UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA

FROM: Thomas L. Adams, Jr. /s/
Assistant Administrator for Enforcement and Compliance Monitoring

J. Winston Porter /s/
Assistant Administrator for Solid Waste and Emergency Response

TO: Regional Administrators
Regional Counsels
Regional Waste Management Division Directors

I. PURPOSE

The purpose of this memorandum is to provide interim guidance for determining which PRPs qualify for treatment as de minimis waste contributors pursuant to Section 122(g)(1)(A) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, and to present interim guidelines for settlement with such de minimis parties pursuant to Section 122(g) of SARA. Guidance on de minimis landowners under Section 122(g)(1)(B) of SARA will be provided by separate memorandum.

II. BACKGROUND

When the harm is indivisible, generators and transporters of hazardous substances disposed of at a facility are strictly

and jointly and severally liable for all costs of removal or remedial action incurred by the United States under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9607(a), as amended by SARA. Although this liability is not statutorily limited by the amount or type of hazardous substance generated or transported to the facility, Congress, in Section 122(g)(1)(A) of SARA, recognized the concept of the de minimis waste contributor, i.e., the potentially responsible party ("PRP") who satisfies the requirements for liability under Section 107(a) of CERCLA and who does not have a valid Section 107(b) defense, but who has made only a minimal contribution (by amount and toxicity) in comparison to other hazardous substances at the site.

Since the beginning of the Superfund program, the Agency has been faced with the problem of how to treat de minimis contributor PRPs. The legal fees and other transaction costs of negotiating and litigating with the Government, compounded by the potential costs of asserting and defending claims for contribution with other PRPs at the site, often could exceed the amount such minimal contributors would be expected to pay, even under a settlement or a judgment unfavorable to them. As a result, de minimis parties often seek a swift and efficient

means to pay a sum that is commensurate with their involvement at the site and allows them to be dismissed from further negotiations and litigation. The Agency also needs a method for achieving settlements with minimal waste contributors in order to make negotiations and litigation more manageable.

EPA formally recognized and endorsed the concept of the de minimis contributor settlement in the Interim CERCLA Settlement Policy ("Settlement Policy"), 50 Fed. Reg. 5034 (Feb. 5, 1985). The Settlement Policy advised that negotiations with de minimis parties should focus on achieving cash settlements and should be limited to low volume, low toxicity disposers who normally would not make a significant contribution to the costs of cleanup in any event.

Section 122(g) of SARA[1] is in large part a codification of the Agency's position with regard to settlements with de minimis parties. While recognizing the liability of such parties, that section gives EPA discretionary authority to enter into expedited settlements with de minimis waste contributors and de minimis landowners. Section 122(g)(1) generally provides that when EPA determines that a settlement is "practicable and in the public interest," the Agency shall, "as promptly as possible," seek to reach a "final" settlement with a de minimis PRP by

[1] The full text of Section 122(g) of SARA is provided as an appendix to this memorandum.

consent decree or administrative order, if the settlement "involves only a minor portion of the response costs at the facility concerned." Section 122(g)(1). A de minimis contributor settlement with a generator or transporter is authorized if these criteria are met and if the Agency determines that both "the amount of the hazardous substances contributed by that party to the facility," and "the toxic or other hazardous effects of the substances contributed by that party to the facility," are "minimal in comparison to other hazardous substances at the facility." Section 122(g)(1)(A). Section 122(g) further authorizes settlements with de minimis landowners as defined by Section 122(g)(B) of SARA. Because the Agency will be providing a separate guidance document on de minimis landowners under SARA, this document will focus on the definition and settlement requirements of the de minimis waste contributor.

III. GUIDELINES FOR NEGOTIATING WITH DE MINIMIS PARTIES

De minimis contributor settlements under Section 122(g) of SARA can be an effective means of providing de minimis parties with an early and equitable resolution of their liability while minimizing their transaction costs. De minimis settlements can be particularly useful to the Government in complex cases involving numerous PRPs. In such cases, de minimis settlements

offer the Agency a method of simplifying CERCLA enforcement actions through early elimination of the sometimes numerous minimal contributor PRPs from litigation and negotiations. De minimis settlements may also increase the amount of response costs recovered through voluntary settlement agreements. This is because de minimis parties (who otherwise might not have participated in settlements) may be attracted by the advantages offered by de minimis settlements and encouraged by the fact that their funds will be used to pay costs of cleanup, rather than transaction costs. Finally, de minimis settlements may increase the likelihood of settlement with the major waste contributors by raising sufficient revenues to reduce the overall liabilities of such parties.

To use the de minimis settlement provision most effectively, the Agency will focus on achieving comprehensive settlements in which interested de minimis PRPs at a particular site are addressed in one settlement agreement. De minimis parties should be encouraged to organize and present multi-party settlement offers to the Government. To limit Governmental and PRP transaction costs, de minimis settlements should take the form of standardized agreements, and the Regions should try to avoid lengthy settlement negotiations with de minimis parties.

At sites with dozens or hundreds of PRPs, the de minimis settlement authority will be particularly useful in helping to simplify the negotiation process. In situations of this kind, it is particularly important for the Agency to gather and release information about PRP waste contributions to the site at an early stage, so that potentially de minimis parties can identify and organize themselves to present settlement offers to the Government. Where sufficient information is available, the Agency may tentatively identify potentially de minimis parties in the information released to PRPs under Section 122(e)(1) of SARA. The Agency may also consider negotiating separately with PRP Steering Committees representing substantial numbers of de minimis parties. In addition, the Agency may wish to consult with the major, i.e., non-de minimis, parties during the de minimis negotiations in order to facilitate a later, comprehensive settlement with such major parties. This is because, among other things, the volume and toxicity criteria established by the Agency for participation in the de minimis settlement may have a significant effect on the willingness of the major parties to settle.

In determining the timing of a de minimis settlement, the Agency must consider a variety of factors: the amount of information available about the PRPs and their waste

contributions to the site; the amount of information available about the costs of remediating site contamination; the nature of the reopeners included in the covenant not to sue; the amount of the premium to be paid by the settling parties; and the volume and toxicity criteria used by the Agency to distinguish between the de minimis and major parties at the site. The approach taken at a particular site should be designed to promote voluntary settlement, minimize transaction costs for both the PRPs and the Government, address the legitimate interests of the de minimis and major parties at the site, and assure that the level of risk to the Agency is acceptable. The Regions are not encouraged to devote extensive effort to assessing proposals for de minimis settlement unless there is a reasonable prospect of successful settlement.

The Agency may consider early settlement where complete information concerning PRP contributions and the nature of the remedy is not yet available. In such early settlements, the reopeners should be more expansive, and/or the premiums should be substantial. In addition, volume and toxicity levels should normally be set low, so that parties who may legitimately be treated as major do not instead end up being treated as de minimis. Where the Agency determines that it is more important to have finality in releases and reopeners and more certainty in

definition of premiums and volume/toxicity levels, negotiations for de minimis settlements should be deferred until the remedial investigation and feasibility study have been completed and the remedy and the relative PRP contributions have been definitively identified.

IV. GUIDELINES FOR DEFINING THE DE MINIMIS WASTE CONTRIBUTOR

Because site conditions, remedial programs, number of PRPs and other considerations vary tremendously among sites, the approach taken by this guidance, consistent with Section 122(g)(1)(A) of SARA, is that the de minimis contributor will be defined on a site-specific basis. To qualify as a de minimis generator or transporter, the PRP must have contributed an amount of hazardous substances which is minimal in comparison to the total amount at the facility. The PRP must also have contributed hazardous substances which are not significantly more toxic and not of significantly greater hazardous effect than other hazardous substances at the facility, as well as meeting the other conditions set forth in this guidance.

If, for example, all PRPs at the site disposed of waste of similar toxicity and hazardous nature, e.g., organic solvents, then those PRPs who had contributed a minimal amount (in relation to the total amount at the facility) could qualify for de minimis status because their waste was not more toxic or

otherwise hazardous than other hazardous substances at the site. If, on the other hand, a PRP disposed of a minimal amount of a waste which is more highly toxic or which exhibits other more serious hazardous effects than other hazardous substances at the site, then that PRP, despite the minimal amount of his contribution, normally would not qualify for treatment as a de minimis party.

Another way of analyzing the facts posed by the second example is to consider the cost of remediating site contamination resulting from the hazardous substance contributed by a particular party. If a PRP disposed of a hazardous substance requiring disproportionately high treatment and disposal costs, or requiring a different or more costly remedial technique than that which otherwise would be technically adequate for the site, then that PRP should not be treated as a de minimis contributor even if he disposed of a relatively minimal amount of such substance.

Even if a particular waste contributor meets the volume and toxicity requirements for de minimis contributor status, a possible settlement with a de minimis PRP must be determined by the Agency to be "practicable and in the public interest." Section 122(g)(1). This requires the consideration of factors beyond the basic eligibility criteria -- factors relating to

whether the settlement would effectuate the intent of Section 122(g) and other purposes of the Act. For example, in the unlikely event that every PRP at a site meets the basic de minimis eligibility criteria, a de minimis settlement would not serve one of the primary goals of Section 122(g): elimination of certain minor parties early in the process to focus the remaining case on the major parties. In such an instance, the emphasis should be on reaching a settlement as soon as possible with all parties using traditional settlement approaches. Similarly, in a situation where several major parties at a site are bankrupt or otherwise non-viable, it may not be in the public interest to "cash out" smaller contributors before reaching a settlement with the remaining parties.

The Agency currently has several de minimis pilot projects underway. After these and other Section 122(g) settlements have been concluded, we will consider providing further guidance on the definition of the de minimis waste contributor based upon our experience with these early settlements and comments received on this interim guidance.

V. GUIDELINES FOR SETTLEMENT WITH DE MINIMIS WASTE CONTRIBUTORS

A. Timing of Settlement and Necessary Information

The general goal of settlements with de minimis parties is to allow PRPs who made minimal contributions to a site to

resolve their liability quickly and without the need for extensive negotiations with the Government. Section 122(g)(3) indicates that the President shall reach a settlement or grant a covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

The first type of information that the Agency must have is adequate information about the identity, waste contributions and viability of PRPs for the site concerned. Such information is essential because the Agency must be able to determine, under Section 122(g)(1)(A) of SARA, that each settling party's contribution by volume and toxicity is minimal in comparison to other hazardous substances at the facility in order to enter into a de minimis settlement. Such information is also important because the Agency must be able to evaluate the financial viability of, and strength of its case against, the non-settling parties at the site to determine whether a de minimis settlement is "practicable and in the public interest" under Section 122(g)(1) of SARA.

Therefore, although the Regions may engage in preliminary negotiations with likely candidates for de minimis settlements prior to completion of full PRP investigatory work, as a general rule, de minimis settlements should not be concluded prior to

completion of a PRP search (including title search and financial assessments) or prior to such time as the Agency is confident that adequate information about the extent of each settling party's waste contribution to the site has been discovered. The Regions should commence PRP investigatory work concurrent with the expanded site investigation or, at the latest, the National Priorities List scoring quality assurances process, and should make aggressive use of information requests pursuant to Section 104(e) of CERCLA, as amended, and Section 3007 of RCRA, as appropriate. The Regions should also use subpoenas, as needed and appropriate, pursuant to Section 122(e) of SARA, and should consider all information discovered during site and PRP investigations.[2]

Early discussions with potential candidates for de minimis settlements will be most beneficial at sites with numerous PRPs, where such discussions may be used to encourage minimal waste contributors to organize and present multi-party settlement offers to the Government. In appropriate cases, the Agency may consider concluding de minimis settlements prior to completion of full PRP investigatory work. In such cases, the Agency may use more conservative criteria for distinguishing between de minimis and non-de minimis parties, i.e., lower volume and

[2] PRPs who have been unresponsive to information requests or subpoenas generally should not be considered for de minimis settlements.

toxicity levels, so that parties who may legitimately be treated as non-de minimis are not included within the de minimis class. Such settlements must also be drafted carefully to assure that they provide added protection to the Agency against the risk that new information may be discovered about a settling party's waste contribution to the site.

The second type of information that the Agency must have is information about the costs of remediating site contamination. De minimis settlements in which PRPs are granted an expansive covenant not to sue, i.e., one without reservations of rights for cost overruns and future response action, see infra, pp. 16-18, generally should not be pursued until the Agency is able to estimate, with a reasonable degree of confidence, the total response costs associated with cleaning up the subject site, including oversight and operation and maintenance costs.[3] The Agency usually will arrive at this level of confidence only after a remedial investigation and feasibility study ("RI/FS") and a Record of Decision ("ROD") have been (or are close to being) completed at the site. A de minimis settlement with an expansive covenant not to sue of this kind may be concluded prior to completion of the RI/FS and ROD, however, if the Agency is relatively confident of its ability to estimate future

[3] Past costs should be fully documented by the Agency prior to entering into a de minimis settlement.

response costs, and the settlement takes into account the increased level of uncertainty through an adequate premium payment and/or other safeguards. See Section V(B)(2) below. The Agency will also consider alternative methods of structuring pre-RI/FS and ROD de minimis settlements, which afford de minimis contributors the opportunity for early settlements (when cost information is less certain) while protecting the Government against the additional risks presented by such early agreements. Options for such settlements are discussed in Section V(B)(2) below.

B. Content and Form of Settlements

1. Introduction

The goal of negotiations with de minimis parties is to achieve quick and standardized agreements through the expenditure of minimal enforcement resources and transaction costs. To attain this goal, the de minimis settlement normally will be a "cashout," i.e., it will not include a commitment to perform work,[4] (See footnote 4 below) but rather will require a payment to be made to the Hazardous Substance Superfund.[5] In

[4] In appropriate cases, the Agency will also consider entering into de minimis settlements under which the settling de minimis parties agree to perform a discrete portion of the response action needed for the site, e.g., an RI/FS or operable unit.

[5] We are exploring the circumstances under which it may be appropriate for the settling parties to deposit the amount paid pursuant to a de minimis settlement into a site-specific trust fund to be administered by a third-

exchange for this payment, the settling parties will receive statutory contribution protection under Section 122(g)(5) of SARA and may receive a covenant not to sue as described in Section V(B)(2) below.

2. Releases from Liability and Reopeners

De minimis settlors may be granted a covenant not to sue for civil claims concerning the site which seek injunctive relief under Section 106 of CERCLA and Section 7003 of RCRA, or cost recovery under Section 107 of CERCLA, when EPA determines that such a covenant is consistent with the public interest, as provided in Section 122(g)(2) of SARA.6 The scope of this covenant not to sue will vary, depending upon the timing of the settlement, the amount of information available to the Agency, and the amount of any premium payment to be made by the de minimis parties pursuant to the settlement. Natural resource damage claims may not be released, however, and should be expressly reserved unless the Federal natural resource trustee has agreed in writing to such a covenant not to sue pursuant to the terms of Section 122(j)(2) of SARA.

In order to protect the Agency against the possibility that a de minimis party's full waste contribution to a site has not

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party trustee and used for site cleanup. Further guidance on this issue will be provided by separate memorandum.

6 Under no circumstances may a covenant not to sue for criminal claims be granted.

been discovered, de minimis settlements should, in most cases, also include a reservation of rights which would allow the Government to seek further relief from any settling party if information not known to the Government at the time of settlement is discovered which indicates that the volume or toxicity criteria for the site's de minimis parties are no longer satisfied with respect to that party.[7] This reservation need not be included if sufficient information about the waste contributions of all site PRPs is known at the time of settlement, i.e., if virtually all of the waste is accounted for, or if site records and results of PRP investigations are sufficiently complete for the Agency to conclude that the risk of discovering new information about waste contributions to the site is negligible.

In addition to the natural resource damage reservation and the reservation for new information indicating that the volume and toxicity criteria for the particular settlement are no longer satisfied, two further reservations of rights or "reopeners" may be required depending upon the facts of the case and the timing of the settlement. These reopeners protect the

[7] In some situations, the Agency may also require each settling de minimis party to certify in the settlement agreement that it has disclosed all information in its possession concerning its waste contribution to the site. This certification should be used in cases in which the de minimis settlement is concluded prior to completion of PRP investigations, particularly where information requests or subpoenas have not been issued.

Agency against 1) the risk of cost overruns during the completion of the remedial action and 2) the risk that further response action will be necessary in addition to the work specified in the ROD.

If an RI/FS and ROD have been (or are close to being) completed at the site, and the Agency has sufficient information upon which to evaluate the likelihood of cost overruns or future response action and the potential costs associated with these contingent events, then the Agency may accept a premium payment from the settling de minimis parties in lieu of one or both of these two reopeners, depending on the facts. However, if a de minimis settlement is concluded prior to completion (or substantial completion) of the RI/FS and ROD, at a time when the Agency has insufficient information upon which to evaluate these risks and develop a premium payment commensurate with them, then reopeners for cost overruns and future response action generally will be required. In appropriate cases, the Agency may make exceptions to this general rule and accept a very high premium payment, which provides a wide margin of safety to the Government at an earlier stage in the process in lieu of these two reopeners.

As noted above, the Agency will also consider various forms of pre-RI/FS and ROD de minimis settlements which provide de

minimis contributors the opportunity for early settlements while protecting the Government against the additional risks presented by such early agreements. For example, EPA may consider partial settlements in which the de minimis parties make a payment in satisfaction of their liability for past costs and projected RI/FS costs. Settlements of this kind would not address the settling parties' liability for post-RI/FS costs. EPA may also consider settlements of greater scope in which an up-front payment is made for known past costs and projected RI/FS and remedial costs. In settlements of this kind, EPA would reserve the right to reopen the agreement if actual costs exceed EPA's estimate by an agreed-upon dollar amount or percentage. Alternatively, the Agency may pursue settlements in which an up-front payment is made for past costs only and in which the settling de minimis parties agree to pay a specified percentage of all future response costs.

In certain additional situations, the cost overrun or future remediation risks may be covered through a method other than a reservation of rights or a premium payment from the settling de minimis parties. First, if an extremely high or worst-case estimate of remedial action costs is used for the settlement, then a cost overrun premium or reopener may not be required from the settling de minimis parties. Second, if the

major PRPs at the site have made a binding commitment to perform the remedial action selected in the ROD regardless of its cost, then the risk of cost overruns will be borne by those major parties, and a premium payment or reopener for cost overruns will not be required by the Government from the settling de minimis PRPs. Finally, if the major PRPs have expressly assumed the de minimis parties' liability for cost overruns and future remediation as part of a comprehensive settlement with the Government, then these risks will be borne by the major parties, and a premium payment or reopener for cost overruns and future remediation will not be required by the Government from the settling de minimis parties.

3. Amount of Payment

In the typical de minimis settlement, the cash offer submitted by the de minimis parties must be at least equal to their volumetric share of the total past and projected response costs at the site.[8] Nature of the waste is less relevant to the amount of payment in a de minimis settlement because the waste must be minimal in toxicity in order for a party to meet the basic eligibility criteria for de minimis status. Volume is, therefore, a useful and simple method for tentatively

[8] The Agency's projection of future response costs generally should be based on a site-specific assessment of the most probable costs of the response action.

determining the de minimis share. It is based upon the type of information that is most likely to be readily available and does not require the PRPs and the Agency to invest an inordinate amount of effort arguing about the appropriate share.

The volumetric share may be adjusted, however, based upon the other factors regarding partial settlements identified in the Interim CERCLA Settlement Policy (Part IV, 50 Fed. Reg. 5037-38). Factors that may be of particular importance include ability to pay, litigative risks, public interest considerations, value of a present sum certain, inequities and aggravating factors, and the nature of the case remaining against other parties after settlement. The shares may also be adjusted on the basis of a Nonbinding Preliminary Allocation of Responsibility, if one has been developed for the site pursuant to Section 122(e)(3) of SARA.

In addition to the volumetric share of past and projected response costs, the Agency generally will require payment of a premium form each settling de minimis party in exchange for granting a covenant not to sue which does not include reopeners for cost overruns and future response action.[9] If the settlement is concluded prior to completion of the RI/FS and ROD, and

[9] The premium payment reduces the liability of the non-settling PRPs in the amount of the premium, unless otherwise provided in the settlement agreement. In some cases, it may be appropriate for the premium to be deposited in a site-specific trust fund as discussed supra n. 5, p. 14.

information about projected costs is limited, then the cost overrun and future response action premiums should be calculated to reflect this increased level of uncertainty.[10] As discussed earlier, if the major PRPs are assuming the responsibility for conducting the cleanup, then the premium amounts may be made available to those PRPs rather than to the Agency. In this situation, the premium amounts may be negotiated between the major PRPs and the de minimis settlors.

Furthermore, because de minimis PRPs are jointly and severally liable for response costs at the site, the amount to be paid by a de minimis settlor is affected by the amount available from other PRPs. Thus, if a significant portion of the major parties at the site are bankrupt or otherwise not financially viable, then the de minimis offer may need to reflect a greater proportion of response costs, rather than simply a volumetric share and a premium. It is also possible that mixed funding may be appropriate in such a situation.[11]

4. Enforcement of Payment

If a settling party fails to make any payment required by a de minimis settlement, or otherewise fails to comply with any term or condition of the settlement, that party is subject to

[10] Further guidance on calculating premium payments will be provided by separate memorandum.
[11] Guidance on mixed funding will be issued separately and is forthcoming.

enforcement action, including imposition of civil penalties pursuant to Section 109 of CERCLA, as amended. See Section 122(1) of SARA. In addition, the Agency may include a provision in the settlement document which permits the agreement to be vacated in the event of noncompliance.

5. Type of Agreement

Section 122(g)(4) of SARA requires that de minimis settlements be entered as either judicial consent decrees or administrative orders on consent. The circumstances and procedures under which these two alternatives should be used are briefly described below.

a. Judicial Consent Decree

Under Section 122(d)(1)(A) of SARA, settlements with non-de minimis PRPs which provide for remedial action must be embodied in consent decrees. Thus, if the de minimis settlement is part of a larger, more comprehensive agreement with the non-de minimis parties under which remedial action will be performed, it may be advisable and efficient to use a consent decree for the entire settlement. Similarly, if the Government has already filed a CERCLA Section 106 or 107 action with respect to the site, a consent decree with the de minimis parties may be useful because the court will be familiar with the case and should be able to approve the settlement expeditiously.

At the present time, all de minimis consent decrees must be referred to Headquarters by the Regions and must receive the concurrence of the Assistant Administrator for Enforcement and Compliance Monitoring ("AA-OECM") and the Assistant Administrator for Solid Waste and Emergency Response ("AA-OSWER") or his or her designee prior to referral to the Department of Justice for filing. Further, all de minimis consent decrees will be subject to a thirty-day public comment period after lodging.[12] A model Section 122(g) consent decree will be issued shortly.

b. Administrative Order on Consent

A de minimis settlement may also be embodied in an administrative order on consent ("consent order"). See Section 122(d)(1)(A) of SARA. Because of the potential effect of administrative de minimis settlements upon future litigation and negotiations with the major waste contributors at the site, all such settlements currently must receive the concurrence of the AA-OECM and the AA-OSWER prior to signature by the Regional Administrator. Additionally, if the total past and projected response costs at the site, excluding interest, exceed $500,000 (as will generally be the case at sites involving de minimis

[12] The payment provisions of de minimis consent decrees should not require payment to be made until after the United States has responded to any public comments received and until after the court has entered the decree.

settlements), Section 122(g)(4) of SARA requires that the de minimis consent order receive the prior written approval of the Attorney General or his designee ("AG"). That subsection of SARA gives the AG thirty days from referral by EPA to approve or disapprove the settlement, unless the AG has reached agreement with the Agency on an extension of time.

Section 122(i) of SARA requires notice of all administrative de minimis settlements to be published in the Federal Register for a thirty-day public comment period. The Agency must consider all comments received and "may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate."[13] Section 122(i)(3) of SARA. Modifying or withdrawing consent to an administrative settlement is subject to the same OECM and OSWER concurrences as are initial agreements.

More detailed guidance on the procedural aspects of de minimis consent orders, including Regional referral of orders for Headquarters concurrence and AG approval, solicitation of public comment, enforcement of orders, and other related

[13] The payment provisions in de minimis consent orders should not require payment to be made until after the public comment period has closed and until after the Agency has had sufficient time to determine whether any comments received require modification of or withdrawal from the consent order.

matters, will be provided by separate memorandum. A model Section 122(g) consent order will be issued shortly.

VI. PURPOSE AND USE OF THIS MEMORANDUM

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

APPENDIX

TEXT OF SECTION 122(g) OF SARA

(1) EXPEDITED FINAL SETTLEMENT. -- Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 106 or 107 if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party –

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) COVENANT NOT TO SUE. -- The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f).

(3) EXPEDITED AGREEMENT. -- The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) CONSENT DECREE OR ADMINISTRATIVE ORDER. -- A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order settling forth the terms of the settlement. In the case of any facility where the total response costs exceed $500.000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) EFFECT OF AGREEMENT. -- A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the order potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(6) SETTLEMENTS WITH OTHER POTENTIALLY RESPONSIBLE PARTIES. -- Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this Act.