUND SITE

The American Chemical Services (ACS), Inc., site, a 36-acre site in Griffith, Indiana, has a long history of industrial activity that contributed to its present contamination. ACS began solvent recovery operations there in 1955, then later began to manufacture small batches of chemicals. From the mid-1960s through the mid-1970s, ACS operated two incinerators, handling about 2 million gallons of industrial waste annually, including waste from outside firms. As a result of all of these operations, the site was left with an estimated 20,000 to 30,000 buried drums of contaminated waste, sludges containing substances such as polychlorinated biphenyls and volatile organic chemicals, and contaminated incinerator ash. In addition, soils are contaminated with heavy metals, coal tar constituents, and some pesticides. Approximately 10,000 people live within 3 miles of the site, the closest less than 150 feet east of one of the contaminated areas. Contaminated groundwater is migrating, threatening wells in the area.

Table I.1 presents a chronology of the major events in the Environmental Protection Agency's (EPA) efforts to identify the parties responsible for the site's contamination to ensure that they pay for the cleanup.

Table I.1: Chronology of Actions to Pursue Cleanup and Establish Liability for Costs

Date	Event
9/84	<p>EPA places the ACS site on the list of the nation's most contaminated hazardous waste sites and begins to search for responsible parties.</p> <p>Placement on the National Priorities List makes the site eligible for long-term remedial actions financed through the Superfund program. At about this time, EPA begins identifying potentially responsible parties (PRP), that is, those entities that own the contaminated site or have generated or transported the contaminants and are thus potentially responsible for costs related to the site's cleanup. The PRP search is the first step in gathering evidence about parties that may be responsible for the contamination. It is primarily an information-gathering process.</p>
3/87	<p>EPA notifies 400 parties of their potential responsibilities for the study of the site's contamination.</p> <p>EPA sends special notice letters to 400 parties informing them that they are expected to finance and conduct the remedial investigation and a feasibility study. In the remedial investigation/feasibility phase, EPA or the PRPs assess the nature and extent of the contamination at the site and evaluate alternative remedies. Typically, once EPA sends these notices, PRPs enter a 60- to 90-day moratorium period during which EPA and the PRPs negotiate a settlement.</p>

Date	Event
6/88	<p>150 parties agree to pay for a site investigation. EPA and 150 parties enter an administrative order on consent, a binding agreement between EPA and the consenting PRPs under which the PRPs agree to conduct the remedial investigation and feasibility study. Such orders are administrative actions that do not require court approval, but may be enforced in court. The order generally protects the consenting PRPs from future litigation related to the remedial investigation/feasibility study by EPA or private parties. EPA is not pursuing other PRPs from the original list of 400 in part because some contributed small amounts of contamination and the agency believes that the cost to pursue them is greater than the amount they would be likely to contribute to the cleanup. Other parties may have been dropped because EPA could not locate them or they were insolvent.</p>
6/92	<p>The remedial investigation/feasibility study is completed. The participating PRPs complete the collection and analysis of enough information to determine the nature and extent of the contamination at the site. They also complete the evaluation of specific alternative remedies, preparing the way for the selection of the final remedy.</p>
9/92	<p>EPA issues the record of decision. The record of decision, based on the work done under the remedial investigation and feasibility study, specifies the remedial action to be taken to clean up the site. The goal for the ACS site is to restore the contaminated property for unrestricted use, including the potential for residential use in the future. The major cleanup actions include (1) continuous operation of a groundwater pumping and treatment system, (2) excavation of buried drums to treat and dispose of them off-site, (3) excavation of buried waste for incineration, (4) installation of soil treatment technology, and (5) long-term groundwater monitoring.</p>
4/93	<p>EPA requests that 26 PRPs design and implement the remedy at the site. EPA, through a "special notice letter," offers 26 PRPs the opportunity to enter into a consent decree under which the PRPs would design and implement the remedy in the remedial design/remedial action phase of the cleanup. This notice begins a formal negotiation period of no more than 120 days, after which EPA may, at its discretion, take enforcement action against the PRPs. During this period, EPA and the PRPs try to reach an agreement under which the PRPs finance and conduct the remedial design/remedial action work. If the PRPs agree, they would enter into a consent decree, which is a binding agreement with EPA. The consent decree is published in the <u>Federal Register</u> for comment and must be approved by the court before it becomes final.</p>
12/93	<p>The 26 PRPs enter a participation agreement among themselves. The group of 26 PRPs that EPA considers the major parties involved enter a participation agreement for the remedial design/remedial action among themselves. This means that they proactively coordinate to decide how they would like to apportion the costs of the cleanup and to negotiate this apportionment with EPA. The agreement also establishes a mechanism for sharing the financing of the cleanup. The group also executes a settlement agreement with ACS, Inc. Under this agreement, ACS pays the remaining 25 PRPs a total of \$6 million, and they agree not to take further action against ACS in the future.</p>

Date	Event
5/94	<p>EPA settles the liability of 1,000 parties that made very small contributions to the site's contamination.</p> <p>In exchange for a total payment of \$25 million, EPA enters into a de minimis settlement with about 1,000 PRPs. De minimis settlements are final settlements with PRPs that made minimal contributions to the contamination at a site. Under the agreement, EPA and the state enter into a covenant not to sue, generally protecting the de minimis parties from future litigation related to the cleanup by EPA, the state, or other private parties. EPA and the state reserve the right to take action against a de minimis party in the future should new information surface indicating that the party was more than a de minimis contributor of waste at the site.</p>
9/94	<p>EPA orders 26 PRPs to conduct the cleanup.</p> <p>By issuing a unilateral administrative order, EPA orders the 26 PRPs to conduct the remedial design/remedial action in accordance with the record of decision. The unilateral administrative order is in contrast to an administrative order on consent, which is typically the product of negotiations between EPA and the consenting PRPs. According to EPA, the agency typically issues unilateral administrative orders to compel cleanups when negotiations fail. In this case, the 26 PRPs did not enter into a consent decree because they disagreed with the extent and type of cleanup action set for portions of the site. Specifically, the PRPs contended that EPA's requirement that the site meet the standards for residential use was unnecessarily strict and expensive.</p>
11/94	<p>The PRPs agree to pay for the cleanup.</p> <p>The coalition of 26 PRPs agrees to comply with EPA's unilateral administrative order and subsequently begins the cleanup work. By agreeing to comply with the order instead of entering a consent decree, the coalition hopes to conduct the cleanup work while negotiating with EPA to reduce the scope and cost of the final remedy.</p>
10/97	<p>The coalition of 26 PRPs files suit against other PRPs.</p> <p>The coalition of 26 PRPs conducting the remedial design/remedial action files suit against 56 other PRPs. In its civil action, the coalition asserts that these 56 PRPs had disposed of hazardous substances at the ACS site and demands that they pay shares of past and future cleanup costs in proportion to the amount of contamination they contributed.</p>
11/97	<p>Additional PRPs request to enter the de minimis settlement.</p> <p>Some of the 56 PRPs ask EPA if they can enter into a de minimis settlement. To date, EPA has reached such an agreement with eight of these parties.</p>
Currently	<p>Future liability actions are possible.</p> <p>Future liability for those PRPs named in any settlements at the site will be somewhat limited when the construction of the cleanup action is complete and the site begins the long-term operations and maintenance phase. At that time, EPA and the PRPs performing the cleanup will enter into a final settlement. Such settlements generally protect the settling parties from future litigation regarding matters addressed in the settlement. Future litigation is still possible, for example, where the PRPs fail to conduct agreed-to operations and maintenance activities. Also, some PRPs have recently begun to try to address the costs they face by negotiating or litigating claims against their insurance companies.</p>

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