Applicants state that granting their request will permit the Applicants to sell the subject gas on the spot market under their small producer certificate.

Applicants state that the August 9, 1965, contract expired on November 7, 1986, and that under the expired contract ANR has no take-or-pay obligation. Applicants state that the gas qualifies under NGPA section 106(a) and that the deliverability is approximately 650 Mcf/d.

Since Applicants allege that they are subject to substantially reduced takes without payment and have requested that their application be considered on an expedited basis, all as more fully described in the application which is on file with the Commission and open to public inspection, any person desiring to be heard or to make any protest with reference to said application should on or before 15 days after the date of publication of this notice in the **Federal Register**, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in a proceeding must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-16963 Filed 7-24-87; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3238-7]

Superfund Program; Covenants Not To Sue

AGENCY: Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The Agency is publishing its Interim Guidance governing the issuance of covenants not to sue under Section 122(f) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), in order to inform the public and to solicit public comment on this important aspect of the Superfund enforcement process. The guidance applies to private party cleanup and cost recovery settlements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by SARA.

DATE: Comments must be provided on or before September 25, 1987.

ADDRESS: Comments should be addressed to Jon Fleuchaus, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Waste Enforcement Division, LE-134S, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Jon Fleuchaus, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, LE-134S, 401 M St. SW., Washington, DC 20460, (202 382-3077.

SUPPLEMENTARY INFORMATION: Previously, on February 5, 1985, the Agency issued an Interim Settlement Policy which provided guidance on the appropriateness of the use of releases from liability, or convenants not to sue, in settlement of CERCLA cases. 50 FR 5034 (1985). The guidance published today on covenants not to sue reflects Congress' adoption of a provision governing the use of such covenants in section 122(f) of SARA.

Briefly, section 122(f) permits EPA, by delegation from the President, to issue covenants not sue for CERCLA liability, including future liability, if certain criteria are met. Section 122(f)(4) of CERCLA identifies a number of factors for the Agency to consider in determining whether to provide a covenant not to sue. These factors include:

- The effectiveness and reliability of the remedy;
- The nature of the risks remaining at the facility;
- The extent to which performance standards are included;
- The extent to which the response action provides a complete remedy;
- The extent to which the technology has been demonstrated to be effective;
- Whether the Fund would be available for any additional remedial action;
- Whether the remedial action will be carried out, in whole or in part, by the responsible parties.

Section 122(f)(3) provides that any covenant not to sue concerning future liability shall not take effect until EPA certifies that the remedial action is complete. Section 122(f)(6)(A) specifies that convenants not to sue for future liability generally must not apply to liability arising from unknown conditions. Finally, section 122(f)(6)(C) allows EPA to include in a covenant not to sue provisions for future enforcement action necessary to protect public health, welfare, and the environment.

Implementation of section 122(f) raises three major issues. The first of these issues is what type of "reopeners" should be included in covenants not to sue. A "reopener" is a provision which reserves EPA's right to require settling parties to take further response action, in addition to cleanup measures already provided for in a settlement agreement, notwithstanding the covenant not to sue. Under the Interim CERCLA Settlement Policy, EPA had required that, at a minimum, there must be reopeners permitting the government to seek further response action if information is received after entry of the consent decree regarding previously unknown site conditions or new scientific determinations, and such information indicates there is an imminent and substantial endangerment to public health or the environment. As noted above, section 122(f)(6)(A) of SARA mandates that, subject only to narrow exceptions, a reopener for unknown conditions be included in all covenants not to sue. One difference from the Settlement Policy, however, is that Congress did not limit the unknown conditions reopener by requiring an imminent and substantial endangerment threshold. Since the unknown conditions reopener has been established by the statute, the primary question is what additional reopeners are appropriate.

The statute not only requires the inclusion of the unknown conditions reopener in virtually all settlements, but also authorizes the inclusion of other limitations in covenants not to sue if necessary and appropriate to protect public health or the environment. Section 122(f)(6)(C). EPA has decided to implement section 122(f)(6)(C) by including in covenants not to sue a second reopener covering situations where additional information reveals that the remedy no longer protects public health or the environment. Further, this reopener is triggered by a threshold of "protection of public health or the environment" rather than the "imminent and substantial endangerment" threshold prescribed in the Settlement Policy.

Order No. 436 on June 23, 1987. In vacating Order No. 436, the Court rejected challenges to the Commission's statement of policy in § 2.77 of its Regulations. Section 2.77 states that the Commission will consider on an expedited basis applications for certificate and abandonment authority where the producers assert they are subject to substantially reduced takes without payment.

EPA's reasons for adopting this second reopener are several. First, although SARA does not explicitly require this reopener, both the statute and the legislative history evince a Congressional concern that responsible parties remain liable for failure of the remedial action to protect public health or the environment. For example, the mixed funding provision in section 122(b) clearly anticipates that the responsible parties who have settled retain liability for additional work necessary to address remedy failure. The five-year review provision in section 121(c) also reflects Congress' concern for remedy failure by mandating periodic reviews to ensure that remedial actions continue to protect public health and the environment. If a remedy does not meet this standard, EPA may take or require such additional remedial action as is necessary.

The second major issue addressed in the guidance is how EPA will exercise its discretion to seek additional remedial relief in the period following settlement but prior to the effective date of the covenant not to sue for future liability. Responsible parties have expressed concern that prior to the date on which the covenant becomes effective, EPA can alter its Record of Decision and impose additional costs upon settlors without the slightest change in circumstances. To assure settling parties that EPA does not intend such a result, EPA will include language in covenants, limiting EPA's ability to reopen a settled remedial matter to those situations where additional information is received, in whole or in part, after entering of the consent decree indicating that the remedy no longer protects public health or the environment. As explained above, EPA thinks that such a provision preserves Congressional intent as to the proper allocation of the risk or remedy failure while also assuring those same parties that some degree of certainty attaches to a settled matter.

The third issue involves the Agency's responsibility to certify completion of the remedial action. Section 122(f)(3) provides that a covenant not to sue for future liability cannot take effect until EPA has certified that remedial action has been completed. Section 122 does not include specific guidance on when a cleanup has been completed. CERCLA cleanups often involve the construction of some type of facility designed to correct contamination at the site and the operation and maintenance of that facility for the indefinite future. In this circumstance, certification of completion should not have to wait until all operation and maintenance activities are completed. Specific distinctions between remedial action and operation and maintenance are drawn in section 104(c)(6) of SARA. Although these distinctions are not strictly applicable as a legal matter to releases from liability, the Agency believes that it is unneccessarily confusing and inefficient to have two separate sets of definitions applied to remedial action, and will therefore as a matter of policy apply the distinctions in section 104 to releases from liability.

Section 104(c)(6) of CERCLA establishes definitions for purposes of the States' cost share of CERCLA response actions. It defines completed remedial action to include the completion of treatment or other measures necessary to restore surface and ground water quality to a level that assures protection of human health and the environment. The operation of such measures for a period of up to ten years after the construction or installation of the remedy shall be considered remedial action. Activities required to maintain the effectiveness of such measures following this ten-year period or the completion of remedial action, whichever is sooner, shall be considered operation or maintenance.

Questions have arisen in determining whether pumping and treating of goundwater constitutes part of the remedial action, or part of operation and maintenance, for purposes of funding. Section 104(c)(6) indicates that the completion of treatment or other measures necessary to restore surface and gound water quality falls within the definition of remedial action, rather than operation and maintenance, and can therefore be paid for out of the Fund for a period of up to ten years. However, ground or surface water cleanup measures initiated for reasons other than restoration would be treated as operation and maintenance, as would source control actions.

We recognize that this guidance addresses important and complex issues and for that reason are requesting public comment. We will evaluate all comments received for the purpose of determining whether any modifications to the guidance are warranted.

The interim guidance follows.

Date: July 17, 1987.

Edward E. Reich,

Acting Assistant Administrator for Enforcement and Compliance Monitoring.

Date: July 17, 1987.

J. Winston Porter,

Assistant Administrator for Solid Waste and Emergency Response.

July 10, 1987.

Memorandum

Subject: Covenants Not To Sue Under SARA.

From: Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, F. Henery Habicht II, Assistant Attorney General, U.S. Department of Justice.

To: Regional Administrators, Regions I–X

I. Introduction

In the Interim CERCLA Settlement Policy, 50 FR 5034 (1986), EPA provided guidance on when releases from liability were appropriate as consideration for an agreement involving a private party cleanup or reimbursement of EPA's costs. That policy expressed a strong preference for issuing releases in the form of covenants not to sue. The Superfund Amendments and Reauthorization Act (SARA) confirms the authority of EPA to release responsible parties from certain liabilities in settlement of an EPA claim under CERCLA. In section 122(f) of SARA, Congress adopted EPA's policy of drafting releases in the form of covenants not to sue and also established specific requirements governing the Agency's ability to issue such covenants. SARA includes several express requirements regarding covenants not to sue and also gives the Agency discretion to place further conditions on the extent of such covenants. This memorandum updates the Interim Settlement Policy by providing guidance on the implementation of the mandatory and discretionary provisions of SARA relating to use of covenants not to sue in consent decrees. Attached to this guidance is a model covenant not to sue.

II. Summary of Statutory Provisions

Section 122(f)(1) authorizes EPA to covenant not to sue responsibile parties for "any liability to the United States under this Act, including future liability, resulting from a release or threatened release addressed by a remedial action. . . ." Such covenants may be provided if each of the following conditions are met:

(A) The covenant not to sue is in the public interest;

(B) The covenant not to sue would expedite the response;

(C) The settlor is in full compliance with a consent decree under § 106 addressing the release or threatened release:

(D) EPA has approved the response action.

Section 122(f)(1).

Prior to entering a covenant not to sue under section 122(f)(1), EPA must assess the appropriateness of the covenant under seven factors set forth in section 122(f)(4). These factors, which relate to the effectiveness, reliability, and enforceability of the remedy, and the nature of the risk remaining at the site, include:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

Section 122(f)(4)

In addition to authorizing EPA, in its discretion, to covenant not to sue for liabilty, including future liability, section 112(f) mandates that EPA grant a covenant not to sue for future liability in two specific circumstances. Section 122(f)(2) provides that where the four conditions in section 122(f)(1) have been met, EPA must issue a covenant not to sue for "future liability for future releases" if: (1) EPA selects a remedial action involving offsite disposal of a hazardous substance after rejecting an onsite response which fully complies with the National Contingency Plan (NCP); or (2) the selected remedial action requires the destruction, elimination, or permanent immobilization of hazardous substances. Such a covenant may only address the portion of the remedial action which involves these two situations.

Assuming that a covenant not to sue for future liability is otherwise authorized under section 122(f), section 122(f)(3) prescribes that a covenant not to sue for future liability shall not take effect until EPA has certified that the remedial action has been completed in accordance with the terms of CERCLA. Moreover, whether the covenant is for future or present liability, section 122(f)(5) conditions such covenants upon satisfactory performance of the terms of the settlement agreement.

Finally, section 122(f)(6) addresses exceptions to covenants not to sue for future liability provided under Section 122(f)(1). For example, EPA must except from any covenant not to sue for future liability any future liability related to the release or threatened release which is the subject of the covenant where such liability arises from conditions unknown at the time the remedial action is certified complete. Section 122(f)(6)(A). This "reopener" for unknown conditions is not required for special covenants granted under section 122(f)(2) or for de minimis settlements under section 122(g). In addition, section 122(f)(6)(B) provides that a waiver for the unknown conditions reopener in section 122(f)(6)(A) may be granted in "extraordinary circumstances." In determining whether extraordinary circumstances exist, EPA must consider "such factors as those referred to in [section 122(f)][(4)] and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, pubilc interest considerations, precedential value, and inequities and aggravating factors." Section 122(f)(6)(B). Nonetheless, even if extraordinary circumstances exist, the unknown conditions exception may not be waived if the terms of the agreement do not provide reasonable assurances that public health and the environment will be protected from any future releases. Section 122(f)(6)(C) authorizes EPA to except from covenants not to sue future enforcement actions necessary to protect public health, welfare, and the environment.

III. Explanation of Key Statutory Provisions

In interpreting Section 122(f) and developing a policy for its implementation, EPA has looked to the expressions of Congressional intent contained in other parts of SARA and the relevant legislative history. These courses indicate that section 122(f) serves several goals, including:

(1) Encouraging private party cleanups by providing EPA with the authority to grant covenants not to sue;

(2) Encouraging more permanent cleanups by codifying the principle that the more permanent the cleanup the more complete the release;

(3) Protecting the public by ensuring that responsible parties remain liable for future releases requiring future remedial action.

A. Present Liability and Future Liability

In section 122(f)(1), Congress authorizes EPA to issue covenants not to sue for both present liability and future liability. In the context of settlements involving remedial action, EPA interprets present liability as a responsible party's obligation to pay those response costs already incurred by the United States related to a site and to complete those remedial activities set forth in the Record of Decision (ROD) for that site, including meeting any performance standards or other measures estabished through the remedial design (RD) process. Future liability refers to a responsible party's obligation to perform any additional response activities at the site which are necessary to protect public health and the environment.

In deciding whether to provide a covenant not to sue for present liability, EPA must consider the criteria in sections 122(f)(1) and 122(f)(4). These factors essentially codify the approach taken in EPA's Interim CERCLA Settlement Policy. There, EPA stated as a general principle that "the more effective and reliable the remedy, the more likely it is that the Agency can negotiate a more expansive release." In judging the reliability and effectiveness of the remedy, the Interim Settlement Policy placed special emphasis on whether the remedy requires that health-based performance standards be met. As noted above, section 122(f)(4) explicitly makes performance standards a factor to be considered and EPA continues to regard this factor as critical. Where the criteria in section 122(f)(1) are fulfilled and where consideration of the factors in section 122(f)(4) suggests the remedy is reliable, effective, and enforceable (such as, for example, where the remedy includes numerical performance standards), a covenant not to sue for present liability may be provided which takes effect upon approval of the consent decree by the court. On the other hand, where the criteria in paragraph (f)(1) are met but the factors in section 122(f)(4) indicate that some questions remain about the reliability, effectiveness, and enforceability of the remedy, any convenant not to sue for present liability, if appropriate at all, would have to be conditioned on a

demonstration of the effectiveness and reliability of that remedy.

Covenants not to sue for future liability are also made contingent on the criteria set forth in section 122(f)(1) and the factors enumerated in section 122(f)(4). When these conditions are met, EPA may, in its discretion, provide a convenant not to sue for future liability but such a covenant, according to section 122(f)(3), may not take effect until EPA certifies that the remedial action has been completed. Prior to certification, therefore, the settling party remains fully responsible for any future liability for future remedial action necessary at the site. Following certification, unless a special covenant under section 122(f)(2) is required or extraordinary circumstances are present, the covenant not to sue for future liability is subject to a reopener covering (1) unknown conditions as mandated by section 122(f)(6)(A), (2) any other conditions EPA deems advisable based on the section 122(f)(4) factors, and (3) future enforcement activity necessary and appropriate to assure protection of public health, welfare, and the environment as provided in section 122(f)(6)(C).

B. Certification of Completion of the Remedial Action

Section 122(f)(3) specifies that a covenant not to sue for future liability shall not take effect until EPA certifies the remedial action is complete. In the context of paragraph 122(f)(3), EPA interprets completion of the remedial action as that date at which remedial construction has been completed. Where a remedy requires operational activities, remedial construction would be judged complete when it can be demonstrated that the operation of the remedy is successfully attaining the requirements set forth in the ROD and RD.

The exact point when EPA can certify completion of a particular remedial action depends on the specific requirements of that remedial action. Each consent decree should include a detailed list of those activities which must be completed before certification can occur.

Certification of completion under section 122(f)(3) does not in any way affect a settling party's remaining obligations under the consent decree. All remedial activities, including maintenance and monitoring, must be continued as required by the terms of the consent decree.

C. Reopeners

Under the CERCLA Interim Settlement Policy, EPA required that there be included in every consent decree reopeners covering situations where EPA received additional information after the time of the agreement regarding site conditions or scientific determinations which indicates that the site may pose an imminent and substantial endangerment to the public health or welfare or to the environment. Under section 122(f), a slightly different approach to reopeners must be followed. Section 122(f) provides that for future liability, no covenant not to sue shall be effective prior to certification of completion of the remedical action. Technically, therefore, since there is no release of future liability prior to certification, there is no need for reopeners in that time period. Reopeners for future liability only becomes necessary after certification, when the covenant not to sue takes effect.

As to reopeners regarding future liability, Congress expressly required a reopener for unknown conditions. In contrast to the Interim Settlement Policy, however, Congress expressly eliminated any endangerment threshold for that reopener. Congress also authorized EPA, in section 122(f)(6)(C), to include any other reopeners "necessary and appropriate to assure protection of public health, welfare, and the environment." EPA believes that it is in the public interest and consistent with Congressional intent to require a second reopener covering situations where additional information reveals that the remedy is no longer protective of public health or the environment. It is not in the public interest to release responsible parties from liability for additional response actions made necessary by new information, given, as noted in the Interim Settlement Policy, "the current state of scientific uncertainty concerning the impacts of hazardous substances, our ability to detect them, and the effectiveness of remedies at hazardous waste sites." 50 FR 5039.

Congressional concern with situations where the remedy fails to protect public health or the environment can be seen in SARA's mixed funding and five-year review provisions. The mixed funding provision in section 122(b) states that if mixed funding is adopted at a particular site, "the Fund shall be subject to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action." This provision anticipates that the responsible parties who have settled retain liability for additional work necessary to address remedy failure. Further support for this proposition can be found in the Conference Report statement that the continuing proportional Fund obligation in mixed funding cases is a settlement incentive. H.R. Rep. No. 99-962, 99th Cong., 2d Sess. 252 (1986). The Fund's continuing obligation would only be an incentive to settlement if in non-mixed funding cases settling parties retained liability where the remedy fails to protect public health or the environment.

The five-year review provision in section 121(c) also addresses Congress' concern for situations where the remedy fails to protect public health and the environment by mandating periodic reviews to assure that remedial actions do just that. If a remedy is found not to protect public health or the environment, the statute provides that EPA may take or require such additional remedial action as is necessary.

Congressional concern that remedial action might fail to protect public health and the environment was not limited narrowly to a focus on the reliability of the remedial technology at the site. Rather, this concern apparently extended to any situation in the future at the site which is judged to present a threat to public health and the environment. EPA will follow this interpretation of remedy failure. For example, should health effects studies reveal that the health-based performance levels relied upon in the ROD are not protective of public health or the environment, *and* that public health or the environment will be threatened without further response action, then the EPA could invoke the remedy failure reopener. The reopener for remedy failure, however, is not meant to require changes purely based on advances in technology. Under the reopener, EPA would not compel settling parties to implement newly-developed, more permanent remedial technological unless EPA can show that the present remedy does not protect public health or the environment. Neither is the remedy failure reopener intended to give EPA the option to make changes in a remedial action absent additional information received following the entry of the consent decree. EPA does not consider the phrase "information received, in whole or in part, after entry of the consent decree," as used in the attached model covenant, to include a new analysis of the same information comprising the record of the initial remedy selection decision.

In short, this reopener is similar to the reopener for new scientific information provided for in the Interim Settlement

Policy, although the imminent and substantial endangerment threshold has not been included. To require a showing of imminent and substantial endangerment would be inconsistent with the provision in section 122(f) of SARA with regard to unknown conditions as well as the provisions concerning future response work in section 122(f)(6)(C) and section 121(c). Moreover, it is the Agency's view that requiring different showings for the two reopeners would lead to protracted disputes about which reopener applied to situations necesitating additional response activity.

EPA believes that in order to give settlors some measures of certainly prior to certification, the most reasonable means to implement the authority in section 122(f) is to specify in consent decrees those pre-certification situations in which EPA would seek further remedial action. Those situations at a minimum would include the circumstances described in the future liability reopeners:

(1) Discovery of previously unknown conditions; and

(2) Situations where additional information reveals that the remedy is no longer protective of public health and the environment.

Thus, prior to certification of completion of the remedial action, EPA will reserve its right to institute new proceedings to compel, or recover costs for further response action made necessary by information received, in whole or in part, after entering of the consent degree related to either unknown conditions or remedy failure. Following certification of completion of the remedial action, EPA will reserve its right to institute proceedings only to address information received after certification of completion of the remedial action related to unknown conditions or remedy failure. Pre-certification reopeners for unknown conditions and remedy failure apply to all covenants not to sue, even to special convenants under section 122(f)(2).

Particularly in the pre-certification period, the relationship of the remedy to the covenant and the reopeners should be carefully considered. EPA may insist on broader reopeners where the consent decree does not provide for a remedy that meets the preference in section 121(b)(1) for a permanent and significant reduction of the volume, toxicity, or mobility of the hazardous substances. In those instances, EPA shall assess the need for broader reopeners in the covenant not to sue based on the factors identified in section 122(f)(4). Nevertheless, once EPA has determined what reopeners are appropriate for the pre-certification period, EPA will agree in the covenant to institute new proceedings only where those reopener provisions are met.

Although covenants not to sue must include, at a minimum, the above-described reopeners during the pre-certification period, reopeners are not mandated in all circumstances in covenants not to sue applicable to the period following completion of the remedial action. Two statutory provisions address this period. First, section 122(f)(2) mandates that EPA issue a special covenant not to sue for future liability in two narrow circumstances: (1) Offsite disposal following rejection of an onsite remedy complying with the NCP; and (2) complete destruction of the hazardous substances. Such a special covenant may not contain reopeners for the post-completion period. Second, section 122(f)(6)(B) specifies that in extraordinary circumstances EPA may exclude a post-completion reopener for unknown conditions. This extraordinary circumstance waiver is only available where other terms in the agreeement provide all reasonable assurances that public health and the environment will be protected. As a policy matter, EPA would also not include the reopener for later-received information relating to failure in a situation where the conditions in section 12(f)(6)(B) are met. EPA, however, is barred from granting covenants not to sue without reopeners absent a finding that a special covenant is appropriate or that extraordinary circumstances exist.

D. Extraordinary Circumstances

Section 122(f)(6)(B) provides that EPA may forego including a reopener for unknown conditions when extraordinary circumstances exist *and* "other terms, condition, or requirements of the agreement . . . are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility."

The legislative history on this provision indicates that it should be narrowly applied. The House-Senate Conference Report states that "[t]his provision should be implemented in an manner consistent with the current application of the Administration settlement policy as to unknown conditions." Conference Report, H.R. Rep. No. 99-962, 99th Cong., 2d Sess. 255 (1986). By this statement, the Conference Committee endorsed EPA's extremely limited use of the extraordinary circumstances waiver for reopeners contained in the CERCLA Interim Settlement Policy.

In section 122(f)(6)(B), Congress lists as relevant factors regarding extraordinary circumstances: "those [factors] referred to in [section 122(f)](4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggrevating factors." EPA has already explained how many of these factors will be interpreted in the Interim Settlement Policy.

A finding of extraordinary circumstances alone is not sufficient to meet the requirements of section 122(f)(6)(B). That provision also mandates that the unknown conditions reopener may only be waiver if other terms of the agreement provide all reasonable assurances that public health and the environment will be protected. One factor which may be considered in determining whether all reasonable assurances have been provided is whether a settling party has offered a premium payment to insure against the risk that future remedial action will be required at the site.

One of the instances where EPA has used the extraordinary circumstances exception in the past is where a responsible party has filed for bankruptcy. Whether or not a responsible party's bankruptcy filing presents extraordinary circumstances will depend on a number of case-specific factors involving, among other things, the grounds upon which the party is liable, and the type of bankruptcy relief-liquidation or reorganization-that is being sought by the debtor. EPA will not grant a debtor a convenant not to sue which is broader than a discharge under the bankruptcy laws but neither will EPA make settlement impossible by insisting on a convenant narrower than the discharge the debtor is entitled to by operation of the bankruptcy laws.

Waivers of reopeners under section 122(f)(6)(B) will require prior approval by the Assistant Administrators for OECM and OSWER and the Assistant Attorney General as provided in the Interim Settlement Policy. 50 FR at 5040.

E. Special Convenants

Special convenants not to sue under section 122(f)(2) are authorized for two extremely limited circumstances. First, under section 122(f)(2)(A) a special covenant is appropriate where EPA selects a remedial action involving offsite disposal after rejecting a proposed onsite remedy which is consistent with the NCP. This special convenant, it should be emphasized, it only available where EPA has determined that an onsite remedy fully

complies with the requirements of the NCP, but that onsite remedy is rejected in favor of offsite disposal. It is not sufficient for EPA to have merely considered onsite proposals in choosing the remedy. Further, the Conference Report makes clear that this provision was adopted in the context of section 121 requirements regarding offsite disposal and therefore EPA will only grant this special covenant in decrees involving remedies selected under section 121. Conference Report, H.R. Rep. 99-962, 99th Cong., 2d Sess. 254 (1986).

Second, under section 122(f)(2)(B), EPA will issue a special covenant where the remedy involves each of the following elements:

(1) Treatment of hazardous substances so as to

(2) Destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, *and*

(3) EPA determines that

(a) The substances no longer present any current or currently forseeable future significant risk to public health, welfare, or the environment,

(b) No byproduct of the treatment or destruction process presents any significant hazard to public health, welfare, or the environment, *and*

(c) All byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or currently foreseeable future significant risk to public health, welfare, or the environment.

The term "permanent immobilization" applies only to a site where treatment technologies change the fundamental nature and character of the hazardous substances so that no person faces a significant risk of being exposed to the hazardous substance. Conference Report, H.R. Rep. No. 99-962, 99th Cong., 2d Sess. 254-55 (1986). Use of "permanent" storage containers or other containment technology does not qualify as permanent immobilization under this provision.

Finally, under either of the two circumstances in section 122(f)(2), the special covenant applies only to those hazardous substances actually transported offsite or destroyed, eliminated, or permanently immobilized. Thus to the extent that hazardous substances remain onsite, the standard reopeners for future liability must be included in the convenant not to sue. For example, Site X has soil contamination to a depth of 30 feet but under present health standards only the first five feet need to be incinerated. Assuming the incineration process meets the requirements of section 122(f)(2)(B), a special convenant may be granted for the incinerated soil but under no circumstances would a covenant not to sue for future liability without the standard reopeners be issued for the contaminated lower 25 feet of soil.

IV. Status of Interim Settlement Policy

The Interim Settlement Policy remains in effect to the extent not contradicted by SARA or by this or any other subsequent guidance. Nonetheless, a number of points from that policy are worth re-emphasizing:

(1) Covenants not to sue will not be issued for redisposal liability unless section 122(f)(2)(A) applies;

(2) Covenants not to sue in agreements where EPA has performed the remedy and EPA is seeking only the recovery of its costs should be no more expansive than covenants not to sue in consent decrees where the responsible parties agree to do the remedy;

(3) A covenant not to sue may be given only to the responsible party providing consideration for the covenant;

(4) The covenant not to sue must not cover any claims other than those involved for that site—thus unless unusual factors are present the covenant not to sue will apply only to claims under sections 106 and 107 of CERCLA and section 7003 of RCRA;

(5) The covenant not to sue must expressly be limited to civil claims;

(6) A covenant not to sue for a remedial investigation and feasibility study or a removal action must be limited to the work actually completed;

(7) A covenant not to sue regarding natural resources may only be provided by the Federal trustee responsible for those resources;

(8) Responsible parties must release any related claims against the Hazardous Substances Superfund.

Disclaimer

The policies and procedures established in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Covenant Not To Sue

1. A. Except as specifically provided in Subparagraph C, the United States covenants not to sue the settling parties for Covered Matters. Covered Matters shall include any and all civil liability to the United States for causes of action arising under §§ 106 and 107(a) of CERCLA and § 7003 of RCRA relating to the Site.

B. With respect to future liability, this covenant not to sue shall take effect upon certification by EPA of the completion of the remedial action. A determination regarding certification of completion will be made by EPA within [one year] of successful completion of the activities listed in Appendix _____.

C. Notwithstanding any other provision in this Consent Decree, the United States reserves the right to institute proceedings in this action or in a new action (1) seeking to compel Settling Parties to perform additional response work at the Site or (2) seeking reimbursement of the United States' response costs, if:

(1) For proceedings prior to EPA certification of completion of the remedial action,

(i) Conditions at the Site, previously unknown to the United States, are discovered after the entry of this Consent Decree, or

(ii) Information is received, in whole or in part, after the entry of this Consent Decree,

and these previously unknown conditions or this information indicates that the remedial action is not protective of human health and the environment;

(2) For proceedings subsequent to EPA certification of completion of the remedial action,

(i) Conditions at the Site, previously unknown to the United States, are discovered after the certification of completion by EPA, or

(ii) Information received, in whole or in part, after the certification of completion by EPA,

and these previously unknown conditions or this information indicates that the remedial action is not protective of human health and the environment.

D. The United States' right to institute proceedings in this action or in a new action seeking to compel Settling Parties to perform additional response work at the Site or seeking reimbursement of the United States for response costs at the Site, may only be exercised where the conditions in subparagraph C are met. [Caution: check to insure that this subparagraph does not waive other reserved rights in the decree relating to additional response work.]

E. Notwithstanding any other provision in this Consent Decree, the covenant not to sue in subparagraph A shall not relieve the settling parties of their obligation to meet and maintain

compliance with the requirements set forth in this Consent Decree including the Record of Decision and Remedial Design for the Site which is incorporated herein.

[FR Doc. 87-16955 Filed 7-27-87; 8:45 am]
BILLING CODE 6560-50-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Submitted to OMB for Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of information collection submitted to OMB for review and approval under the Paperwork Reduction Act of 1980.

Title of Information Collection

Consolidated Reports of Condition and Income (Insured State Nonmember Commercial Banks) (OMB No. 3064-0052).

Background

In accordance with requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the FDIC hereby gives notice that it has submitted to the Office of Management and Budget a request for OMB review for the information collection system identified above.

ADDRESS: Written comments regarding the submission should be addressed to Robert Fishman, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 and to John Keiper, Assistant Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429.

Comments:

Comments on this collection of information should be submitted on or before August 26, 1987.

FOR FURTHER INFORMATION CONTACT: Requests for a copy of the submission should be sent to John Keiper, Assistant Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429, telephone (202) 898-3810.

SUMMARY: The FDIC is submitting for OMB review changes to the Consolidated Reports of Condition and Income (Call Reports) filed quarterly by insured state nonmember commercial banks. These revisions were approved at the April 21, 1987, meeting of the Federal Financial Institutions Examination Council (FFIEC) and are designed to reduce the reporting burden imposed by Call Report Schedule RC-J, "Repricing Opportunities for Selected Balance Sheet Categories," while preserving rate sensitivity data essential to the commercial bank surveillance activities of the three federal banking agencies. The proposed changes involve simplifying the methods used for presenting maturity and repricing frequency data. These changes, if approved, would become effective as of the March 31, 1988, report date.

The FFIEC approved one other change in the Call Report requirements that is unrelated to Schedule RC-J. This involves a change in reporting the "Loans secured by 1-4 family residential properties" item in the loan schedule (Schedule RC-C). This change would become effective as of the December 31, 1987, report date.

As a result of the proposed changes it is estimated that insured state nonmember banks, collectively, would receive an annual reduction in reporting burden of 121,008 hours. The annual reporting burden on these banks would then amount to 668,996 hours.

Dated: July 22, 1987.
Federal Deposit Insurance Corporation.
Margaret M. Olsen,
Deputy Executive Secretary.
[FR Doc. 87-16944 Filed 7-24-87; 8:45 am]
BILLING CODE 6714-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-795-DR]

Major Disaster and Related Determinations; Iowa

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Iowa, (FEMA-795-DR), dated July 17, 1987, and related determinations.

DATED: July 17, 1987.

FOR FURTHER INFORMATION CONTACT: Sewall H.E. Johnson, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3616.

Notice

Notice is hereby given that, in a letter of July 17, 1987, the President declared a major disaster under the authority of the Disaster Relief Act of 1974, as amended (42 U.S.C. 5121 *et seq.*, Pub. L. 93-288), as follows:

I have determined that the damage in certain areas of the State of Iowa resulting from severe storms and flooding during the period May 26 through 31, 1987, is of sufficient severity and magnitude to warrant a major-disaster declaration under Public Law 93-288. I, therefore, declare that such a major disaster exists in the State of Iowa.

In order to provide Federal assistance, you are hereby authorized to provide Public Assistance only to assist State and local governments for repair of damages to public facilities required as a result of this incident. Consistent with the requirement that Federal assistance be supplemental, Federal funds provided under PL 93-288 for Public Assistance will be limited to 75 percent of total eligible costs in the designated area. You are further authorized to allocate, from funds available for these purposes, such amounts as you find necessary for administrative expenses.

The time period prescribed for the implementation of section 313(a), priority to certain applications for public facility and public housing assistance, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Mr. Paul Ward of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Iowa to have been affected adversely by this declared major disaster: Fremont, Mills, Montgomery, and Page Counties for Public Assistance only.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Julius W. Becton, Jr.,
Director.
[FR Doc. 87-16922 Filed 7-24-87; 8:45 am]
BILLING CODE 6718-02-M

[FEMA-796-DR]

Major Disaster and Related Determinations; Ohio

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Ohio, (FEMA-796-DR), dated July 17, 1987, and related determinations.

DATED: July 17, 1987.

FOR FURTHER INFORMATION CONTACT: Sewall H.E. Johnson, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3616.