Developing Allocations Among Potentially Responsible Parties for the Costs of Superfund Site Cleanups

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I. EXECUTIVE SUMMARY

The Office of Site Remediation Enforcement contacted nine entities experienced in administering, or participating in the allocation process to collect information regarding allocation methods used to apportion Superfund site costs under the Comprehensive Environmental Response, Compensation, and Liability Act. The information gathered serves to assist EPA and the parties paying these costs in examining settlement options that are fair and minimize transaction costs at Superfund sites. This report reflects the information that gathered from the persons interviewed, and does not reflect the views of the EPA. The following highlights represent the primary findings of this research:

- It is important that the allocation process is flexible to accommodate the site-specific circumstances, and assist with the ultimate goal of reaching settlement and reducing transaction costs;

- The factors selected to apportion costs in any allocation are a function of site type, amount of information available, and the classes of parties participating in the allocation;

- The most critical factors in selecting an allocator for a successful allocation are the neutrality of the allocator and the PRPs' perception of fairness in the process.

II. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is often criticized for the high transaction costs that are incurred by potentially responsible parties (PRPs)[1] in reaching settlements for Superfund site cleanup and in litigating where settlement efforts are unsuccessful. Many believe that much of these transaction costs arise as a result of a retroactive, strict, joint and several liability scheme. One way PRPs may facilitate settlement at the site and reduce transaction costs is through the use of an allocator to apportion cleanup costs among PRPs at the site.

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[1] Section 107(a) of CERCLA defines four classes of parties who may be liable for the cleanup costs at Superfund sites: 1) present owners and operators of a site; 2) past owners and operators of a site; 3) parties which arrange for the disposal, treatment, or storage of the hazardous substance (generators); and 4) parties which transported the substances to the site (transporters). These parties may be pursued by the government under sections 104, 106 and 107 of CERCLA and/or by private parties.

In April 1993, the EPA launched an effort to explore options by which the Agency could implement Superfund in a more fair and efficient manner. One of the initiatives that EPA identified focuses on the use of allocation tools as a way to address fairness concerns and reduce transaction costs in the enforcement of Superfund. As part of this initiative, the Agency committed to conducting information-gathering activities on allocation issues and distributing this information to the regulated community to further facilitate settlements. This report fulfills that commitment by providing information received in interviews on allocation practices from the perspective of both allocators and PRPs participating in allocations.

III. METHODOLOGY

The Office of Site Remediation Enforcement (OSRE) contacted three organizations experienced in leading and developing allocations (allocators), five firms experienced in representing PRPs in CERCLA settlements, three of which function as allocators when not representing parties at sites, and one in-house counsel, to discuss their allocation experiences. The nine parties interviewed are located in, and represent parties from, geographically diverse areas of the country. These interviews were conducted in order to identify allocation methods currently used to allocate costs at sites, and identify issues associated with the implementation of allocation processes. The information in this report is limited to the extent that the number of interviewees is limited.

IV. DEVELOPING ALLOCATIONS

The process by which PRPs organize to apportion site remediation costs with the goal of settling among themselves and collectively with the U.S., is commonly referred to as an allocation. PRPs often coalesce to allocate cost shares so that they may resolve potential liability with the United States, through negotiations with the EPA, to minimize transaction costs that might otherwise be associated with PRP settlement negotiations and litigation. To facilitate these processes (i.e., allocation and settlement), coalescing parties usually set up an allocation committee. The allocation committee may be responsible for developing a method to fairly allocate site costs among the parties and recommending a final allocation to an executive committee, or the group may hire a private consultant (an allocator) who would perform all or part of these functions. The latter arrangement is the focus of this report.

Once the PRPs select an allocator, the allocator's specific responsibilities are set forth in a contract between the PRPs and the allocator. The allocator's role may vary in scope from data collection and compilation activities to development of a cost allocation. Prior to beginning work, the allocator submits to the parties a scope of work for the project, including specific tasks and corresponding cost estimates. The scope of work assures the allocator that participants agree up front on the process used for allocation and provides the participants with necessary control over the allocator's activities and charges. The scope of work continues to operate as a master plan throughout the

allocation process.

Some of those interviewed cite that a primary advantage of involving an allocator in the settlement process is the degree of confidentiality afforded contribution information and confidential business information. Participants are more forthcoming with information to an allocator with whom they have entered a confidentiality agreement than they are to an allocation steering committee with whom there is generally no such agreement.

Others interviewed report that, in some instances, especially for sites with few parties and relatively good contribution information, it is more appropriate for an internal committee, rather than an outside party, to make cost allocation determinations. In these cases, an intermediary adds an unnecessary layer and cost to the allocation process; however, many interviewees observe that it is often necessary to hire an allocator for compilation of the database and to resolve intra-PRP group disputes.

Whether or not a PRP group hires an outside consultant, there are several well-recognized phases of an allocation: 1) development of procedures to govern the allocation (this step includes approval of the allocator's scope of work, where appropriate); 2) information identification and collection; 3) database development including resolution of participant disputes and corrections to the database; 4) submittal of advocacy briefs from PRPs to the allocator and the allocator's review of available information; 5) issuance of draft allocation report; 6) challenges to the allocation; 7) issuance of a final allocation report; and 8) facilitation of a settlement. (See attachment for an overview of the process). When an allocator is hired by the PRP group, the allocator is primarily responsible for developing an allocation of cost, with support from technical and legal support where necessary.

A. Procedural Rules

It is usually during the first phase of the process that the participants develop rules and procedures regarding, for example, ex parte communications, dispute resolutions, and appeals. The allocator may assist in developing a balanced process that ensures both goals of fairness and of reaching an expeditious settlement. Some allocators caution against too much process; they report that the more the allocation process resembles a mini-trial, the higher the transaction costs. Some interviewees argued that procedures such as rights of cross-examination and the use of document production and interrogatory-like requests add substantially to transaction costs but do not significantly change the bottom-line allocation results/figures.

Some of those interviewed noted that confidentiality of information is an issue which needs to be resolved early in the process, and noted that parties usually enter into extensive confidentiality agreements. Parties may agree to keep information confidential

among the participants or with the allocator, where appropriate. These agreement help to ensure that if a party shares information that waste was sent to a particular site other than the site for which an allocation is being conducted, that information may not be used in future dealings with EPA or other parties. By identifying the ground rules as early in the process as possible, the likelihood of law suits resulting from inappropriate disclosures is minimized. This is particularly important to prevent parties from discontinuing participation and attempting to settle with EPA using information gathered from other allocation participants. Opening statements provide an opportunity for parties to propose that certain facts and allocation factors be given consideration. Parties do not generally agree at the outset as to what factors the allocator should apply to apportion site costs. The allocator decides what factors are most relevant and documents these decisions and additional assumptions in the allocation report. Once a draft allocation report is issued, the parties have the opportunity to comment on factors used to allocate costs. Essentially, a dialogue takes place between parties and the allocator until a final allocation report is issued. At this point the parties may choose to accept the report as issued, or use it as a basis for negotiation, in order to reach settlement.

B. Information Collection and Data Compilation

Once the parties agree upon procedures to govern the allocation, the information collection can officially begin. In some cases that means continuing where earlier information gathering efforts ceased. Information-gathering activities vary depending on the site type and classification of parties. Sources typically used for waste contribution information include: responses to EPA's CERCLA section 104(e) information requests; disposal records; site records; interviews; and questionnaires.

The majority of those interviewed report that section 104(e) information is easily obtained as a result of EPA's recent information-sharing policy; however, one interviewee noted that 104(e) information was available only half of the time needed. The latter interviewee proposed that a more diligent use of 104(e) requests by EPA, including collection of penalties by EPA for noncompliance, would result in better data and ultimately, more accurate cost allocations. Availability of 104(e) data becomes particularly relevant for cases in which parties identified by EPA as PRPs at the site do not participate in the allocation process. EPA's 104(e) requests may provide information to the allocator regarding volume of waste contributed by those parties not participating in the allocation.

Even though PRP responses to EPA 104(e) requests are readily available in most cases, allocators are frequently asked to draft and administer questionnaires. Questionnaires typically include questions regarding the waste-generation process, disposal methods, and waste haulers used, to provide the allocator with additional information on waste contributions and leads on transporters and pathways of contamination. Generally, employee statements relied upon for corporate information are required to be notarized, and corporate officer certification is required for verification that corporate records have been searched with diligence. One allocator

observed that participant responses to allocator information requests are often more thorough than responses to EPA's 104(e) requests because of PRP-allocator confidentiality agreements.

Information gathering in the case of a generator landfill allocation initially focuses on obtaining available volumetric information or information which may be used to generate surrogate volumetric information. For periods in which volumetric information is absent, data is often extrapolated from existing waste production and disposal records for a given period to determine waste contribution for a non-recorded period. The yearly amount of waste produced and the number of years of operation are two factors frequently used during extrapolation in order to better calculate volumetric contributions absent records. Another example of how extrapolation is used is the case in which a party utilizes four recycling facilities for disposal annually. In the absence of other information, the allocator may, for example, use the assumption that the recycling facility at issue accepted one-fourth of the facility's waste during the annual period.

In addition, some allocators rely upon waste output models of a party's production facility for cases in which waste-disposal information is absent. For example, if a facility manufactures 50 units in a given year and a corresponding byproduct of 2 gallons of hazardous materials, then, in the absence of other information, the allocator may assume the generation of 2 gallons of byproduct in a recordless year provided that manufacturing remains at 50 units. One interviewee objected to waste output models because models may inaccurately portray production during that period, or even worse, they may unjustly penalize a company for keeping detailed production or disposal records during other time periods. A model could attribute the generation of waste to a PRP in excess of the amount actually produce based on records.

In an effort to fill data gaps, economic issues are also considered in developing disposal assumptions. For example, an allocator may rely upon the assumption that the transporter hired by the generator used the disposal facility which was most cost effective for the transporter.

If volumetric contribution information is collected, the allocator develops a database to house the information. Many of those interviewed first classify parties by waste type disposed (e.g., solids verses liquids). Once waste type categories are developed, the allocator then ranks parties by volume of waste disposed. Some interviewees stressed that consistency of judgment throughout development of the database is critical in developing an accurate allocation; therefore, the fewer people directly involved in making interpretations, applying assumptions, and inputting data, the more reliable the data. PRPs are generally provided an opportunity to provide a quality control review of the database for clerical and technical errors. That review may result in challenges to data input, such as recording of duplicate transactions and purported misinterpretations of data.

For sites at which contamination is due to the historic operation of a manufacturing facility or facilities (non-landfill sites) or landfill sites at which the only

PRPs are owners or operators, though the basic information collection process is similar, interviewees reported that a substantially different approach must be taken in developing and organizing a database. The ranking of parties in these situations is dependent upon site specific circumstances and generally does not lend to ranking parties in a purely quantitative manner. In contrast to many landfill sites where volumetric data is available from disposal records, at non-landfill sites disposal data is not available since any disposal was generally a consequence of a manufacturing process which included undocumented discharges and inadvertent spills of hazardous substances. Therefore, surrogate data may be generated by an evaluation of: 1) typical manufacturing process discharges and spills; 2) production line practices; and 3) the environmental fate of contaminants.

Finally, those interviewed report that for sites at which an allocation is between PRPs which are owners and operators, information should be obtained regarding the practices and knowledge of the parties in order to determine relative responsibility. Information sought typically includes length of ownership, operational control, degree of control over disposal practices, knowledge of the hazardous nature of materials disposed, and financial or other benefit derived from allowing disposal. Once data is collected, the process of allocating cost shares may begin.

C. Application of Allocation Factors

The Gore Amendment[2], an unadopted amendment proposed to the original Superfund bill, contains the following factors to be considered when allocating site costs among PRPs: (1) the amount of hazardous substances involved; (2) the degree of toxicity or hazard of the materials involved; (3) the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances; (4) the degree of care exercised by the parties with respect to the substances involved; and (5) the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.

Since proposed, the Gore factors have been applied as relevant factors, in whole or in part, by allocators in private allocations and by courts in contribution actions.[3] In both contexts, a variety of additional factors have been applied depending on site circumstances and at the discretion of the judge or allocator. Those factors include: 1) years of ownership or operation/years of generation or transportation/years of manufacturing process; 2) consideration of the petroleum exclusion; 3) the ultimate

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[2] See H.R. Rep. No. 99-253 (III), 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3042.

[3] See "Allocating Contribution Shares in Superfund Cases," Chemical Waste Litigation Reporter; "Allocation of Response Costs in Private Superfund Actions," Chemical Waste Litigation Reporter, Vol. 17, No. , December 1988.

environmental fate of wastes at the site; 4) the degree of care exercised in waste disposal or ownership and operation; 5) the degree of control over waste practices; 6) permit violations; 7) the degree to which a party is providing a public service; and 8) knowledge of waste disposal practices. One allocator reported using the degree of party cooperation as a factor since allocations only work in situations with cooperating PRPs.

Because the goal of the allocation process is settlement, all interviewees recommend that application of allocation factors should be flexible to accommodate site-specific situations and to increase the likelihood of settlement. None of the allocators interviewed rely on specific formulas or models to allocate cost shares. They all emphasized that factors applied are a function of site type, amount of information available, and classes of parties involved in

the allocation. Generally, in generator/transporter allocations, the allocator primarily considers volume and contaminant fate in allocating cost shares. Some interviewees believe that the use of volumetric information alone is inappropriate to develop a cost allocation. In owner/operator allocations, the allocator's focus shifts to factors such as degree of care in, and years of, ownership and operation.

Of the allocation factors identified, those interviewed identified toxicity of waste as the factor generating the most controversy in its application. Interviewees reported that claims of toxicity often result in much time spent name-calling and little time addressing contribution. Although many of those interviewed indicate that the toxicity of waste contributed is considered as a factor in a generator/transporter allocation, most parties believe that toxicity alone is not an appropriate modifier because it is a poor measure of site responsibility. More specifically, for allocations at landfill sites involving primarily generators, for example, the degree of toxicity of a party's waste is used to manipulate the raw volumetric data by either discounting or appreciating a party's contribution to the site. Interviewees report that many PRPs feel that toxicity should only be used to discount baseline volumetric information already determined (i.e., more weight is giving to more toxic waste when volumes are relatively equal). They state that some PRPs prefer developing a waste contribution table made up solely of volumetric contributions, and then providing an appeals process for parties to argue for adjustment of their contributions based on toxicity claims.

Rather than considering toxicity of a waste alone, many interviewees propose that toxicity be considered in relation to the contaminant's role in the driving the cost of the remedy at the site. For example, if a generator disposed of a highly toxic chemical at a site, but that contaminant was not the primary contaminant of concern being addressed and resulting in the high cost of the remedy, then that party's share would not be increased because of its waste toxicity any more than the parties who contributed less toxic waste to the site. In addition, if the toxic materials disposed at the site are well contained (e.g., remained immobile and capped as part of landfill containment) and consequently represent a discernable component of the cleanup costs, the participant would not be responsible for a greater cost share associated with a groundwater pump and treat system simply because of the high toxicity of the material. This application

focuses on the ultimate role of a contaminant in site remediation, rather than the toxicological characteristic of the waste.

Although litigative risk is not a factor of the actual contribution findings, it may be used to modify the ultimate settlement. Even after the allocator issues a final recommendation, the degree to which parties are motivated to settle may still be an issue. For example, litigation risk may be used as a floor to determine a minimum payment. If volumetric information does not exist but the party is presumed to have been a small volume contributor, then the minimum settlement cost for that party may be set at the cost of litigation, and that amount may become the party's allocated share.

D. Allocations between Classes of Parties

None of the allocators interviewed identified specific formulas or reliance on any particular rule of thumb to determine shares in cases in which generators/transporters and owner/operators are both involved. Interviewees stated that allocations which include owners and operators pose a greater challenge in achieving a reliable allocation than generator/transporter allocations.

Unlike generator/transporter allocations, at which volumetric information or surrogates may be used to generate volumetric information, raw volumetric data is inapplicable in calculations of owner/operator allocations. Often, allocators utilize site-specific facts and court opinions with similar fact patterns to determine what factors are applicable for an owner/operator allocation. Most allocators interviewed rely on some or all of the following factors in determining owner/operator share: (1) degree of care exercised in ownership or operation; (2) years of ownership or operation; (3) degree of control over waste practices; (4) permit violations; (5) degree to which party is providing a public service; (6) knowledge of waste disposal practices; and (7) economic benefits from ownership and operation.

For generator/owner/operator allocations, often, the owner/operator is not part of the original group of coalescing parties. Generators/transporters commonly initiate and participate in an allocation without involving the owner/operator in order to allocate among themselves and adjust for cost shares depending on a determination of an orphan share.[4] Frequently it is futile for parties to invest much time in determining an owner/operator share because the owner/operators are often financially non-viable, and have little money to contribute to site cleanup. In cases where generator/transporters

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[4] Depending on the allocation, there are different ways to define orphan share. An orphan share may be defined as contamination attributed to defunct, bankrupt or financially nonviable parties. At other sites it may also be defined as contamination that cannot be attributed to an identifiable party.

have developed an allocation scheme absent owner/operator participation, the generator/transporter participants may look first to financial viability of the owner/operator. Based on an ability-to-pay analysis (discussed in more detail below) of the owner/operator, the group often takes whatever payment the owner/operator can make, and uses that payment to offset the total settlement amount. In those cases, no percentage share is assigned to the owner/operator.

Where a generator and transporter are responsible for the same waste, interviewees identified a couple of ways to allocate the costs: (1) divide the cost of their allocated share between the two parties; or (2) if there is an orphan share, assign the costs associated with their allocated share to either the transporter or generator and allocate the orphan share or a portion thereof to the other party. Facts associated with the generators' and transporters' activities can affect the share allocated to those parties. Some factors often considered with generator/transporter divisions are whether the transporter had alternative disposal locations available, or by contract was required to dispose of waste at a particular location, and the respective parties' culpability and general practices.

E. Federal, State and Municipal Parties

Most allocators indicate little difference in their experience whether dealing with private, federal, or state parties as PRPs. Most interviewees indicate that allocators treat federal and state parties similarly to other parties; however, private parties in some cases indicate uneasiness about participating in allocations with federal parties because of confidentiality concerns. PRPs develop very extensive agreements to preserve confidentiality of information shared during the allocation process; generally these agreements are not entered into with Federal parties due to the dual role of the government as enforcer and PRP. With the exception of confidentiality issues, the interviewees did not identify additional issues which arise by virtue of federal and state participation in allocations. However, some of those interviewed identified unique issues which arise with allocations involving municipalities.

Some interviewees observed that for cases in which PRPs perceive that EPA treats municipalities differently than the other parties at the site, the allocation process may deteriorate. Of those interviewed, some stated that not knowing the grounds upon which the EPA may settle with a municipal party may negatively affect the allocation. In addition, one allocator stated that when EPA contemplates settling with a municipality for an amount lower than the amount determined in the allocation proceeding, participants often feel slighted and the allocation effort may fail. That allocator suggested that the development of a cohesive municipal PRP policy by EPA would alleviate these concerns.

Another interviewee, stressed the significance of differences between municipalities and other parties which should be taken into consideration, on a site-specific basis, in allocations. The allocator observed that municipalities are not for profit organizations; therefore, economic benefit factors generally considered in allocations between private parties are inappropriate to use. The allocator also noted that determination of cost shares should be tempered by the fact that municipalities perform

a public service. That factor should be weighed against any culpability a municipality might have demonstrated in the disposal, transportation, ownership or operation of hazardous waste.

F. Ability to Pay Determinations

Most sources indicate that, with the exception of owner/operator contribution determinations, ability-to-pay issues are not considered until the allocation recommendation is completed. At that time, inability-to-pay claims are presented, and where proven, the discounted amount is redistributed among the remaining parties. In some cases allocators may also be involved in structured settlements for parties with limited ability to pay (i.e., development of a payment schedule).

Determinations of ability to pay are reported as most difficult among municipalities. When allocator's assess a municipality's financial viability, they must consider issues not relevant to assessing private parties' viability. Indicators of municipal health reportedly used include the following: overall net debt as percent of full market value of taxable property; bond rating; unemployment; median household income; property tax collection rate; and property tax revenues as a percent of full market value of taxable property. For assisting in assessment of municipality assets, one source recommends the article, "Assessing a Municipality's Ability to Pay Superfund Cleanup Costs," written by Tex Ann Reid, U.S. EPA, Region IV, and Edward M. Clark, Anthony M. Diecidue, and Mark F. Johnson, PRC Environmental Management, Inc. "Methodology for Analyzing a Municipality's Financial Capability," by the Economic Analysis Division, of EPA's Office of Policy, Planning and Evaluation (February 28, 1985) is also recommended by this person for assistence in determining municipal financial health.

G. Parent and Successor Corporation Issue

Whether parent and successors of a participating PRP should be allocated a cost share may be considered at some sites (e.g., in the case of an impending bankruptcy claim). In general, parent and successor corporation issues are treated in one of two ways. At some sites, parent/successor issues are not considered in the allocation; rather, the participants are responsible for seeking resolution on issues, such as whether the parent or successor may be liable under CERCLA, in side-bar negotiations without the allocator's assistance or through litigation. At other sites, a successor may be brought into the allocation if there has already been a finding of liability or an allocator is asked to undertake an analysis of whether a parent company is liable or successor liability would attach. Some of the interviewees expressed a reluctance to address issues of parent and successor liability.

V. ALLOCATOR EXPERTISE

All interviewees agreed that the most critical factors for a successful and accurate allocation are the neutrality of the allocator and the perception of fairness. One allocator noted that an allocation is perceived as fair when the participants have an opportunity to present their arguments, and they believe those arguments are taken into

consideration and addressed rationally. Several interviewees noted that an allocator's neutrality and ethics are key elements to good faith participation by parties. Interviewees all agree that full disclosure of possible conflicts of interest by the allocator is an absolute necessity prior to commencing allocation efforts. Because of participant desires for neutrality, PRPs often disapprove of prescribed formulas or models. Preconceived models may indicate that an allocator is not beginning the process with a neutral view.

Most persons interviewed agreed that ideally allocators should possess extensive familiarity with CERCLA. One allocator noted that a PRP has greater confidence in the process if a person experienced in Superfund is allocating cost shares. That person stated that hands-on experience can not be substituted with academic experiences. Interviewees did not agree as to whether or not the allocator should be an attorney. None of the interviewees expressed interest or concern for an allocator certification program, nor felt that administrative law judges or arbitrators are better equipped to conduct Superfund allocations.

Other traits considered helpful to the allocator include: excellent interpersonal and communication skills (listening to other ideas and reconsidering when necessary), and problem-solving abilities. In addition, interviewees agreed that allocators should be team builders, steer the allocation process, and periodically update the PRPs on progress of the allocation. Allocators are also expected to introduce issues needing resolution, make recommendations as to the resolution of these issues, and ultimately keep the process moving towards settlement.

VI. TIME AND EXPENSE CONSIDERATIONS

The time and expenses associated with an allocation varies greatly from site to site, but are primarily influenced by the number of parties at a site and the cost of remediation. Generally, an allocation at an average site may take six months. At some sites, however, allocations have been completed within two months. Complicated sites may require up to two years for resolution. A generally accepted range of time involved for allocating at sites is six months to two years.

For cases in which remediation is most costly, more time is required to develop an acceptable allocation. In addition, a correlation exists between the amount of documentation available and the amount of time invested in negotiating an allocation: for cases in which ample information is available, less time is required for an allocation. Allocations are more expensive now than they were in the 70s and 80s in part because volumetric information is not now as readily available.

The expense of an allocation (e.g., costs of retaining allocation professional services) depends largely on the number of parties participating or being allocated shares. Generally, allocation costs for a small site range from $25,000 to $100,000. The expense for complex sites, however, may exceed $200,000, with a likely maximum of $500,000. For generator/transporter allocations, a significant portion of the cost is associated with development of the database.

The internal expense of participating in an allocation process must also be considered. PRPs represented by internal counsel report that the expense of participating in an allocation are minimized because their representative counsel are salaried employees, costing less than counsel retained on a project-specific basis.

VII. PURPOSE AND USE OF THIS DOCUMENT

This report reflects the information that was gathered from persons involved with administering or participating in an allocation process to apportion the Superfund cleanup costs. This report does not constitute the views of, or policy by, the Agency and may not be relied upon to create any specific rights or privileges, substantive or procedural, enforceable at law or in equity.