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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OSWER Directive #9834.7-1C

MEMORANDUM

SUBJECT: Methodology for Early De Minimis Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

William A. White, Enforcement Counsel for Superfund
Office of Enforcement

TO: Waste Management Division Directors, Regions I - X
Regional Counsel, Regions I - X

This memorandum transmits to you the Agency's "Methodology for Early De Minimis Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)." This guidance is a supplement to the "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements," OSWER Directive #9834.7-1B (December 20, 1989).

This guidance sets forth procedures for identifying early de minimis candidate sites under Section 122(g)(1)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). The guidance also provides practical assistance in developing early de minimis settlement proposals and agreements.

This guidance reflects input from the Regions, Headquarters and the Department of Justice. We thank you for your assistance.

Attachment

cc: Superfund Branch Chiefs, Waste Management Division, Regions I - X
Superfund Branch Chiefs, Office of Regional Counsel, Regions I - X

OSWER Directive #9834.7-1C

METHODOLOGY FOR EARLY DE MINIMIS WASTE CONTRIBUTOR SETTLEMENTS UNDER CERCLA SECTION 122(g)(1)(A)

U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
Office of Enforcement
Washington, D.C. 20460

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METHODOLOGY FOR EARLY DE MINIMIS WASTE CONTRIBUTOR SETTLEMENTS UNDER CERCLA SECTION 122(g)(1)(A)

I. INTRODUCTION

This guidance sets forth procedures for identifying sites which are candidates for potential de minimis settlements early in the response process (for example, prior to the signature of a Record of Decision), and provides a methodology for developing such settlements.

This guidance supplements the "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements," OSWER Directive #9834.7-1B (12/20/89).[1]

A. Purpose and Scope

The purpose of this guidance is to identify a methodology whereby Regions may provide PRPs who are minor contributors of hazardous substances at a CERCLA site ("de minimis parties") the opportunity to resolve their CERCLA liability as completely as possible early in the response process, without the need for extensive negotiation. This guidance primarily addresses potential de minimis settlements prior to the signature of a Record of Decision (ROD), although the Regions may use the methods described in this guidance to facilitate de minimis settlements at any point in the response process.

This guidance encourages Regions to consider de minimis settlements with eligible potentially responsible parties (PRPs) as early in the response process as possible. To do so, Regions should compile waste contribution information for individual PRPs as soon as it is available, and identify response costs for settlement purposes. The guidance authorizes use of cost information from other sites to assist in developing the future response cost component of the settlement. The guidance also provides criteria for evaluating when there is enough site information to pursue an early de minimis settlement. In addition, the guidance outlines streamlined settlement procedures to reduce transaction costs.

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[1] See also "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," OSWER Directive #9834.7 (6/19/87) and "Interim Model CERCLA Section 122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order on Consent," OSWER Directive #9834.7-1A (10/19/87).

B. Background

Under Section 122(g) of CERCLA, the Agency may enter into de minimis settlements whenever practicable and in the public interest. There are two groups of parties which are eligible for these settlements: de minimis waste contributors and de minimis landowners. This guidance addresses only de minimis waste contributors.[2]

Early de minimis settlements allow persons who contributed minor amounts of hazardous substances to a site, both in terms of volume and toxicity, to resolve their liability early in the response process. Early de minimis settlements also promote efficient case management at multi-generator sites and reduce the number of parties with which to negotiate the performance of future response actions (e.g., remedial design/remedial action (RD/RA)). This reduces transaction costs, provides the Agency with reimbursement of past costs, and may provide funds for future site cleanup. Collecting such funds early in the response process should benefit the Agency and all waste contributors (both de minimis and non-de minimis parties).

II. IDENTIFICATION AND NOTIFICATION TO HEADQUARTERS THAT A SITE IS A CANDIDATE FOR AN EARLY DE MINIMIS SETTLEMENT[3]

A Region should assess whether there is sufficient information to determine that a site is a candidate for an early de minimis settlement. This threshold is met when the minimum level of information is present to assess individual PRP waste contributions and identify response costs. Once the threshold is met, a Region should notify Headquarters that the site is an early de minimis candidate.

A. PRP Waste Contributor Threshold

The waste contribution threshold is met when the Region identifies the individual hazardous substance contributions of

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[2] The Agency addresses de minimis landowners under another Agency guidance. See "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property," OSWER Directive #9835.9 (6/6/89).

[3] Identification of a site as an early de minimis candidate does not guarantee that a de minimis settlement will occur at that site. However, the prospects for settlement should increase since the baseline information necessary for a de minimis settlement will be present.

the PRPs. This threshold can be met by the development or acceptance of a "waste-in" list or volumetric ranking of PRPs. For purposes of this guidance, this threshold is met regardless of who performs the waste-in list or volumetric ranking of PRPs (EPA, other federal or state agencies, or PRPs).

1. Waste-in Information

To determine individual PRP contributions of hazardous substances sent to a site, a Region performs a PRP Search.[4] Prior to and during this process, waste-in information (i.e., information on the type and quantity of hazardous substances sent to a site) is acquired. This information is obtained through different methods, including site visits, examination of records from prior state or federal enforcement actions, or through information gathering authorities (e.g., information request letters, interviews, or subpoenas).[5] If there has been prior governmental action at the site such as enforcement actions, permits or inspections, information may be available shortly after the PRP Search commences. If the site was a landfill or a recycling, processing or disposal facility, information such as manifests, waste tickets, log books, billing records or canceled checks may be available. If available, this information must be organized and checked for accuracy before it can be used to negotiate a settlement. If information request letters are the primary means to gather waste-contributor information, waste-in information normally will not be available until later in the PRP Search process.

When waste-in information is available, Regions should make reasonable efforts to compile and verify the data (e.g., through information request letters) as soon as possible.[6] Processing the waste-in information as soon as it is available should

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[4] See "Potentially Responsible Party Search," OSWER Directive #9834.3-1A (8/27/87); "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program," OSWER Directive #9834.3-2a (6/29/89).

[5] There is no specific point during the PRP Search process when waste-in information is certain to become available. Waste-in information may never be available at certain sites (e.g., abandoned facilities with no facility records or groundwater-contaminated facilities with no apparent contamination source). In such cases, de minimis settlements are probably not feasible.

[6] The Office of Waste Programs Enforcement is considering adjustments to the PRP Search process to encourage Regions to assemble waste-in information as early in the PRP Search process as possible.

facilitate consideration of a de minimis settlement much earlier in the response process.

2. Waste-in Lists and Volumetric Rankings of PRPs

When a Region gathers and verifies sufficient waste-in information, it should prepare a waste-in list and volumetric ranking of PRPs. A waste-in list provides the volume and nature of hazardous substances contributed by each PRP identified at a facility. A volumetric ranking of PRPs is a ranking of PRPs on the waste-in list in descending order by the total volume of hazardous substances they contributed to the facility. The Regions are encouraged to perform these activities because they may further the statutory objectives regarding information release under Section 122(e)(1) of CERCLA, and often increase the opportunities for settlement.[7]

As soon as practicable after a verified waste-in list and volumetric ranking of PRPs is available, a Region should provide the information to all identified PRPs for review and comment. This information can be released informally under Section 122(e)(1) of CERCLA, with general or special notice letters to PRPs, at PRP meetings, or through other appropriate means. Regions may modify the waste-in list or volumetric ranking based on the comments received concerning individual PRP hazardous substance contributions.

Regions can also accept waste-in lists and volumetric rankings developed by other interested parties (e.g., individual PRPs, PRP steering committees, states, or other federal agencies). Before using information from such documents, they should be evaluated for consistency with the qualitative standards articulated in EPA guidance. Regions should review conversion factors (which establish one form of measurement) and compilation assumptions, to ensure that waste-in lists and volumetric rankings prepared by other parties are adequately documented and not biased against certain classes or types of PRPs. If a PRP database is used, the PRPs must be willing to cooperate in disseminating that information to all PRPs.

B. Response Cost Threshold

The response cost threshold is met when a Region acquires sufficient information to identify past and future response costs

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[7] See "Guidance on Preparing and Releasing Waste-In Lists and Volumetric Rankings to PRPs Under CERCLA," OSWER Directive #9835.16 (2/22/91).

for settlement.[8] To establish past costs, a Region will commonly rely on existing documentation.[9] To identify future response costs, it is necessary to estimate these costs, since future response actions (e.g., remedial design/remedial action, operation and maintenance, and oversight costs) are commonly not identified at the time of the early de minimis settlement. The future response cost estimate does not need to be a precise figure; what is necessary is a reasonable calculation of the potential future response costs for purposes of settlement only.

To reach the future response cost threshold, a Region should generally have two pieces of related information:

1) sufficient site contaminant information to identify possible future response activities; and

2) knowledge of other sites with similar site characteristics where remedy cost information is available.

Site contaminant information provides baseline data about the potential de minimis settlement site. This information, used in conjunction with cost information from other similar sites, provides a means to develop future cost estimates. This is important because detailed site-specific cost information is commonly unavailable very early in the response process.

Where the waste contribution threshold is met at a point later in the response process (e.g., during the feasibility study) site-specific information alone may be sufficient to reach the response cost threshold. In that situation, cost information is more likely to be available to estimate future response costs for the potential de minimis settlement site and it is not necessary to evaluate cost information from other sites to reach the response cost threshold.

A Region does not have to actually estimate the future response costs before a site becomes a candidate site; actual

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[8] Most de minimis settlements address the liability of PRPs for both past and future response costs under Sections 106 and 107 of CERCLA. A Region could entertain offers to settle for only past costs. However, under that circumstance PRPs would not receive a covenant not to sue for future costs. See Section IV.D.1. of this guidance for further discussion of covenants not to sue. Settlements for only past costs may be more appropriately resolved under the settlement authority in Section 122(h) of CERCLA.

[9] See "Procedures for Documenting Costs for CERCLA Section 107 Actions," OSWER Directive #9832.0-1a (1/30/85).

cost estimates are only necessary when negotiating the early de minimis settlement. However, the Region should have the necessary information to make that estimate before the threshold is met.

1. Site Contaminant Information

Site contaminant information may be available from present or past sampling efforts, previous response actions, or records of past site operational history (including PRP waste contributions). This information assists in identifying the nature of contaminants, contaminated media, and approximate volume of contamination at the site. Regions can then identify, for settlement purposes, the possible future response actions which may be necessary at the site.

Significant site sampling data is typically available prior to the signature of a Record of Decision (ROD). A Region will often conduct site visits and take samples (soil and groundwater) to identify contaminants and contaminant pathways. If there is a remedial investigation/feasibility study (RI/FS) being performed at the site, additional site data is often collected.

Another factor to consider is whether there have been previous removal or remedial (operable units) actions at the site. Removal actions often include activities such as the removal and disposal of materials or stabilizing the site to prevent further contamination. These efforts may help quantify the volume of site contamination. Estimating future response costs for an early de minimis settlement may also be easier at a site where there was a prior remedial action and the only future response action to be determined is, for example, the appropriate ground water remedy. It could be easier to estimate costs for one contaminated medium rather than multiple contaminated media (e.g., soil, surface and groundwater). There may also be situations where there are only a limited number of possible response actions to remedy the site contamination; at such sites, estimating future response costs may be easier than at a site with a wide range of possible remedy options.

If operational history or process engineering information is available, it may be possible to ascertain the likely hazardous substances received, stored or disposed of at the site, possible pathways of contamination, and a rough volume of hazardous substances currently at the site. If a state or local authority undertook enforcement actions, additional site contaminant information may be available. Knowledge of PRP waste-in information may also help to identify the type and volume of hazardous substances brought to the site. This information can also serve to substantiate the findings concerning process engineering and site sampling data at the site.

2. Similar Site Characteristics

Regions should consider another factor in identifying whether the response cost threshold is met: similarity between the characteristics of the site where the early de minimis settlement may occur and those of other sites where a remedy has been chosen or implemented. Similar site characteristics include similar site type (e.g., landfill or battery recycling facility), contaminated media, site location, and nature of contamination present at the site.

Information from other sites provides a basis from which to estimate possible response costs at the early de minimis settlement site, because actual cost estimates or actual cost figures will likely be available at these other sites from the ROD or other cost documents. At sites where the response action is under construction or where construction is complete, actual cost data may be available.

The Office of Waste Programs Enforcement is collecting data to assist Regions in estimating future response costs for settlement by using information from sites with similar characteristics.[10] In addition, the Office of Emergency and Remedial Response is exploring whether sufficient data exists to develop standardized or presumptive remedies for "generic" site types. This effort could further aid efforts to increase the availability of future response cost data earlier in the response process.

At sites where the Agency has never chosen a remedy addressing similar contaminants and contaminated media, it may be difficult to identify potential remedy costs for settlement without engaging in a site-specific inquiry. If such site-specific inquiries could be difficult, such sites may not be good candidate sites for an early de minimis settlement.

C. Notification to Headquarters that a Site Is a Candidate Site

Once the thresholds are met for both waste-in and response cost information, a Region should notify Headquarters, in writing, that the site is a candidate for an early de minimis settlement. The notification serves to provide Headquarters with advance notice that a Region is considering an early de minimis

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[10] See Section III.C. of this guidance for an expanded discussion on the use of cost information from other sites to estimate future response costs.

settlement. Notification also helps to assure that Headquarters resources are available to facilitate the settlement.

This notification requirement is different from the consultation requirement enunciated in EPA Delegation 14-14-E (September 13, 1987, and modified by memorandum June 17, 1988). Under that delegation, the Regional Administrator must consult with the Assistant Administrators for the Office of Solid Waste and Emergency Response and Office of Enforcement, prior to entering into de minimis settlements. Regions should consider early Headquarters involvement to assist with the settlement (e.g., help develop estimates of future response costs) and facilitate subsequent formal review of the proposed settlement.[11]

This notification should be made to the Branch Chief, Compliance Branch, CERCLA Enforcement Division, Office of Waste Programs Enforcement and to the Enforcement Counsel for Superfund, Office of Enforcement. The notification can be made as soon as the Region identifies the site as a candidate or on a more regular basis (e.g., quarterly).[12]

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[11] At sites where the total response costs exceed $500,000.00, the Agency may enter into the de minimis settlement only after obtaining prior written approval from the U.S. Department of Justice (DOJ). See Section 122(g)(4) of CERCLA. To facilitate DOJ review of a proposed settlement, a Region should notify DOJ of the Region's intent to enter into negotiations for an early de minimis settlement prior to sending the draft settlement documents to the de minimis parties. Regions should provide DOJ with the draft settlement documents and information that has been or will be made available to the de minimis PRPs, as well as other documents which may facilitate DOJ approval of the de minimis settlement. Where a federal PRP is identified as a potential de minimis settlor this should be specifically noted. Regions should also notify, in writing, the Federal Natural Resource Trustees of the potential de minimis settlement as early as possible, thereby offering them the opportunity to participate in the de minimis settlement in a timely manner. If the Federal Natural Resource Trustees decide to participate, a Region should ensure that all relevant information is made available to them.

[12] The Office of Waste Programs Enforcement is exploring whether this notification requirement can be performed through the CERCLIS reporting system.

III. EARLY DE MINIMIS SETTLEMENT CRITERIA

A. Allocation of Responsibility

A Region must determine that a person qualifies for de minimis status under Section 122(g)(1)(A) of CERCLA before pursuing a de minimis settlement. A de minimis waste contributor is a person who contributed hazardous substances in an amount and of such toxicity as to be minimal in comparison to other hazardous substances at the facility. De minimis settlements may only address a minor portion of the response costs at a site for each settlor.

To establish which parties qualify for an early de minimis settlement, it is often necessary to develop individual allocations of responsibility among all the PRPs. For an early de minimis settlement this should generally be considered an early or draft allocation of responsibility.[13] The Region should use this allocation to determine the amount a de minimis party must pay in the proposed settlement. The waste-in list and volumetric ranking of PRPs is generally used as the basis for allocating responsibility among generators and transporters. An allocation of responsibility may also be assigned to the owners and operators of the facility. To the extent such information is available, factors such as viability of PRPs, presence of bankrupt or defunct entities, or unallocable shares (i.e., orphan shares), should be considered during the allocation process.

After completing the allocation, a Region should consider sending the allocation document to all PRPs for review and comment. PRPs should be able to comment on factual assumptions made with respect to individual shares within a reasonable time period specified by the Region.

B. Identification of PRPs Eligible for the Early De Minimis Settlement

After making allocation decisions for de minimis settlement purposes only, a Region should determine the appropriate cutoff for eligible de minimis waste contributors. There is no specific statutory criterion for identifying the appropriate cutoff other than the requirement that the contribution of each de minimis

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[13] Regions may want to consult Agency guidance for useful information concerning developing the allocation, although it is not necessary in an early de minimis settlement to create a non-binding allocation of responsibility (NBAR). See "Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility," OSWER Directive #9839.1 (5/29/87).

party must be minimal relative to other hazardous substance contributors.

When a Region considers a de minimis settlement early in the response process, PRP contributor information, both for de minimis and non-de minimis parties, may not be completely available. Where this means that the precise cutoff is in some doubt, a Region should establish the cutoff at a level which allows only those who clearly qualify as de minimis (i.e., the smallest waste contributors) the opportunity to settle at this time. This limits the risk of settling with parties who are not truly de minimis. Persons who are not eligible for an early de minimis settlement may be eligible for future de minimis settlements with the government at a later time when there is more complete information.

Once a Region identifies the appropriate cutoff for the early de minimis settlement, both the de minimis and non-de minimis parties should be informed of this determination. A Region may also choose to make available the list of parties eligible for the early de minimis settlement and the basis for the cutoff.[14]

C. Estimating Future Response Costs for Settlement

As discussed above, early de minimis settlements generally address the liability of PRPs for both past and future response costs under Sections 106 and 107 of CERCLA. When available at the time of settlement, a Region should use itemized cost summaries as the basis for past costs plus applicable interest. If an action is ongoing at the time of settlement (e.g., an RI/FS), a Region should use both itemized cost summaries for past work performed and an estimate of remaining costs. A Region may use RI/FS cost figures from the State Superfund Contract or Cooperative Agreement with a state as the basis for estimating these costs.

A Region should use available site and cost information to develop a best estimate of the future response costs for the de minimis settlement. This estimate should be based on reasonable judgement; a precise figure is not necessary since the Region is not selecting a remedy. This guidance does not establish a set procedure to estimate future response costs for settlement. To assist the Regions, two possible methods for developing future

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[14] The procedure used to give notice to PRPs of these determinations will be site-specific. A Region could disseminate this information in a number of ways, including use of the procedures in Section 122(e)(1), at a meeting with PRPs, by mail to all identified PRPs or through distribution of a settlement offer.

response cost estimates are identified below. Both of these procedures suggest use of available cost information from other sites to assist in estimating costs for the early de minimis settlement. Use of information from other sites should help facilitate development of the future cost estimate and reduce the transaction costs in developing an estimate. These procedures are presented as options only, and Regions may choose other approaches for estimating future response costs.[15] Regardless of the option employed, the methodology used should be supported by documentation.

1. Use of Response Cost Information from Other Sites

This approach combines use of site-specific information from the proposed de minimis settlement site, together with a review of cost documents from other sites with similar site characteristics where a remedy has been selected or implemented.

Under this approach a Region would first assemble site-specific contaminant information (i.e., nature of contaminants, contaminated media, and volume of contaminants). Then, the Region would review post-1986 RODs for selection of remedy at other sites with similar characteristics.[16] If there is more current information concerning these RODs (e.g., the remedy selected has been implemented or is at the remedial action stage in the response process), the Region should use that information instead of the cost estimate in a ROD.[17]

The next step is to extract the relevant cost information from similar sites. In this way the Agency could establish an range or average of future costs from the prior remedies selected or implemented.

After establishing the range or average of future response costs, the Region may adjust those figures based on known site-specific factors to establish the future response cost estimate for the de minimis settlement. To the extent such site-specific

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[15] A Region can rely on cost information from the early de minimis site as the sole basis for estimating future costs where sufficient site-specific cost information is available at the time the Region contemplates the early de minimis settlement.

[16] The Superfund Amendments and Reauthorization Act of 1986 (SARA) added Section 121 of CERCLA, setting forth criteria for all future remedial response actions.

[17] As discussed in Section II.B.2. of this guidance, the Office of Waste Programs Enforcement is collecting data to facilitate use of relevant cost data from RODs or implemented remedies.

information is not available, a Region may use the information from similar sites alone to establish the future remedy cost estimate for the early de minimis settlement.

2. Establishing Unit Costs for Remedial Technologies

Under this methodology, a Region could develop unit costs for remedial technologies at sites with similar site characteristics as the basis for estimating the site-specific future response action costs.

This approach requires development of a list of remedial technologies from RODs chosen or implemented for sites with similar characteristics (e.g., landfills, lead battery recycling facilities) and contaminated media. Unit costs could then be developed by matching the extent of contamination at a site with a ROD, with the estimated remedial cost for addressing that contaminated medium.[18] For remedies under construction, the remedial action documents commonly establish unit cost figures.

The Region would then establish a list of technologies relevant to that contaminated medium. From this list, an average unit cost for a particular contaminated medium could be developed. This average unit cost figure could then be multiplied by the amount (or extent) of contamination at the early de minimis settlement site, to establish an estimate of the future response costs for a particular contaminated medium.

A Region may also consider site-specific factors from the early de minimis site in developing the average unit cost figure. If, at the time of the proposed settlement site-specific studies (e.g., the feasibility study) indicate that one or more remedial alternatives are not viable remedial options for the early de minimis site, then the unit costs for those remedial technologies do not have to be factored into the average unit cost figure. In addition, if one or more remedial technologies appear to be more likely to be selected than others at the early de minimis site, a Region may factor in the probability of a particular remedy being chosen into the average unit cost estimate.

IV. EARLY DE MINIMIS SETTLEMENT METHODOLOGY

A. Formation of the Early De Minimis Group

Once a Region determines which parties are eligible for an early de minimis settlement, it may assist in the formation of an early de minimis group (e.g., send out letters, hold meetings,

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[18] The Office of Waste Programs Enforcement is collecting data to assist in developing unit costs for remedial technologies.

publish notice in a local newspaper), if to do so would facilitate negotiations.[19] If the PRPs form a de minimis group, the Region should encourage them to take on administrative functions (e.g., dissemination of information and review of proposed settlement documents). Eligible parties should be advised that the terms of an early de minimis settlement offer will likely not be available in the future, although there may be later chances to settle, but on less favorable terms.

B. Negotiations

The main objective of the early de minimis settlement methodology is to reduce transaction costs, conserve government resources, and settle with the eligible parties as expeditiously as possible. Regions should adopt procedures necessary to fulfill these objectives.

Set forth below is one suggested method to facilitate the settlement:

- Send a draft settlement document to parties identified as de minimis, take comments over a specified period of time, and send the final settlement document (incorporating appropriate comments) to all de minimis PRPs for signature.[20] Comment or negotiation over boilerplate provisions should be actively discouraged.

- Once the final settlement document is sent, the de minimis PRPs have a specified period (e.g., 30 days) to sign and return the document.

- When the Region receives executed signature pages, it should repackage the settlements into one de minimis settlement package for formal review by regional management, Headquarters, the Department of Justice and for public comment.

C. Early De Minimis Settlement Document

Under Section 122(g)(1) of CERCLA, the Agency may settle the liability of de minimis parties either through an administrative order on consent (AOC) or a judicial consent decree. Regions should use the model settlement documents (AOC and judicial

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[19] Assisting in the formation of the de minimis group need not wait until the estimate of future response costs for settlement is established.

[20] It may be appropriate at a given site to send a copy of the draft settlement document to non-de minimis parties for informational purposes or to seek comment.

consent decree) as the basis for the proposed early de minimis settlement.[21]

An AOC should be the preferred option for early de minimis settlements. A de minimis settlement under an AOC can usually be issued more quickly and with fewer resources than a settlement by judicial consent decree, while providing similar legal effect. Early de minimis settlements often address only the liability of the de minimis parties; non-de minimis PRPs will not usually be a party to this agreement. However, a Region may choose to embody the early de minimis agreement in a judicial consent decree where, for example, there is current litigation involving the Agency and de minimis parties or where non-de minimis parties agree to perform the RD/RA at the time of an early de minimis settlement.[22]

D. Early De Minimis Settlement Provisions

In any de minimis settlement there are several provisions in the settlement document which affect the finality of the settlement offered. They include covenants not to sue, reservation of rights, premiums, and contribution protection. Another important facet of the settlement is the distribution of money received from the settling de minimis PRPs. These provisions are generally discussed in earlier Agency guidance.[23] Set forth below is a more detailed discussion of these provisions as they relate to an early de minimis settlement.

1. Covenants Not to Sue

Section 122(g)(2) of CERCLA provides the Agency with the authority to provide covenants not to sue in a de minimis settlement, to address the liability of parties under Sections

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[21] See "Interim Model CERCLA Section 122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order on Consent," OSWER Directive #9834.7-1A (10/19/87)). The Agency is currently reviewing and updating the model documents.

[22] This may occur where the non-de minimis parties agree to perform the RD/RA for an operable unit with a ROD (e.g., source control remedy), but the de minimis component of the settlement addresses the liability for the source control remedy as well as other future response actions not yet chosen (e.g., groundwater remedy).

[23] See "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," OSWER Directive #9834.7 (6/19/87) and "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements," OSWER Directive #9834.7-1B (12/20/89).

106 and 107 of CERCLA. These covenants indicate that the Agency will not pursue the de minimis parties in the future for matters addressed in the settlement. If appropriate, a Region may provide the settling PRPs with a covenant not to sue which is immediately effective once the terms of the agreement are met (e.g., payment of money). Thus, the covenant can be effective before the future response work at the site is ever implemented.

Consistent with Agency guidance, a Region should always include a limited re-opener to the covenant not to sue in the early de minimis settlement for false, incomplete, inaccurate, or new information which indicates that the PRP's contribution to the site was higher than the allocable share established for the settlement. This re-opener is often triggered where such information materially affects the terms of the settlement (information which indicates the party is no longer within the de minimis cutoff established for the settlement or information which substantially affects the payment made by that party).[24] If triggered, the re-opener should only affect that party's settlement with the Agency and not have an effect on the allocations of other settling de minimis parties.

Another re-opener sometimes included in de minimis settlements relates to potential cost overruns associated with the future response action.[25] This re-opener addresses some of the risk of settling with de minimis parties before completion of the future response action. Cost overrun re-openers may be triggered when the estimated future costs increase over a set percentage or set amount. Agency guidance states that this re-opener is not necessary where the premium payment established is sufficient to address the risks associated with possible cost overruns.[26]

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[24] A Region may want to consider adding a penalty provision in the settlement document with regard to false information submitted by the PRP where the Agency originally relied upon that information in identifying that party as eligible for the early de minimis settlement. If it knowingly submitted false information, the PRP may also be subject to criminal liability.

[25] For purposes of this guidance a "cost overrun" is additional money that needs to be spent to implement the future response action selected in a ROD. The term also includes the situation where further response actions beyond that specified in a ROD are necessary to protect human health and the environment.

[26] See Page 14 of the "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements," OSWER Directive #9834.7-1B (12/20/89).

A primary goal of the Agency in an early de minimis settlement is to provide as much finality as possible to the de minimis parties. This reduces transaction costs to all parties, and reduces the possibility that the Agency will have to pursue the de minimis parties in the future for site-related costs. To the extent possible (taking into account site-specific concerns, including uncertainties related to the future response cost estimate), therefore, Regions should offer early de minimis settlements which do not contain cost overrun re-openers. To offset the risk involved, the Region should increase the premium payment component of the offer.[27] The result is likely to be that the de minimis parties may pay more to settle, but they receive a covenant not to sue without this re-opener, and more complete contribution protection from potential future CERCLA liability at the site.

On the other hand, cost overrun re-openers can have the advantage of reducing the premium component of the offer, and can play an important role in structuring a settlement that reduces risks to both EPA and the non-de minimis parties. At some sites, therefore, a cost overrun re-opener may be an important aspect of the structure of the over-all resolution of the case, and may also be viewed as desirable by some or all of the de minimis parties.

To facilitate settlements with as many eligible de minimis parties as possible, a Region may wish to offer a choice of a no cost overrun re-opener/higher premium or a cost overrun re-opener/lower premium in the same settlement. This provides individual de minimis parties with the ability to choose the appropriate settlement option, while allowing the Region to incorporate different settlement terms in one settlement agreement.

2. Reservation of Rights

A Region should commonly include a reservation of rights in all early de minimis settlements. Reservations of rights relate to issues for which the Region is not providing a covenant not to sue. Regions should provide reservations of rights, at a minimum, for: 1) liability resulting from a settling party's failure to comply with the terms of the settlement (e.g., non-payment of money); 2) liability for natural resource damages (unless the Federal Natural Resource Trustees have agreed to a covenant not to sue); 3) criminal liability; 4) future disposal activities at the site; or 5) any claim or cause of action not expressly included in the covenant not to sue. Regions should also consider a reservation of rights related to potential

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[27] See Section IV.3. of this guidance for an expanded discussion of premium payments.

liability under other federal statutes. A Region should reaffirm that the settlement has no affect on the Agency's ability to pursue non-settling parties.

3. Premiums

As a general matter, the risks posed to the Agency in entering into de minimis settlements are greater earlier in the response process. These risks arise from site-specific uncertainties with regard to completeness of PRP information, knowledge of future response costs, as well as the absence of an agreement with the non-de minimis PRPs for the eventual performance of the RD/RA.

To address several of these risks, the early de minimis settlement should include a premium payment for future response costs.[28] The premium charged should be in addition to the de minimis party's pro rata share of the site response costs. The premium should be sufficient to compensate the Agency for the risks associated with: 1) settling at a site where the future response action has not been chosen; 2) possible cost overruns for a remedy not yet selected and; 3) potential inability to recover response costs from other sources.

For early de minimis settlements, the premium chosen should relate to the finality of the settlement (e.g., whether there is a covenant not to sue with cost overrun re-opener). When a Region is willing to offer or consider a settlement with a covenant not to sue without a cost overrun re-opener, the settlement should include a higher premium to address that risk.[29] This higher premium also reduces the risk of settling when waste-in information may be preliminary and information concerning financial viability of all PRPs is not complete. The higher premium in this situation also reduces the possibility that the Agency will be unable to recover response costs from other parties. Conversely, if the settlement includes a covenant not to sue with a remedy cost re-opener, a lower premium may be offerred. A lower premium may also be appropriate where PRP investigatory work is complete, financially viable non-de minimis parties are identified, or there is an agreement with the non-de minimis parties to perform the RD/RA at the time of the early de minimis settlement.

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[28] If a Region is able to fully document the past costs, a premium payment may not be necessary for that aspect of the settlement.

[29] See "Guidance on Premium Payments in CERCLA Settlements," OSWER Directive #9835.6 (11/17/88).

4. Contribution Protection

Regions should indicate to PRPs the Agency's belief that a party which fully resolves its liability to the United States by paying its fair share of all past and future costs in a de minimis settlement should qualify for protection against contribution actions (regarding matters addressed in the settlement), to the full extent provided in Sections 113(f) and 122(g)(5) of CERCLA.

5. Money Received in Settlement

Money received in an early de minimis settlement should generally be deposited in the invested portion of the Hazardous Substance Superfund (Trust Fund). This reimburses the government fully for past costs expended and may provide additional funds for the Trust Fund. Where appropriate, amounts in excess of past costs may be set aside into other accounts, such as a site-specific special account, a state-managed escrow account or trust fund, or deposited to an EPA-approved, but PRP-established and managed trust fund or escrow account.[30] Where excess money is set aside, a portion of that money may be available to reimburse whatever party will be performing the future response action (EPA, the state or the non-de minimis PRPs).

If it would facilitate the overall settlement at the site and the non-de minimis PRPs have been cooperative during the de minimis settlement process, the Region may take the funds received and apportion them between past and future response costs, without fully reimbursing the government for its past costs. Before agreeing to such an arrangement, a Region should consider its ability to recover any remaining past costs from other PRPs not a party to the early de minimis settlement. At a minimum, the past cost component of the de minimis parties overall payment should be deposited into the Trust Fund. The remainder of the payment may be then deposited into an account established for the site. This approach may provide more money for future response work at the site, while allowing the Agency to pursue non-settlors for remaining past costs. Apportioning costs may also result in reducing the opposition of non-de minimis parties to the de minimis settlement, since more money may be available for use in funding the eventual future response action (RD/RA).

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[30] Either the de minimis parties or non-de minimis parties should set up the trust fund or escrow account for this purpose.

V. PURPOSE AND USE OF THIS GUIDANCE

This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Environmental Protection Agency. This guidance does 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 guidance or its internal implementing procedures.

VI. FURTHER INFORMATION

For further information concerning this guidance, please contact Gary Worthman in the Office of Waste Programs Enforcement at FTS or (202) 260-5646, or Ken Patterson in the Office of Enforcement at FTS or (202) 260-3091.