UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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MEMORANDUM

SUBJECT: Evaluating Mixed Funding Settlements Under CERCLA

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I. Introduction

This document provides guidance for use when a party proposes, as part of a settlement negotiation, that both private and Fund resources be used at a site. This type of arrangement is generally referred to as a "mixed funding" settlement. Section 122(b) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 (hereinafter cited as "CERCLA") provides explicit authority for the Government to enter into these types of arrangements.

The primary goals of this guidance are to:

1) Encourage the Regions to consider mixed funding settlements, based on the statutory approval of these settlements in §122(b) of CERCLA;

2) Present a method for Regional enforcement personnel to analyze mixed funding in the context of a settlement offer, and

3) Indicate broad Agency preferences by specifying acceptable and poor candidates for mixed funding in general.

Historically, the term "mixed funding" has been used to describe three types of arrangements. Section 122(b)(1) of CERCLA describes one mixed funding arrangement, in which one or more of the potentially responsible parties (PRPs) agree to perform a response activity and the Agency agrees to reimburse those PRPs for a portion of their response costs. In such cases, the statute provides that the cost incurred by the Fund be recovered from non-settlors when possible.

Settlement agreements involving cleanups by PRPs and reimbursement of their response costs require the Agency to "preauthorize" the claim against the Fund prior to the initiation of the response action. The term "preauthorization" refers to the approval that must be granted by the Agency prior to cleanup actions if a claim for response costs is to be considered against the Fund. If preauthorization is granted, it serves as an Agency commitment that, if response costs are conducted pursuant to the settlement agreement and the costs are reasonable and necessary, reimbursement will be available from the Fund as dictated by the agreement, subject to the availability of appropriated monies.

Two other kinds of settlement agreements also constitute forms of mixed funding, but do not require preauthorization. Section 122(b)(3) describes one type of arrangement, in which the Agency conducts the response action and the PRPs pay the Agency for a portion of the costs. This type of settlement is known as a settlement for cash, or "cash-out." A third type of mixed funding, known as "mixed work," involves an agreement which addresses the entire response action, but the PRPs and the Agency agree to conduct and pay for discrete portions or segments of the response action. The term "mixed funding", as used in this document, applies to any of the aforementioned types of settlements. It should be noted, however, that §122(b)(4), concerning future obligation of the Fund for remedy failure, only applies to mixed funding in the form of preauthorization, as described in §122(b)(1).

As noted above, the 1986 Amendments to CERCLA included an explicit statutory authorization of mixed funding settlements. Prior to these Amendments, the primary document which made reference to mixed funding was the Interim CERCLA Settlement Policy (50 FR 5034). This policy set out ten criteria to use when evaluating a settlement offer for less than 100% of the cost or cleanup at a site. In mixed funding settlements, the PRPs agree to pay for a portion of the response cost, and may conduct some or all of the response action.

A major portion of this guidance addresses the application of the Interim Settlement Policy to mixed funding settlements. Section II outlines the key principles underlying the Agency's Interim Settlement Policy, and the role of mixed funding within these general principles. Section III then provides an approach for applying the ten settlement criteria to mixed funding settlement offers in general (e.g., without regard to any specific

funding arrangement.) This section first highlights factors of key importance to mixed funding settlements, and then suggests the Agency's preferences among various combinations of these factors.

Section IV identifies criteria to be used to determine if a particular type of mixed funding is appropriate for a site, and then lists secondary considerations related to all mixed funding settlements. Section V outlines the general procedure for review and approval of mixed funding.

II. The Role of Mixed Funding in the CERCLA Cleanup Program

The Interim CERCLA Settlement Policy identified negotiated private response actions as an essential component of the Agency's overall program for obtaining cleanup of the nation's hazardous waste sites. This program, to be effective, depends upon a balanced approach, which includes a mix of Fund-financed cleanups, enforceable settlement agreements reached through negotiations, and litigation. Expeditious cleanups reached through negotiated settlements are preferable to protracted litigation.

Section 122 of the 1986 Amendments, which is devoted entirely to settlement issues, indicates Congressional affirmation of the emphasis in the Interim Settlement Policy toward increased flexibility in settling CERCLA cases in order to expedite cleanups. Like the Interim Settlement Policy, §122 covers a wide range of mechanisms designed to promote settlements. In particular, in §122(b), Congress acknowledged the need to consider settlements for less than 100% of the costs of cleanups"...by using monies from the Fund on behalf of parties who are unknown, insolvent, similarly unavailable, or refuse to settle." (See the Conference Report on Superfund Amendments and Reauthorization Act of 1986, 99 Cong., 2d Sess. Report 99-962 pp. 183, 252 (1986).)

The Agency encourages the use of mixed funding to promote settlement and hazardous site cleanup. For example, preauthorization offers the advantage of PRP performance of the response activity and funding of a substantial portion of the response costs, thus conserving Agency resources for use at other sites. In addition, §122(b)(1) requires the Agency to make all reasonable efforts to recover these costs. The Agency will therefore pursue nonsettlors to make the Fund whole, unless it would be unwarranted to undertake such efforts. To the extent that mixed funding reduces the number of PRPs to be sued in such cost recovery cases, it will also reduce the Agency's costs for litigation.

Support of mixed funding as a settlement tool, however, does not imply that the standard and scope of liability under CERCLA has changed. As established by court decisions prior to the 1986 Amendments, PRP liability under CERCLA remains strict, joint and several, unless the PRPs can clearly demonstrate that the harm at the site is divisible. Thus, the Agency will assess mixed funding settlements in a manner consistent with the Interim Settlement Policy, where complete cleanup or collection of 100% of costs remains a primary goal.

For example, the Agency will not approve mixed funding simply on the basis that a share of wastes at a site may be attributable to an unknown or financially non-viable party. The Agency may conduct an allocation of liability among PRPs at a site, or may evaluate the PRP's allocation and allow volume to be considered as one factor used to assess the reasonableness of the PRPs' offer. However, the availability or the amount of any Fund-financing for a particular site will not be dependent solely on consistency with any volumetric or "fair-share" allocation. The Agency may, as a policy decision, determine that mixed funding is the best method to promote cleanup at a particular site, based on the totality of the circumstances. Mixed funding should be viewed as one tool, approved by Congress, to be used to promote settlements in the context of the existing Interim Settlement Policy.

Section 122 also contains settlement provisions related to: a) de minimis settlements [§122(g)], in which parties who are liable for only a minor portion of the hazard or cost of cleanup at a site may resolve their liability to the Government in an expedited process; b) non-binding allocations of responsibility (NBARs), [§122(e)(3)], which involve a discretionary EPA allocation of the total response costs among PRPs at a site; and c) covenants not to sue, [§122(f)], in which the Government agrees to certain releases from liability at a site.

These settlement mechanisms may influence the decision as to whether a settlement should include mixed funding. Thus, the use of mixed funding at a site should be evaluated both in the context of §122 as a whole, which encourages settlement in general, as well as individual §122 settlement provisions and their relevance to the proposed mixed funding settlement.

For further guidance on these settlement provisions, see "Interim Guidelines for Preparing Non-Binding Preliminary Allocations of Responsibility (NBAR)," 52 FR 19919; "Interim Guidelines on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," Adams/Porter, June 19, 1987; "Covenants Not to Sue Under SARA," Adams/Porter July 10, 1987.

III. Assessment of Mixed Funding Settlement Proposals Using the Interim Settlement Policy Criteria

In the evaluation of a proposed mixed funding settlement, Agency enforcement personnel should first focus on the quality of the overall settlement offer. Thus, the initial determination in each case will not be whether a particular type of mixed funding should be used, but whether the underlying offer for a mixed funding settlement is a good one. This determination should be made by applying the ten settlement criteria set out in the Interim Settlement Policy.

The factors and hypothetical examples set forth below provide guidance as to how to apply the ten settlement criteria to settlement offers in which PRPs have requested some form of mixed funding. The Agency does not intend to limit the availability of mixed funding to the fact patterns described below, but recommends the following approach as a means of focusing the analysis of the settlement. Regions must continue to consider the totality of the circumstances for each mixed funding settlement offer.

In settlement offers in which any form of mixed funding is proposed, factors of primary importance include:

- Strength of the liability case against settlors and any non-settlors. This factor includes:
  - litigative risks in proceeding to trial against settlors, and
  - the nature of the case remaining against non-settlors after the settlement;
- Government's options in the event settlement negotiations fail (e.g., if a state cost-share will be available for a Fund-lead action);
- Size of the portion or operable unit for which the Fund will be responsible (or the amount of the PRP's offer);
- Good-faith negotiations and cooperation of settlors and other mitigating and equitable factors.

The following examples indicate the combinations of the above factors which may be considered acceptable candidates for any type of mixed funding, and those cases considered poor candidates for mixed funding:

Acceptable Candidates for Mixed Funding

The best candidates for mixed funding are cases in which the following features are present:

- The potential portion or operable unit to be covered by the Fund is small, or the settling PRPs offer a substantial portion of the total cost or cleanup. In this context, substantial portion may be defined as a commitment by the PRPs to undertake or finance a predominant portion of the total remedial action.*

- The Government has a strong case against financially viable non-settling PRPs, from which the Fund portion may be recovered.

While this combination of factors represents the optimum conditions under which mixed funding may be approved, cases will more typically involve one or more variations of this scenario. Thus, the Agency anticipates that a range of cases will be considered acceptable candidates for mixed funding. The following examples indicate the circumstances under which a mixed funding settlement may represent the Government's preferred alternative:

Example one:

A strong case against potential settlors may initially weigh in favor of litigation, especially if the case against non-settlors is weak. However, a mixed funding settlement may still be acceptable upon evaluation of additional factors, such as:

- The settling PRPs offer to conduct or pay for a substantial portion of the response;

- Public interest considerations (e.g., if settlement would expedite cleanup and/or a §104 Fund-financed action is not feasible);

- Whether settlors have negotiated in good-faith;

- The Government's time and resources saved by simplification or avoidance of litigation.

- As noted later, the Agency's preference is for the PRPs to perform the response action, rather than finance a Governmental response action.

Example two:

If a substantial portion of the waste at a site cannot be attributed to known and financially-viable parties, as determined, for example, by a preliminary nonbinding allocation of responsibility by the Government), the Agency may initially consider pursuing the recovery of all costs under joint and several liability. However, if the litigative risks appear substantial, a mixed funding settlement may represent more than the Government would recover in litigation, especially when the cost and time required for litigation is considered. Litigative risks which may weigh in favor of settlement include:

- Weak evidence against financially viable potential settlors;
- Equitable considerations which weigh against the imposition of joint and several liability.

In addition, if the hazard at the site is serious and no Fund-financed response is possible, a delay in the response action pending the conclusion of litigation might represent an unacceptable risk to the public and the environment.

Poor Candidates for Mixed Funding

Cases considered poor candidates for mixed funding have the following features:

- The case against settling parties is strong, and thus the potential for successful litigation is high;
- The potential Fund portion is large (e.g., the potentially settlors' offer is insufficient.)

These factors do not automatically preclude mixed funding for a case. However, for mixed funding to be seriously considered in such instances, other compensating factors must be present, such as the ability of the settlors to initiate the response action more quickly than the Government in a Fund-financed action.

IV. Selection of the Mixed Funding Technique

As noted in the Introduction, the term mixed funding has been used to refer to three different types of settlement arrangements:

1) Preauthorization, in which the PRPs conduct the response action and the Agency agrees to allow a claim against the Fund for a portion of the response costs;

2) Cash-outs, in which the PRPS pay for a portion of the response costs up front, and the Agency conducts the response action;

3) Mixed Work, in which the PRPs and the Agency each agree to conduct discrete portions of the response activity.

Once Regional enforcement personnel have determined that a mixed funding settlement is appropriate, based on the settlement criteria as described in Section III and the Interim Settlement Policy, then the Agency must decide which type of mixed funding best suits the situation at hand. Among the three major types of mixed funding, the Agency generally prefers preauthorization, since the PRPs conduct the response action. However, as noted below, cash-outs and mixed work may be appropriate under certain circumstances.

PREAUTHORIZATION

The assessment and approval of preauthorization, once a mixed funding settlement is approved, is a two-part process. The first stage, as described below, is the determination by the Agency enforcement personnel that preauthorization is appropriate in the context of the settlement as a whole. The second stage represents the actual process of preauthorization of the claim against the Fund by the Office of Emergency and Remedial Response (OERR) (see Section V.) The Response Claims regulations, which are presently in draft form, will provide guidance on the preauthorization process itself.

a) Technical and timing concerns related to preauthorization

For the first stage of the review, the nature of the proposed remedy and the PRPs' ability to perform it in a timely manner are major factors to consider when assessing a settlement offer which contemplates preauthorization. In addition, the size of the PRPs' portion is important. When PRPs are responsible for a sufficiently high percentage, they will have a strong economic incentive to keep the actual response costs within or close to estimates. The nature and

the severity of the threat posed by the site may also weigh in favor of settlement, if preauthorization would increase the speed at which the hazard could be addressed. For example, prompt initiation of the remedial action would be of particular importance for sites which are not currently scheduled for full Fund-financing.

On the other hand, Regional negotiators must also consider the time required for the preauthorization process itself when determining if preauthorization is appropriate for particular types of response actions. While the Agency has set a goal of completing review of individual preauthorization applications within a 45-day period, this timing limitation will vary on a case-by-case basis. The Agency is unlikely to have time to consider preauthorization requests when action is required to avert an immediate threat to the public health or the environment, therefore, no reimbursement would be possible. Regions should anticipate the processing time in managing negotiations.

b) Availability of preauthorization for various response actions

For agreements involving activities such as an RI/FS or a removal, preauthorization in general will not be warranted, because the process of preauthorization will usually prove too burdensome for the small amounts or short time-frames often encountered in these cases. Limited exceptions may be considered in unusual circumstances, as where preauthorization will facilitate a broader agreement (e.g., an area-wide RI/FS) which will be less resource intensive than several agreements of smaller scope. A large, extensive removal (e.g., greater than $2 million) may also qualify as an extraordinary circumstance justifying preauthorization. However, Headquarters approval must be obtained before preauthorization may be offered during negotiations for such activities.

c) Covenants not to sue for preauthorization settlements

For preauthorization of remedial design and remedial action (RD/RA) activities, the statute contains a specific provision related to remedy failure. Section 122(b)(4) of CERCLA states that for cases involving preauthorization, as described in §122(b)(1), the Fund will be responsible for costs of remedy failure, up to a proportion equal to that contributed for the original remedial action. This section also states that the Fund portion may be met either through Fund expenditures or by recovering such costs from parties who were not signatories to the original agreement. However, it should be noted that remedy failure due to negligence of the PRP will not trigger any Fund obligation. In any case, a covenant not to sue granted in preauthorization settlements must comport with Agency guidance on covenants not to sue, as cited above.

d) Settlement provisions needed to process claims

Settlement agreements involving preauthorization should contain the following restrictions to facilitate the processsing of claims:

- Settlement agreements should specify a percentage of the total estimated cost to be included in the preauthorization claim for PRP reimbursement, subject to a maximum dollar limit.

- Claims against the Fund are not subject to the §104(c)(3) requirement that States contribute 10% of the cost of the remedial action. However, prospective claimants are encouraged to file a letter of cooperation from the State along with their request for preauthorization. This letter should describe any agreements resulting from the claimants' consultation with the State, including any State assurance of cooperation with the remedial action. Further, all actions conducted pursuant to a preauthorized claim must be consistent with the NCP and the proposed draft Response Claim regulations, when promulgated.

- Claims may be filed only for costs incurred after the date of preauthorization. Parties will not be eligible to make a claim against the Fund until the entire cleanup or agreed-upon preauthorized phase (e.g., an operable unit) is completed according to specifications set out in the settlement agreement and the Preauthorization Decision Document.

- Applicants must demonstrate that their proposed response costs are reasonable. The applicant should justify any proposal to perform an activity in-house, or to contract it out. Applicants may look to Federal and State procurement practices for guidance on how to meet EPA's objectives in the area of contracting and subcontracting.

- PRPs must be financially and technically capable of implementing all of the agreed upon response action. Parties may be required to submit financial assurances or performance bonds to substantiate their financial capability for completing the response action.

CASH-OUTS

For settlement proposals involving a cash-out by some of the PRPs, the nature of the remedy and the public interest factors are generally not decisive, since the Government will be conducting the response action. Thus, of the criteria in the Interim Settlement Policy noted in Section III, the key issues in these agreements include:

- The percentage of the total costs to be paid by settlors (i.e., a substantial portion should be offered);
- The Agency's level of confidence in information related to liability and cost estimates at the time of settlement;
- Equitable considerations for both the settling and non-settling parties, including the nature of any covenants not to sue in the cash-out settlement.

In general, cash-out settlements may occur at any stage of the remedial process. Such offers should generally be assessed in light of the criteria in Part IV of the Interim CERCLA Settlement Policy. It is important to note that, once a Fund-lead response action is ongoing, the potential benefit of mixed funding as a means of expediting cleanup is largely eliminated. In addition, a cash-out of some of the PRPs during the response action may serve to fragment the Government's enforcement proceedings, since cost recovery will generally be pursued once the remedial action is completed. Other issues related to cash-outs include:

a) Information needs related to cash-out settlements

One example of the use of cash-out settlements could involve PRPs which have contributed a low percentage of the waste to a site, and are not technically or financially capable of conducting the entire response action (e.g., preauthorization is not an option.) In order for this type of settlement to be appropriate for both settling and non-settling responsible parties, the Agency should have sufficient information to determine a settlement amount for the settlors as a group. This amount should be based on the Settlement Policy, and should include their waste contribution and other relevant information. Thus, the Agency should have a fairly high level of confidence in the information concerning the liability at the site and the expected cost of the remedy in order to determine an appropriate cash-out settlement.

The settlement may include a risk premium which may partially offset the Government's risk due to uncertainties such as remedy failure or cost overruns, as well as uncertainties which may be present if the necessary information is less than complete.

b) Covenants not to sue in cash-out settlements

The sufficiency of the Agency's information related to PRP liability and the nature, stage of development and the cost of the potential remedy has particular bearing on the scope of any covenant not to sue in cash-out settlements. In general, if the Agency has only limited information in these areas (e.g., if the cash-out settlement entered into early in the remedial process), then covenants not to sue should contain appropriate reopeners to reflect this uncertainty. In reference to these reopeners, it is important to note that the obligation of the Fund to pay for a portion of any costs incurred due to remedy failure, under §122(b)(4), is limited to mixed funding in the form of preauthorization under §122(b)(1). Thus, for cash-outs, the statute does not limit the potential PRP liability for costs resulting from remedy failure. Any future obligations will be specified in the cash-out agreement, including the covenants not to sue. Further guidance concerning covenants not to sue is provided in the Agency guidance "Covenants Not to Sue Under SARA" cited above.

In addition, although cash-out settlements need not involve de minimis parties, as defined by §122(g), similar analytical factors are important in both instances. Thus, Agency guidance entitled "Interim Guidelines on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA", cited above, may also be helpful for cash-out settlements.

c) State cost-share requirements for cash-out settlements

When the Federal government uses its response authority to conduct a remedial action, §104(c)(3) of CERCLA requires that the State "pay(s) or will assure payment" of 10% of the remedial action, including all future maintenance, or 50% or greater for sites involving a state operated facility. Since cash-out settlements involve PRP payment toward a federally-conducted remedial action, the applicable cost share is required for these settlements. The cost-share will be calculated using the total remedial costs, rather than a percentage of the Fund share alone.

There are a variety of ways that the State can "pay or assure payment" of the appropriate cost-share. For example, the State, the Federal government and the PRPs may enter into an agreement under State law and CERCLA in which the PRPs pay 10% to the State, and the State obligates the money for use at the site in question. The State may also use its own funds to pay for any portion of its share that cannot be paid for by PRPs. In general, cash-out settlements should only be considered when the litigation team is reasonably certain that the State is willing and able to pay for its 10% share, although the cost-share need not be part of the consent decree between the Federal government and the PRPs.

MIXED WORK

Mixed funding in the form of mixed work may be appropriate for cases in which the Agency can identify discrete phases or operable units of the response action. One common example involves a settlement with the PRPs to conduct the RD/RA once the Agency has conducted the RI/FS.

A second, more complicated mixed work arrangement could involve an agreement in which the Agency and the PRPs agree to conduct separate portions of an area-wide RI. In this example, the Agency might agree to conduct soil testing if the PRPs conduct ground-water monitoring. Regional enforcement personnel should be reasonably assured of PRP cooperation and the ability to identify in detail the individual activities for which each party will be responsible before entering into any mixed work settlement. In addition, any covenants not to sue in mixed work settlements should be clearly limited to the operable units addressed in the agreement. Mixed work should be avoided where there is a significant potential for delays in response actions as a result of inadequate coordination or potential conflicts. Thus, due to the high potential for technical and legal complications, mixed work in the form of mixed construction should generally not be considered.

Additional Considerations Regarding Mixed Funding

Operation and Maintenance

For preauthorized settlements, full responsibility for payment of operation and maintenance (O & M) activities remains with the PRPs. In some circumstances, a State may agree, as a party to the settlement, to manage O & M activities which are financed by PRPs. The Agency will generally resort to enforcement actions rather than committing Fund money for cleanup at the site when both the PRPs and the State refuse to be responsible for O & M.

Actions Against Non-settlors

It is the policy of the Department of Justice that the Federal government will not commit in a consent decree or other agreement to sue other non-settling parties. Consistent with this policy, mixed funding settlement agreements should not contain provisions which commit the Federal government to sue non-settling parties at a particular site. At most, the agreement may indicate that the Government has a "present intention" to sue non-settlors, subject to the exercise of the Government's enforcement discretion. Such provisions, however, must be approved by Headquarters and the Department of Justice (DOJ) on a case-by-case basis, and may not be offered in negotiations until such approval is obtained.

Reservation of Rights

Potential settlors occasionally will agree to allow the Government to reserve the right to bring an enforcement action against them, contingent upon a certain event, such as an unsuccessful enforcement action against non-settlors. Such an arrangement is not desirable, although it may be acceptable in limited circumstances. Such an offer should not be used by settlors as a means of reducing the amount offered up front. In addition, the negotiation team should consider the practical problems that might arise in implementing such an arrangement, including statute of limitation issues and fragmented enforcement actions involving successive suits covering similar issues. The Government generally prefers to settle for a substantial portion up front, rather than being required to bring a second enforcement action against settlors for an additional amount.

Documentation

For preauthorization and mixed work cases in which the Agency will take enforcement actions against non-settling parties, the Agency must assure that the settling PRPs agree to provide the necessary documentation and any other assistance required for support of the cost recovery cases. This assistance may include an agreement to provide witnesses to substantiate response costs. Government oversight will also be required, not only to assure that reimbursement by the Government is appropriate, but also that PRP documentation constitutes sufficient and admissible evidence for the cost recovery cases.

V. Procedural Considerations for Review of Settlements Involving Mixed Funding

As noted in Section I, consideration of a site for any type of mixed funding involves a two-stage process. The site first should be evaluated to determine if an offer for a mixed funding settlement in general (e.g., without regard to the particular funding arrangement) should be accepted. This analysis includes the settlement criteria, with the hypothetical examples in Section III indicating the Agency's preferences among various combinations of factors. Once the Regional enforcement personnel determines that a mixed funding settlement will be acceptable, then the factors noted in Section IV should be used to evaluate whether a particular type of mixed funding is appropriate.

The Agency has developed guidance on streamlining and improving the CERCLA settlement decision process, which, in part, highlights the need for improved preparation for negotiations and for a more systematic management review process. (See "Interim Guidance: Streamlining the CERCLA Settlement Decision Process", Porter/Adams, Feb. 12, 1987.) In keeping with the goals of this improved process, Regions should conduct both stages of the mixed funding analysis as early as possible (e.g., prior to the appropriate special notice.)

Timely Headquarters and DOJ notification is particularly important for cases involving preauthorization, since the use of preauthorization in settlements requires both the approval of the settlement for preauthorization, as described above, and the review by OERR of the request for preauthorization itself. Early DOJ involvement is necessary in mixed funding negotiations, as it is for other types of negotiations. While the preauthorization process need not be completed at the time of settlement, the settlement document must describe the major parameters of the proposed preauthorization agreement. Therefore, OERR should be contacted once the mixed funding analysis has been completed and the Region supports further consideration of preauthorization. For further information on the draft Response Claims regulations and the procedure for preauthorization with OERR, contact William O. Ross, Office of Emergency and Remedial Response (WH-548), (FTS) 382-4645.

Issues which cannot be resolved at the staff level may be raised to the Settlement Decision Committee (SDC), a Headquarters-based review panel. Like all consent decrees, mixed funding settlements will require final approval by the Assistant Administrator (AA) for the Office of Solid Waste and Emergency Response (OSWER), the AA-OECM, and the Assistant Attorney General for Lands and Natural Resources.

If the amount to be paid by the Fund exceeds $750,000 or 10% of the total response cost (whichever is greater), approval by the Deputy Attorney General at DOJ will also be required. Regional enforcement personnel may, of course, decline to consider mixed funding at a particular site without prior Headquarters consultation.

VI. Conclusion

Settlement agreements incorporating mixed funding provisions, as described in part under §122(b) of CERCLA, offer an alternative to either up front Fund financing of the total costs of response actions at a site, or possible delays in cleanup resulting from litigation required to force PRP action. Mixed funding represents one component of the Agency's comprehensive approach toward increased flexibility in settling CERCLA cases. This approach originates from the CERCLA Interim Settlement Policy as well as the codification of much of this Policy in §122 of the 1986 Amendments.

The assessment of mixed funding for a particular site must always begin with the determination as to whether any type of mixed funding settlement is appropriate, based on the ten settlement criteria. At the broadest level, this evaluation will involve a determination as to the most effective means of promoting cleanup at a site while insuring the most efficient use of the Agency's resources, including the Fund itself. Regions are encouraged to consider a mixed funding settlement when an assessment of the settlement criteria, including the strength of the evidence, the equities of the settlement, and the public interest, indicate that mixed funding is in the best interest of the Government, the public and the environment.

For further information or questions concerning this guidance, contact Kathy MacKinnon, OWPE (WH-527) at FTS: 475-6770.

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