UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: CERCLA Future Response Costs: Settlement, Billing and Collection

FROM: Kenneth Patterson, Acting Director /s/
Regional Support Division
Office of Site Remediation Enforcement (OSRE)

TO: Office of Regional Counsel Branch Chiefs, Regions I-X

The timely billing and collection of Superfund's future response costs continues to be a high priority for the Agency. Recently, EPA focused on the backlog of unbilled response costs. Due to significant Regional effort, EPA has significantly reduced this backlog.

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In addition to continuing timely and comprehensive billing, we are focused on collecting the amounts billed. This memorandum addresses some of the most common issues that arise with the billing and collection of future response costs.

The information presented here is largely based on the May 2001 model RD/RA consent decree language; deviations from the model may lead to other strategies for billing and collection of future response costs.

This memorandum is intended solely for the guidance of employees of EPA. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts. Unless otherwise specified in the paper, questions regarding the billing and collection of future response costs can be directed to OSRE's Regional Support Division.[1]

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[1] At the time of publication, the OSRE contact is David Dowton (dowton.david@epa.gov; 202-564-4228)

I. Settling Future Costs

A. Adherence to Model CERCLA Settlement Provisions

Effective future response cost billing and collection starts at the settlement phase.[2] The model consent decree clearly reflects EPA's expectation that settlements will recover all future response costs not inconsistent with the National Contingency Plan (NCP).[3] Future response costs include the Agency's oversight costs, and other costs such as enforcement costs and interim response costs. The model consent decree defines "Future response costs" as "all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, . . . and shall also include all 'interim response costs,' and all interest on those 'past response costs' Settling Defendants have agreed to reimburse under this consent decree."[4]

Two sections of the model consent decree critical to the billing and collection of future response costs are the *Payment of Response Costs* and *Dispute Resolution* provisions.[5] Both of these provisions contain language that should not be deleted or negotiated out of a settlement absent extraordinary circumstances. Of particular importance is the requirement that a party disputing a future response cost bill place the disputed funds in an interest-bearing escrow account.

The escrow provision acts as a deterrent to frivolous disputes or delay used by a disputing party. Because the Superfund interest rate is relatively low, a party may have an incentive to delay because it may make more money by privately investing contested funds instead of placing the funds in escrow. In contrast, if the party places the contested funds in

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[2] Unless otherwise specified, references to "model consent decree," "model settlement," or "model language" refer to the 2001 Model CERCLA RD/RA consent decree (dated June 15, 2001). Although the document focuses on RD/RA future response costs, many of the principles are also applicable to RI/FS and removal response costs.

[3] *See Model RD/RA Consent Decree*, Section XVI, *Payments for Response Costs*, ¶ 55 (2001). Under the terms of the model consent decree, the settling party agrees to pay "all future response costs not inconsistent with the National Contingency Plan."

[4] *See Model RD/RA Consent Decree*, Section IV, *Definitions*, ¶ 4 (2001). In addition, the latest version of the model defines "Future Oversight Costs" as "that portion of 'Future Response Costs' that EPA incurs in monitoring and supervising Settling Defendant's performance of the Work to determine whether such performance is consistent with the requirements of this Consent Decree, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Consent Decree, as well as costs incurred in overseeing implementation of the Work . . . . " The "Future Oversight Costs" definition is usually used in RD/RA consent decrees providing orphan share compensation through forgiveness of RD/RA oversight costs.

[5] *Model RD/RA Consent Decree*, Section XVI, *Dispute Resolution*, and Section XIX, *Payment of Response Costs* (2001).

escrow, it does not have use of the money during the pendency of the dispute, and thus has an incentive to conclude the dispute quickly. Consequently, the model consent decree requires the party to pay the uncontested portion of the future response cost bill, and simultaneously place contested funds in an interest bearing escrow account.[6]

> Absent unusual circumstances, parties disputing a future response cost bill are required to place the disputed funds in an escrow account.

B. Unique Billing Provisions

It is not uncommon for settlements to contain minor, insignificant deviations from the model consent decree. On rare occasions, however, settlements have significantly deviated from the model language and established unique billing provisions. Deviations that prevent EPA from recovering all response costs not inconsistent with the NCP are not favored. Two examples of such modifications to the model language are provisions that place a ceiling (*i.e.*, "cap") on the amount of future response costs a party has to pay, and provisions that create a floor that must be reached before the Agency agrees to start billing a party for future response costs.

Generally, a settlement that creates a cap on future costs provides that a private party will only be responsible for a sum-certain amount of future response costs. Any costs incurred over that amount are covered by EPA using money from the Hazardous Substances Superfund (Fund). In most cases the use of a cap on future response costs is not favored; EPA's future response costs are legitimate response costs that EPA is entitled to recover fully. Placing a cap on future response costs may place an unnecessary burden on the Fund to compensate for any shortfall.

A settlement that creates a floor for future response cost billing provides that EPA will not commence billing until EPA incurs a sum-certain amount of response costs (the "threshold amount"). In the same vein as caps, future response cost floors are generally not favored because the Agency is depriving itself of the recovery of legitimate costs. Furthermore, floors place the burden on the Agency to document that the "threshold amount" has been reached before the Agency may start billing. Settlements that contain floors require EPA to expend resources to show that the Agency has reached the threshold amount. The main exception to the general rule against floors is in cases where EPA is waiving some portion of its future response costs in the form of orphan share compensation.[7]

> Payment structures that could result in less than full recovery of future response costs are generally not favored.

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[6] Placing funds in escrow is discussed in more detail in Section IV.B on page 6.

[7] *See Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time Critical Removals*, S. Herman, June 3, 1996. For appropriate model settlement language *see Model Language Relating to Orphan Share Compensation Through the Compromise of Future Oversight Costs*, Breen/Gelber, Sept. 28, 2000. There might be cases where it would be appropriate to offer a cap or floor on future response costs given the special circumstances of the situation (*e.g.*, significant litigation risk, value of the work performed, etc.). Such an arrangement, however, has

C. Use of Special Accounts

Recent guidance on the use of special accounts funds discusses, among other things, the use of special accounts to pay for oversight of PRP-lead RD/RA.[8] The guidance provides that special account funds may be used to fund the oversight of a PRP-lead RI/FS or PRP-lead removal action *where there is an agreement in place for the work PRPs to reimburse EPA for its oversight costs*.[9] If there are sufficient funds in the special account, EPA can draw down on special account proceeds to fund the oversight, and then bill PRPs for those costs. If work remains at the site, future oversight payments subsequently received from PRPs should be deposited back into the special account.

A private party may agree to pre-pay oversight costs with the payments being deposited into a special account. Regions may negotiate payment of the full amount of oversight based on cost information found in the ROD, or payment on a periodic basis. This approach does not, however, remove a party's obligation to reimburse all of EPA's oversight costs;[10] the party remains responsible for any future response costs that are not covered by the pre-payment. PRPs that perform the response action and pre-pay oversight costs are eligible to receive any remaining pre-paid oversight dollars at the conclusion of the response action since the party only agreed to pay the actual costs of the oversight.[11]

II. Billing Issues

A. Timely Billing of Future Response Costs

The model consent decree states that, "on a periodic basis the United States will send Settling Defendants a bill requiring payment" of incurred future response costs.[12] Although EPA maintains its flexibility in billing future response costs, the Agency strives to issue future

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the potential to constitute a compromise of recoverable costs. Therefore, please consult with Headquarters as required. *See Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas*. (Originally issued on 9/30/98. Part III is superseded by the revised OSRE CERCLA Prior Approval, Concurrence, and Consultation Roles Chart issued on 7/13/01). Consultation is required for settlements that compromise future response costs unless the compromise is for orphan share compensation or required by *United States v. Rohm & Haas*.

[8] *Special Accounts: Guidance on Key Decision Points in Using Special Account Funds*, Breen/Davies, OSWER # 9275.1-03, Sept. 28, 2001.

[9] Special account funds may also be used to fund oversight when the work is being performed under a unilateral administrative order, providing the Region determines that is the best use of the funds consistent with the special accounts' guidance.

[10] This does not apply to cases where EPA enters into a settlement that provides a release for future response cost payments in exchange for a lump-sum prepayment of future response costs (cash-outs).

[11] *See Update and Implementation of the Superfund Reform on Special Accounts*, p.4 (Feb. 7, 1997).

[12] *See Model RD/RA Consent Decree*, Section XVI, *Payments for Response Costs*, ¶ 55 (2001).

response cost bills annually. In July 1999, the Office of the Chief Financial Officer (OCFO) created a new performance measure for the timely billing of future response costs.[13] For measurement and evaluation purposes only, this "SRO" measure defines "periodic billing" as meaning annual billings. The measure, however, is for evaluation purposes only and does not create any legal obligation for the Agency.

B. Indirect Costs

EPA has been recovering indirect costs associated with Superfund sites since 1987. Initially, EPA selected a very conservative method of indirect cost accounting, which resulted in only one-third of the allocable indirect costs being charged to sites. OCFO has developed a new indirect accounting methodology that achieves "full cost accounting." The revised methodology allocates the indirect costs in proportion to the Superfund sites' direct costs (previously, indirect costs were allocated based on EPA staff hours charged to a site). The new methodology has been favorably reviewed by the General Accounting Office, the Office of Management and Budget and an outside accounting firm. The new methodology took effect on October 1, 2000. All future response costs bills sent after October 1, 2000 should use the new methodology to calculate indirect costs.

C. Billing DOJ Costs

The Department of Justice (DOJ) sometimes incurs costs that are within the definitions of future costs or interim costs and are therefore billable under a settlement. When that happens, DOJ's costs should typically be included in EPA's future response costs bill. Pursuant to discussions between EPA and DOJ, procedures have been implemented to provide EPA regional offices, on a timely basis, with information regarding billable DOJ costs and documentation for use in issuing bills. These procedures will facilitate the billing and collection of DOJ costs incurred under the future costs (including interim costs) provisions of consent decrees and administrative orders on consent. These procedures, which apply only to the process of billing costs under settlements, are detailed in the attachment to this memorandum. Questions on the procedures should be directed to Kevin Brittingham (202-564-4941) in OCFO's Financial Management Division or Peggy Fenlon-Gore (202-514-5245) at DOJ.

III. Post-Billing/Dispute Resolution

A. Proper Invocation of Dispute Resolution[14]

In most cases a settlement will provide that a party has 30 days to pay a bill for future response costs. Under the terms of most settlements, the party may decide to dispute all or a

[13] *See Performance Measures*, Michael W. S. Ryan, July 28, 1999.

[14] In situations where a party properly invokes dispute resolution, future response cost bills should continue to be issued as scheduled.

portion of the bill anytime within that 30 day period.[15] The model consent decree provides that a party must specifically identify the contested future response costs and the basis for the challenge.[16] The model consent decree limits a dispute to two distinct grounds:

1. EPA made an accounting error; or
2. EPA included a cost item that represents costs that are inconsistent with the NCP.[17]

Challenges beyond the articulated grounds may be considered outside the scope of the agreement and, therefore, not a permissible basis for invoking dispute resolution.[18] If a party disputes a bill on grounds outside those articulated in the settlement, EPA should notify the party that they have not paid the bill nor invoked dispute resolution. The notice should give the party 14 days to either pay the bill or properly invoke dispute resolution. Failure to pay the bill or properly invoke dispute resolution will result in enforcement of the debt under the April 2000 Collection Process Memo.[19]

Acceptable challenges to a future response cost bill are limited; challenges outside the grounds articulated in the settlement document may not constitute a valid invocation of the dispute resolution process.

B. Placement of Funds in Escrow

Under the model CD provisions, if a party identifies a permissible basis to invoke dispute resolution, it must also:

1. pay the uncontested portion of the future response bill, and
2. place the contested portion of the bill in an interest bearing escrow account.

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[15] EPA may decide not to consider a dispute raised outside the 30 day window after considering the circumstances. If EPA decides not to consider a dispute, EPA should notify the party that it has not invoked the dispute resolution process in a timely manner and should restate the demand for payment. If the party again fails to submit payment, EPA should proceed with enforcement of the debt as set forth in the April 2000 Collections Guidance (*Delinquent Accounts Receivable: Interim Guidance on the Referral Process and Timing for Collection of Delinquent Debts Arising under Superfund Judicial or Administrative Settlements*, Connor/McNeil, April 6, 2000)(hereafter referred to as the "April 2000 Collection Process Memo" - the Collections Guidance will be superceded by a final guidance issued in Summer 2002). Exceptions should be made for problems that fall outside the control of EPA and the party (*e.g.*, mail delivery problems).

[16] *See Model RD/RA Consent Decree*, Section XVI, *Payments for Response Costs*, ¶ 56 (2001).

[17] While the model consent decree limits challenges to two grounds, in any dispute the actual language of the consent decree controls.

[18] For a discussion of where the party requests additional documentation (*i.e.*, documentation beyond what EPA agreed to provide in the settlement) see Section IV.C.1, p. 7.

[19] In addition to the material specified in the April 2000 Collection Process Memo, the referral should include all correspondence which indicates that the party was given an opportunity to either pay the future response cost bill or properly invoke dispute resolution.

The party should provide EPA evidence of the creation of the account as outlined in the settlement. If a party fails to create the escrow account, EPA should notify the party that it is not in compliance with the dispute resolution provision(s) of the settlement and should give the party an opportunity to cure the defect. In addition, in most cases EPA should convey that creation of an escrow account is a necessary requirement to invoke the dispute resolution process and failure to place the funds in escrow will result in EPA considering the party to have waived its dispute resolution rights under the settlement. EPA should then proceed with enforcement of the debt as set forth in the April 2000 Collection Process Memo.[20]

> EPA's obligation is to provide the level of cost documentation agreed upon in the settlement document.

> Valid invocation of dispute resolution requires the settling defendant to:
>
> 1. identify a permissible ground for the dispute;
> 2. pay uncontested costs; and
> 3. escrow contested amounts

C. Commonly Raised Challenges

Although the model language limits disputes to two grounds, parties have nonetheless raised a diverse array of challenges to EPA's ability to collect future response costs. Practically every type of cost incurred by EPA has been targeted for challenge at one point or another. With few exceptions, EPA has been successful in defending against these challenges. A discussion of the most common areas disputed by private parties follows.

1. Requests for Additional Documentation

Frequently, parties request additional cost documentation after receiving a future response cost bill from EPA. EPA's primary concern should be to fulfill its obligation under the settlement. This usually involves providing a cost summary with the bill. The model consent decree does not require EPA to provide the underlying financial and work performed documentation. It is quite common, however, for parties to request the underlying documentation. In addition, the National Contingency Plan (NCP) does not contain any specific standard concerning the documentation of costs. Rather, all the NCP requires is that the United States provide sufficient documentation for an accurate accounting of costs incurred by the federal government.

Whether to respond to a request for additional documentation is a Regional decision that will hinge on a number of factors, including resources, litigation considerations, and whether the party has placed contested funds in escrow. The Region should make clear to the party that the cost of producing the additional documentation is a response cost that will be

[20] The model consent decree states that, "simultaneously with establishment of the escrow account, the settling defendants shall initiate the dispute resolution procedures." *See Model RD/RA Consent Decree*, Section XVI, *Payments for Response Costs*, ¶ 56 (2001).

billed to the party as part of another future response cost bill.

2. Inconsistency with the NCP

The model consent decree requires settling defendants to pay all of EPA's future response costs that are not inconsistent with the NCP. Settling defendants sometimes contest payment by alleging that "a cost item represents costs that are inconsistent with the NCP."[21] A well-established body of case law developed in Section 107(a) cost recovery cases should be applied when assessing allegations of NCP inconsistency during billing disputes.

Courts have consistently held that under the statute, the burden is on the private party to demonstrate inconsistency with the NCP.[22] Courts also have consistently held that an assertion that the United States' response costs are "unreasonable" does not make the costs unrecoverable under CERCLA.[23]

Moreover, a party cannot challenge individual costs as inconsistent with the NCP.[24] Rather, a party must show that the government's response action that gave rise to the particular cost is inconsistent with the NCP.[25] In order to make such a showing, a party must identify the particular NCP provision violated and demonstrate that EPA acted arbitrarily and capriciously in choosing a particular response action to respond to cleanup of a release to the

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[21] *See Model RD/RA Consent Decree*, Section XVI, *Payments for Response Costs*, ¶ 56 (2001).

[22] *United States v. NEPACCO*, 579 F. Supp. 823, 850-851 (W.D. Mo. 1984) (holding "the insertion of the word 'not' immediately prior to 'inconsistent' to mean that the defendants are presumed liable for all response cost incurred unless they can overcome this presumption by presenting evidence of inconsistency."), *aff'd* in pertinent part, *rev'd* in part on other grounds, 810 F.2d 726, 747 (8th Cir. 1986). *See also*, *United States v. Findett Corp.*, 220 F.3d 842, 849 (8th Cir. 2000); *United States v. Chromalloy*, 158 F.3d 345, 353 (5th Cir. 1998); *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992), *cert. denied*, 510 U.S. 913 (1993); *United States v. Burlington Northern*, 200 F.3d 679, 695 (10th Cir. 1999); *United States v. Chrysler Corp.*, 168 F. Supp.2d 754 (N.D. Ohio 2001); *United States v. Pretty Products*, 780 F. Supp. 1488, 1500 (S.D. Ohio 1991).

[23] *United States v. NEPACCO*, 810 F.2d 726, 747-748 (8th Cir. 1986)("The statutory language also supports the district court's reasoning that under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), 'all costs' incurred by the government that are not inconsistent with the NCP are conclusively presumed to be reasonable."); *Chrysler*, 168 F. Supp.2d at 764 (holding that any response costs that are consistent with the NCP are conclusively presumed to be reasonable); *Kramer*, 757 F. Supp. at 436. *See also*, *Hardage*, 982 F.2d at 1441, 1443 (CERCLA § 107(a)(4)(A) does not limit the government's recovery to "all reasonable costs; rather it permits the government to recover *all* costs . . . not inconsistent with the NCP."); *Chromalloy*, 158 F.3d at 352.

[24] *Hardage*, 982 F.2d at 1443 ("Costs, by themselves, cannot be inconsistent with the NCP").

[25] *Id*. at 1442; *United States v. Kramer*, 913 F. Supp. 848, 867 (D.N.J. 1995).

environment.[26] And, as several courts have held, a party must show that the arbitrary and capricious actions of the EPA resulted in "avoidable and unnecessary remediation costs."[27]

3. Recovery of Oversight Costs/*United States v. Rohm & Haas*

EPA believes that the *Rohm & Haas*[30] case was wrongly decided and therefore, continues to vigorously oppose any extension of the *Rohm & Haas* decision outside of the Third Circuit. Outside of the Third Circuit, the *Rohm & Haas* decision provides no basis for not billing or for compromising oversight costs.

Section 107(a) states that a liable party is responsible for all costs of removal or remedial action incurred by the United States that are not inconsistent with the NCP.[31] EPA has always taken the position that the broad definition of "response,"[32] which includes enforcement activities related to removals and remedial actions, includes EPA's oversight activities, and therefore, that the costs associated with oversight activities are recoverable. In addition, the definitions of "removal" and "remedial action" specifically include a reference to "monitoring."[33] Based on this reasoning the United States had been largely successful in recovering EPA oversight costs, with the U.S. Court of Appeals for the Third Circuit decision in *United States v. Rohm & Haas* being the exception.

In *Rohm & Haas*, the Third Circuit held that the United States could not recover the costs of overseeing a cleanup performed pursuant to a RCRA[34] corrective action order. EPA had entered into the RCRA Section 3008(h) consent order with Rohm & Haas in 1985. The order, however, did not provide for the reimbursement of EPA's oversight costs. Therefore, in

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[26] *Id*; *United States v. American Cyanamid Co.*, 786 F. Supp. 152, 161 (D.R.I. 1992); *Kramer*, 757 F. Supp. at 436.

[27] *See United States v. Burlington Northern*, 200 F.3d 679, 695 (10th Cir. 1999); *See also*, *American Cyanamid*, 786 F. Supp. at 161. Also note that CERCLA's provision governing remedy challenges provides that: "In reviewing alleged procedural errors, the court may disallow costs or damages only if they errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made." 42 U.S.C. § 9613(j)(4).

[30] *United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3rd Cir. 1993)

[31] 42 U.S.C. § 9607(a).

[32] 42 U.S.C. § 9601(25). "The terms 'respond' or 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."

[33] 42 U.S.C. §§ 9601(23), 9601(24) . Although neither definition specifically mentions "oversight," the definition of "removal" includes "such actions as may be necessary to *monitor*, assess and evaluate the release or threat of release," and the definition of "remedial action" includes "any *monitoring* reasonably required to assure that such actions protect the public health and welfare and the environment (italics added)."

[34] Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq*.

order to recover the government's past costs, including oversight costs, the United States filed a CERCLA Section 107(a) cost recovery action against Rohm & Haas in 1990. Although the United States was successful at the district court level, the Third Circuit remanded the lower court's decision and held that the United States was unable to recover oversight costs associated with removals.[35] The Third Circuit found that EPA's oversight costs were "administrative costs" that required a specific Congressional delegation to the Executive in order to be recoverable. Finding that CERCLA did not contain this express delegation, the Court held that EPA's removal oversight costs were unrecoverable.

The *Rohm & Haas* decision is still binding within the Third Circuit. Subsequent district court decisions within the Third Circuit have further defined the recoverability of EPA's oversight costs. In *United States v. Witco*, a Pennsylvania district court extended the *Rohm & Haas* decision to cover oversight of remedial actions as well.[36] The court found that a sufficient distinction between removals and remedial actions did not exist to allow the court to disregard the *Rohm & Haas* decision. As a result, the court felt "constrained" by the *Rohm & Haas* decision and found EPA's costs of overseeing remedial action were not recoverable.

Despite the *Witco* decision's extension of the *Rohm & Haas* holding to oversight of remedial actions, some district courts within the Third Circuit have held that *Rohm & Haas* does not affect a party's obligation under a previously negotiated consent decree.[37] These courts have generally found that where the authority for the government to recover oversight costs comes from a consent decree, rather than from Section 107(a), general contract principles apply. Furthermore, these courts have refused to find that the *Rohm & Haas* decision represents a change in law that would allow a settling party to petition the court to modify the consent decree.

On numerous occasions private parties have asked courts outside the Third Circuit to adopt the reasoning of the *Rohm & Haas* decision. Although a handful of district courts outside the Third Circuit have followed the *Rohm & Haas* decision,[38] the vast majority of courts outside the Third Circuit have refused to do so. Notably, the Fifth Circuit, Eight Circuit and Tenth Circuit[39] Courts of Appeals have all refused to follow the *Rohm & Haas* decision.[40]

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[35] The Court did note that costs associated with a RI/FS, including EPA's oversight, are expressly recoverable under Section 104(a) of CERCLA.

[36] *United States v. Witco Corp.*, 853 F. Supp. 139, 142-143 (E.D. Penn. 1994).

[37] *See United States v. Chemical Leaman Tank*, 1994 U.S. Dist. LEXIS 11489 (D. N.J. Mar. 30 1994); *United States v. Rohm & Haas Co.*, 1997 U.S. Dist. LEXIS 22828 (M.D. Pa. Aug. 1, 1997). *See also, United States v. Witco Corp.*, 76 F.Supp.2d 519 (D. Del. 1999).

[38] *Central Maine Power, Co. v. F.J. O'Connor*, 838 F. Supp. 641 (D. Me. 1993); *County of Santa Clara v. Meyers Ind.*, 1994 U.S. Dist. LEXIS 9874 (N.D. Cal. 1994).

[39] *United States v. Lowe*, 118 F.3d 399 (5th Cir. 1997); *United States v. Dico*, 266 F.3d 864 (8th Cir. 2001); *Atlantic Richfield Co. v. American Airlines*, 98 F.3d 564 (10th Cir. 1996).

[40] In addition, at least ten district courts have refused to adopt the reasoning set forth in the *Rohm & Haas* decision. *See*, *e.g.*, *AT&T Global Info. Solutions v. Union Tank Car Co.*, 1996 U.S. Dist. LEXIS

The Tenth Circuit noted that the statutory definitions of "remedial action" and "response" "unambiguously allow recovery of the costs of government oversight of private party remedial actions."[41] Although the Court found the Third Circuit's analysis "questionable," the Court concluded that if the Third Circuit's rationale were applied, the statute would nevertheless satisfy the express delegation required by the Third Circuit. The following year, the Fifth Circuit went a step further, and found that the government is entitled to recover its oversight costs regardless of the type of response action taking place. Noting that EPA oversight is an integral part of removal and remedial actions, the Court found no meaningful distinction between remedial and removal actions, in the context of reimbursement of oversight costs, that would justify treating the two types of response differently.[42]

4. Annual Allocation Costs

Private parties often challenge annual allocation costs. Generally, annual allocation costs are non-site-specific costs that either benefit or relate to more than one Superfund site.[43] The annual allocation methodology is used to apportion these non-site-specific costs to multiple Superfund sites.

Private parties have often alleged that EPA uses its annual allocation methodology to "double bill" contractor overhead costs or EPA indirect costs. Neither assertion is correct. Annual allocation costs have never been included in EPA's indirect cots rates. Annual allocation costs also are <u>not</u> contractor overhead costs. Some examples of annual allocation costs include: training employees how to handle certain hazardous materials, safety training, and the development of CERCLA site standard operating procedures. Contractor overhead costs, on the other hand, include costs to support the products and services of the

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8167 (S.D. Ohio)("this court respectfully finds the reasoning in *Rohm & Haas* unpersuasive . . . . EPA's oversight of cleanups conducted by liable parties fits squarely within the terms of CERCLA § 107(a) and § 101(23).").

[41] *Atlantic Richfield*, 98 F.3d at 569.

[42] *Lowe*, 118 F.3d at 404, n. 5.

[43] Annual allocation costs are similar to indirect costs in that they generally benefit or relate to the response action at more than one Superfund site. Courts have generally held that the United States is entitled to recovery of indirect costs. *See United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1502-1504 (6th Cir. 1989)("the statute contemplates that those responsible for hazardous waste at each site must bear the full cost of cleanup actions and those costs necessarily include both direct costs and a proportionate share of indirect costs"); *United States v. Dico, Inc.*, 266 F.3d 864 (8th Cir. 2001), *cert. denied* 2002 U.S. LEXIS 3846 (May 28, 2002); *United States v. Chromalloy American Corp.*, 158 F.3d 345, 352 (5th Cir. 1998); *United States v. Ottati & Goss*, 900 F.2d 429, 445 (1st Cir. 1990); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 528 (2d Cir. 1996); *see also United States v. Hardage*, 750 F. Supp. 1460, 1502 (W.D. Okla. 1990), *aff'd* in part and *rev'd* in part on other grounds, *United States v. Hardage*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 510 U.S. 913 (1993). There is no reason for annual allocation costs to be any less recoverable than EPA's internal indirect costs. Annual allocation costs are a type of indirect cost. The few courts that have expressly considered annual allocation costs have held that they are properly allocated and recoverable. *See United States v. Findett*, 220 F.3d 842 (8th Cir. 2000) and *United States v. The Atchison, Topeka & Santa Fe Railway Co.*, No. CV-F-92-068 (E.D. Cal. May 24, 2002).

contractor and to operate the contractor's organization.

As annual allocation costs are costs incurred for the benefit of Superfund site clean-up and, therefore, are recoverable under the statute and the NCP, these costs generally should not be compromised.[44] If a Region is contemplating compromising annual allocation costs please contact OSRE's future response cost contact. Specific questions regarding the annual allocation methodology can be directed to the OCFO's Financial Management Division.

D. Post-Settlement Compromises of Future Response Costs

There are very few instances where a post-settlement compromise of future response costs is appropriate.[45] If a party has entered into a settlement whereby it agrees to reimburse EPA for all future response costs (as defined by the settlement), the party's obligation is binding and it is not generally appropriate to adjust or compromise these costs unless the Agency has billed costs that the party can demonstrate are directly related to an action by the Agency that is inconsistent with the NCP or that reflect an accounting error or if the party has a legitimate inability to pay.

Defendants have sometimes contended that a court would not require payment where a settlement called for annual billing but the Agency failed to bill for multiple years.[46] Now that the Regions are on a regular billing schedule, such situations should rarely arise, and in general, there should be few if any instances where litigation risk would justify compromising future response costs. Where the Region believes a post-settlement compromise is appropriate please consult the October 2001 Compromise Guidance.

Post-settlement compromises of future response costs are generally not appropriate.

Attachment

[44] Courts have upheld EPA's ability to recover annual allocation costs. *See United States v. Findett Corp.*, 220 F.3d 842. 849 (8th Cir. 2000); *United States v. Chrysler Corp.*, 168 F.Supp. 754, 771-772 (N.D. Ohio 2001).

[45] This section does not deal with situations where EPA has made an accounting or math error in preparation of the bill. In that case, the error should be corrected and the bill should be reissued with the corrected amount. This is not a compromise, but rather an adjustment and does not need the input of the Department of Justice or consultation with Headquarters. *See Compromise of, and Termination of Collection Activity on, Post-Settlement and Post-Judgment Superfund Debts*, Breen/Dillon/Gelber, October 2, 2001 (hereafter referred to as the "October 2001 Compromise Guidance").

[46] Even under these circumstances, however, the Agency has been successful in recovering its future response costs. *See United States v. Witco, Corp.*, 76 F. Supp.2d 519 (D. Del. 1999)(holding that EPA's failure to bill annually did not constitute a material breach of the settlement).

cc: Regional Program Branch Chiefs, Regions I-X
Regional Financial Management Officers, Regions I-X
Alan Carpien, OGC
Charles Young, FMD
Karen Dworkin, DOJ
Steve Gold, DOJ

Attachment

Procedures for Requesting DOJ Costs and Documentation [†]

Introduction

The following provides instructions for requesting Department of Justice (DOJ) costs, and related cost documentation, to be included in EPA Superfund (oversight) bills. Please note that the oversight billing process is the shared responsibility of the regional Superfund program, finance, and legal offices. Accordingly, each office involved in the preparation of oversight bills must work together to identify any Superfund sites possibly having DOJ costs incurred during the respective billing period, and bill the responsible parties for those amounts that are billable under the applicable settlement document.

Procedures

1. By August 1st of each year, each EPA regional office will provide DOJ with an annual list of Superfund sites targeted for oversight billing during the upcoming fiscal year. Each region may choose to provide the list in two parts: 1) a first part provided by August 1 that lists Superfund sites targeted for oversight billing during the first quarter of the upcoming fiscal year, and 2) a second part provided shortly after the beginning of the new fiscal year that lists Superfund sites targeted for oversight billing during the remainder of the fiscal year. To determine which Superfund sites to include on the list, all offices (i.e., program, finance, and legal) involved in the preparation of oversight billings shall work together to identify all sites for which oversight bills will be issued and, in particular, identify those bills that may have DOJ costs incurred during the billing period.

2. The following information should be included for each site listed:

   - Site name, site identifier (i.e., SSID), and location,
   - Name of lead defendant or respondent,
   - DOJ case number and name (if known),
   - Nature of enforcement action (i.e., consent decree or administrative consent order),
   - EPA docket number or administrative order number (for orders),
   - Court and Civil Action (docket) number (for decrees, if known),
   - Date enforcement action (i.e., decree or order) issued/entered,
   - Billing Period, including specific starting and ending dates,
   - Anticipated billing date, and
   - Name, phone number, fax number, and e-mail address of regional EPA contact.

[†] This attachment was created by OCFO's Financial Managment Division. Please direct any questions to Kevin Brittingham of FMD (202-564-4941).

3. Forward the list to Peggy Fenlon-Gore, Environmental Enforcement Section, Case Management Unit Chief, by fax at **(**202) 514-0097**,** or e-mail at **pfenlon@enrd.usdoj.gov**.

4. DOJ will use the list to determine whether DOJ incurred billable costs during the billing period. Priorities will be established based upon anticipated billing dates identified on the list. Priorities will be modified, if feasible, should an EPA region notify DOJ of a change in its anticipated sites to be billed or billing dates. DOJ will determine whether any DOJ time relating to the site at issue was recorded in DOJ's timekeeping system during the billing period. For sites where the billing period has ended before DOJ receives the list on which the site is included, DOJ will make this determination and notify EPA that it has incurred costs during the billing period as soon as possible after receiving the list. For sites where the end of the billing period, as indicated on the list, is a date during the current fiscal year, DOJ will make this determination and notify EPA that is has incurred costs during the billing period as soon as possible after the end of the billing period.

5. For sites where it is determined that no DOJ time was recorded or charged during the entire billing period to a particular Superfund site on the list, DOJ will notify the EPA regional contact as soon as that determination is made. DOJ will provide this notice no later than 60 days after receipt of the list, or 60 days after the close of the billing period, or 60 days before the anticipated billing date, whichever is later. The regional office may then proceed to bill in the ordinary course of business without any DOJ costs included in the bill.

6. If a site on the annual list has an anticipated billing date in the second, third, or fourth quarter of the fiscal year, and DOJ has not informed EPA that no DOJ time was recorded or charged to that site during the billing period, the EPA regional office will provide to DOJ a separate, specific notice of anticipated billing on that site to DOJ approximately 120 days before the anticipated billing date for that site. This notice may be faxed or e-mailed to Peggy Fenlon as described above in paragraph 3.

7. For sites with billable DOJ costs, DOJ will transmit the DOJ cost information to the EPA regional contact within 60 days after receiving notice of the anticipated billing date or at least 60 days prior to the anticipated billing date, whichever is later. If the end of the billing period is less than 90 days before the anticipated billing date, DOJ may not be able to provide costs through the end of the billing period. In such case, DOJ will nevertheless provide cost information in timely fashion, through the latest available date. DOJ's cost summary will clearly indicate the date through which costs have been compiled. If that date is different from the end of the EPA billing period, EPA's regional office should note the DOJ cost cut-off date on its bill. The DOJ cut-off date should be used as the start of the period for requested DOJ costs the following year's bill or subsequent bill if the billing cycle is other than annual. Any questions regarding DOJ's cost information should be directed to Peggy Fenlon-Gore at (202) 514-5245.

8. DOJ will prepare and provide to the EPA regional contact a DOJ cost summary. The summary will include the billable amount for direct labor costs, associated indirect costs, and other direct costs. The summary will also include the total dollar value of the billable time broken out by fiscal year. It will also include the case and site name and number. The summary will be supported by: (1) for direct labor costs, a time report that will include the case numbers(s), date, timekeeper's name, hourly rate, hours worked, and dollar value of the hours worked; and (2) for other direct costs, a report listing the case number, date, payee, and amount (Note: for travel costs, the traveler's name may not be listed).

9. In some cases, the EPA regional office may issue an additional request through Peggy Fenlon-Gore for backup documentation to support the DOJ costs (in addition to the summaries and reports referred to in the preceding paragraph). This documentation will consist of timesheets (if they exist), travel vouchers, and invoices as appropriate. Documentation of DOJ indirect cost computations will be provided if necessary and specifically requested. DOJ will provide the EPA regional contact with the additional documentation 30 days after the receipt of the request.

10. Failure to identify a site at the beginning of the fiscal year does not preclude the EPA regional offices from requesting and obtaining DOJ costs and documentation during the fiscal year. However, every effort should be made to identify the universe of bills targeted for oversight billing to provide DOJ with ample time to identify billable costs and assemble cost summaries for these sites early in the process. DOJ will attempt to respond to all requests for cost information in a timely fashion, but the time targets identified above are less likely to be met for sites not identified at the beginning of the fiscal year. If an anticipated billing that was included on the list is postponed or canceled, the EPA regional office should inform DOJ as soon as possible so priorities may be adjusted to allow for the most efficient use of resources.

11. In some instances (i.e, in a billing dispute), EPA may require the assistance of DOJ attorneys in explaining, or defending the documentation for, DOJ costs included in a bill. The EPA regional contact may request such DOJ assistance from Peggy Fenlon-Gore, who will forward the request to the appropriate attorney, or the regional attorney may contact the appropriate DOJ attorney directly if known

12. EPA regional staff should apply EPA's indirect costs rates to the DOJ costs in accordance with the procedures in effect at the time of the bill.