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REVIEW ON THE ADMINISTRATIVE RECORD
IN CERCLA ACTIONS

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Getting A Handle On Hazardous Waste Controls

A short course sponsored by the
Natural Resources Law Center
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I. OVERVIEW.

A. The government has adopted the position, in litigation and in the administration bill to amend CERCLA, that review of decisions for CERCLA remedial actions is confined to the administrative record.


B. The CERCLA procedure for remedial actions.

1. The lengthy procedure leading to selection of remedial action is set out in the National Oil and Hazardous Substances Contingency Plan
a. The first stage is the preliminary Assessment/Site Investigation ("PA/SI"), a quick look at the site.

   (i) §300.64

b. Next, the site is proposed to be placed on the National Priorities List ("NPL"); proposal is accompanied by opportunity for comment.

   (i) §300.66

c. The site is then listed on the NPL.

   (i) §300.66

(ii) See Eagle-Pitcher Industries v. EPA, 759 F.2d 905 (D.C. Cir. 1985) (consolidated industry challenge to the original NPL).
d. Next, the government or private parties prepare a Remedial Investigation/Feasibility Study ("RI/FS") - a comprehensive site analysis and evaluation of alternative remedial actions.

   (i) §300.68(d)
   (ii) Note: The RI/FS can and often does precede NPL promulgation.

e. EPA then allows informal comment on RI/FS, and a public meeting; public comment is usually restricted to three weeks.

   (i) §300.67

f. EPA's selection of the "cost-effective" remedial action is embodied in the Record of Decision ("ROD") and accompanying staff analyses.

   (i) §300.68(i)

g. The ROD allows EPA to commit Superfund monies to take remedial action.
§300.68(j); CERCLA §104

The government can then commence a cost-recovery action against potentially responsible parties ("PRP's") to recoup Superfund expenditures.

(i) CERCLA §107

(ii) This is the stage at which the court reviews the merits of the remedial action, to determine whether the remedial action was consistent with the NCP. The courts have rejected PRPs' attempts to get review of EPA decisions prior to government initiation of a cost-recovery action. E.g., Lone-Pine Steering Comm. v. United States, supra.

II. LEGAL RAMIFICATIONS: REVIEW ON THE ADMINISTRATIVE RECORD.

(WHAT IS IN THE RECORD? HOW IS IT COMPILED? WHAT IS THE STANDARD OF REVIEW?)

A. Review confined to materials before decision maker at time he made decision.

2. Thus, accepting the government's view, review would be confined to the ROD and the back-up materials, including the RI/FS and public comments.

B. The heart of the government's position is its desire to avail itself of the favorable arbitrary or capricious standard of review.


a. Review would not be under the substantial evidence test.

(i) See Judge Friendly's opinion in Automobile Club of N.Y., Inc., v. Cox, 592 F.2d 658 (2d Cir. 1979), comparing the arbitrary or capricious and substantial evidence tests.
b. Not preponderance of evidence test.


c. Not trial de novo.


d. Thus, the government would not have to show its decision is the best, only that it was based on the record and not in contravention of law or policy.


C. Deference to decision maker.

1. On matters of legal interpretation.

b. On technical and factual matters, deference is greatest under the arbitrary or capricious standard.

(i) SRTF v. EPA, supra.

D. Procedure.

1. The government will likely certify the record to the court.


2. Much like a summary judgment procedure; government will argue review based on evidence in the record.

E. Questions of permissible level of discovery.

1. There are tight restrictions on probing the mental processes of the decision maker under the arbitrary or capricious standard.

2. Alternatives are interviews with government employees, or


F. There are limited circumstances in which the reviewing court will look beyond the administrative record.


   a. For example, courts may take testimony in light of failure to explain agency action adequately, failure to consider or document consideration of relevant factors, bias and prejudgment.

   b. Also, discovery generally is allowed to determine scope of the record.

   (i) See, e.g., NRDC v. Train, 519 F.2d 287 (D.C. Cir. 1975) (plaintiffs in the district were "entitled to
an opportunity to determine, by limited discovery, whether any other documents which are properly part of the administrative record have been withheld.

G. Bear in mind that district courts, unlike courts of appeal, are generally unfamiliar with record review. This suggests opportunities to expand the record.

III. PRACTICAL RAMIFICATIONS FOR JUDICIAL REVIEW.

A. Record review is a double-edged sword.

1. The corollary of record review is that the government's record must support its action.

2. The private parties have opportunities to help shape a favorable record, and to take advantage of favorable gaps in the record.

B. Keep up with the government.

1. Use of Freedom of Information Act, broadly and often, and challenge withholding of relevant documents.
2. Attempt to compel the government to use a docket system.
   b. There is an added appearance of arbitrariness and procedural sloppiness if the government refuses.

C. Memorialize all favorable communications and positions in writing.
   1. Helps to shape a favorable record.
   2. Artful use of the "Book-of-the-Month-Club" response ("If we do not hear from you, we assume you agree with us.").

D. Take full advantage of every opportunity to comment.
   1. PA/SI (EPA may refuse to consider these comments - see point III. E., infra).
   2. NPL proposal.
3. RI/FS.

4. Use of creative administrative practice, e.g., petition for reconsideration of Record of Decision, particularly when the PRP's have a well-documented, less expensive alternative remedial plan.

E. Force the government to respond to your comments.

1. And, document when they do not, to lay foundation for later challenge.

F. Make sure the government's record contains what you want.

1. Constant monitoring and supplementing of record.

2. Avoid a judicial dispute on scope of record -- it is far better to get your documents in up front than to argue their relevance after-the-fact.

G. Watch for possible bias and prejudgment.
1. Particularly at stages of site listing, remedy selection.

2. State and federal governments are under pressure to tell public what they will do, and they often get ahead of the process.

3. Failure of government to document *ex parte* contacts.

H. Organize PRP effort for maximum impact.

IV. MOUNTING THE SUCCESSFUL LEGAL CHALLENGE.

A. Substantive challenges.

1. Lack of record support for the selected remedy.


2. Government's failure to take account of contrary positions.
3. Government's failure to adhere to NCP, its own guidance policies and procedures; including sampling and analysis techniques.


4. But beware possible bars on challenging underlying models -- Eagle-Pitcher, supra.

a. Thus, important to maintain distinction between challenging model or policy itself, and challenging application of the model or policy. Latter may be allowed, former may not. Eagle-Pitcher, supra.

b. And, may be able to challenge policy indirectly, e.g., challenge to failure
to delete site from NPL as way of challenging EPA policy of requiring full RI/FS even when remediation complete before listing.

5. Use of administrative **stare decisis** -- EPA collects and may be publishing its RODs. EPA has an obligation to follow its administrative precedents, or to explain its deviations. The potential for inconsistent agency decisions increases as RODs are delegated to Regional Administrators.

B. Procedural challenges.

1. Inadequate opportunity for public comment, especially when the government relies on 11th-hour documents.

   a. **Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).**

2. Failure to document **ex parte** contacts.

   a. **Sierra Club v. Costle, supra.**
3. Final action that departs significantly from "proposed" action -- the "logical outgrowth" test.

   a. SRTF v. EPA, supra.

4. Failure to consider full range of practicable alternatives to selected remedial action.

   a. See, generally, the cases arising under Section 102 of the National Environmental Policy Act., e.g., Druid Hills Civic Ass'n, Inc v. FHWA, 23 E.R.C. 1663 (11th Cir. 1985).

C. Due process considerations.

1. See, generally, the arguments advanced in Defendants' Joint Memorandum in United States v. AVX Corp., supra.

   a. Lack of meaningful notice and opportunity for comment.

   b. Lack of hearing (opportunity to confront and cross-examine witnesses) at any stage.
c. Lack of pre-enforcement review, and the "sufficient cause" defense.

(i) Wagner Electric Corp., supra, and cases cited therein.

d. Also, the government's position that previously promulgated models and policies are immune from review raises due process concerns.


e. For another approach, compare the procedures used by the Corps of Engineers under Section 404 of the Clean Water Act.

(i) Moretti v. Hoffman, 526 F.2d 1311 (5th Cir. 1976); Buttrey v. United States, 690 F.2d 1170 (5th Cir. 1982).

D. Uncertain effect of a government loss.
1. Inappropriateness of the typical remand order, when remedial work is already done.

2. Trial de novo, or outright loss by government.

V. POSSIBLE EXTENSION OF RECORD REVIEW FOR OTHER CERCLA ACTIONS.

A. Removal actions.

B. Enforcement actions under §106.


VI. POSSIBLE CERCLA AMENDMENTS -- LEGISLATIVE RATIFICATION OF GOVERNMENT POSITION.

A. H.R. 2817 would require EPA to establish an administrative record and would impose the arbitrary or capricious standard of review. The Senate bill has no similar provision.
SETTLEMENT POLICY SUMMARY

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The government published its "Interim CERCLA Settlement Policy" on November 29, 1984. Although billed only as guidance for analyzing settlement proposals in superfund cases, the ten sections of the policy actually set forth the overall enforcement philosophy for the superfund program. The policy is an attempt to distill the government's collective experience in the litigation and settlement of superfund cases in order to advise affected parties of the course it will follow in selecting cases for prosecution, targeting parties as defendants, conducting negotiations and evaluating settlement proposals. The policy is important both as an expression of new concepts as well as a formal statement of operating principles. For example, the government's unequivocal statement of its willingness to consider and accept settlement proposals of less than 100% of cleanup is an important public clarification of its position. Similarly, the removal of the requirement that potentially responsible parties (PRPs) be willing to undertake or pay for 80% of cleanup as a condition precedent to negotiation
has been deleted from the initial draft of the policy. This is an important initiative intended to spur settlement proposals.

Underlying the policy is an intention to vest more authority and flexibility in the conduct of negotiations and the evaluation of settlement proposals in regional EPA offices. The evaluative criteria are subjective. As a result, line personnel will be the most influential in making the case specific, factual determinations that will ultimately drive the decision making process.

The policy can be broken into five main parts:

1. Enforcement philosophy (Section I)
2. Litigation priorities and defendant selection (Section VIII)
3. Information release policy (Section III)
4. Settlement evaluation guidelines (Sections II, IV, V, IX and X)
5. Scope of release and contribution (Sections VI and VII)
1. Enforcement Philosophy

Section I of the policy reaffirms EPA's enforcement resolve while recognizing the need for negotiated settlements. The policy outlines an agency enforcement philosophy, the goal of which is to recover all costs of cleanup. Yet it also recognizes the 100% goal is unobtainable in every case. This acknowledgement of the relevancy of such real world considerations as case equity, party culpability, limited resources and fund availability provides a rationale for the government to settle for less than 100% of cleanup after a rigorous, internal review of delineated, case specific factors. The policy is designed to allow the government flexibility to take less than a 100% clean-up without appearing to have abrogated its enforcement responsibilities.

The approach set out in the settlement policy is bottomed on the government's substantial success in obtaining more than $400 million in private party clean-up and its fear that anything less than a "100%, clean it to background" policy will appear to be a signal that the agency has lessened its reliance on enforcement as a method of obtaining cleanup. Thus, in Part I the agency restates its basic superfund enforcement tenants, tempered by its experience and understanding that not every case can or should be actively litigated. They are:
- 100% clean-up goal
- strict liability standard in Section 106 and 107 of CERCLA which is joint and several in scope
- importance of negotiated private party clean-up as necessary adjunct to fund financed and litigation induced clean-up
- pursuit of parties in litigation who refuse to negotiate or cooperate with government
- use of the fund to supplement less than 100% settlements
- relaxed information exchange requirements to facilitate negotiations
- removal of the arbitrary 80% rule as condition precedent to negotiation.

The government's enforcement philosophy is: negotiated settlements whenever possible, litigation as necessary; flexibility and increased delegation of authority to regional offices, albeit with overriding authority in EPA headquarters.

2. Litigation Priorities and Defendant Selection (Part VIII)

This section of the policy is remarkable for its open direction to government enforcement personnel to select cases on the basis of merit. The factors enumerated for use in case selection are:
- substantial environmental problem
- significant amounts of money involved
- good factual and legal basis for establishing liability
- solvent defendant
- statute of limitations problems (here the government carefully avoids stating what it believes to be the applicable statute of limitation. A good argument can be made for the statute's running either 3 or 6 years from cleanup completion. Less persuasive arguments exist for a two year statute or the statute's running from initiation of cleanup. In the first case to address the issue, United States v. Mottolo, Civil No. 83-547D ___ F.Supp. ___ (D.N.H., March 15, 1985), the Court held the statute of limitations for actions against the fund for natural resources damages under Section 111 and 112 to be 3 years. The Court held there was no statute of limitations for Section 107 response actions.

While stopping short of articulating an absolute rule, the policy establishes priorities for case development and prosecution:

- 107 actions where all costs have been incurred
- 106 actions at sites not subject to fund cleanup
- 106/107 combinations where money has been spent, identified injunctive relief is needed and the fund is unavailable.

Implicitly, the policy instructs regional offices to refer for litigation well-developed cases against solvent defendants at sites presenting significant environmental problems and fund financed cleanup is either completed or will never begin. The genesis of this section is EPA's fear that numerous small cases will drain available resources, making it impossible to successfully prosecute major cases. Parties who desire to know which cases are targeted for enforcement or cleanup should consult the Site Management Plan (SMP) compiled by and maintained in the Region where an NPL site is located. The SMP gives a preview of site activity (RI-FS, RD, etc.) and allocation of funds for work increments on a quarter-by-quarter basis for each fiscal year. Availability of funds (both federal and state share), political and public health considerations will drive enforcement/fund lead determinations at most sites. The agency's experience in Section 106 cases - good results but big resource investment - has resulted in a reluctance to seek cleanup through injunctive litigation except in the absence of other alternatives.
This section also discusses the way the government chooses defendants. Relying on joint and several liability, the government attempts to maximize its litigative convenience, choosing defendants for the following reasons:

- site owners and operators almost always sued
- largest manageable number of parties, primarily based on volume, toxicity and financial viability.

The government is looking for the best case against the smallest number of solvent defendants. Volume is the most important consideration in choosing a defendant. Toxicity comes into play as a determinative factor primarily with generators who might not otherwise be joined as defendants due to the small volume of waste for which they are responsible.

- recalcitrance or other equitable factors relating to cooperation with the government. Recalcitrance can virtually insure inclusion, past favorable action does not generally enable PRPs to avoid suit.

The policy states that the agency will consider not suing companies which have settled with the government in the first phase of a multi-phased cleanup. It creates the impression that the government may sue non-settlers, pursuing the settling parties only as a last resort for any
deficiency. To date, the government has not exhibited much willingness to follow this approach. The success of the settlement policy may turn on whether the government will in fact do so. Unless PRPs can realize an advantage by voluntary cooperation with the government, no incentive to early cooperation is created. As discussed below, this provision, together with the policy on releases from liability, is critically important to the government's successful implementation of the settlement policy.

3. Information Release Policy

The government's perceived and actual unwillingness to provide PRPs with basic information about the identity and number of contributors, type of substances, and percentage of total contribution at sites has been a major source of complaint by private parties. The absence of this information made efforts to coalesce PRPs in order to formulate settlement proposals and allocate costs extremely difficult. The settlement policy provides that this summary information will now generally be made available unless countervailing confidentiality or litigation considerations predominate. The agency will utilize all its information gathering authority under RCRA and CERCLA to collect information from PRPs. See, in this regard, United States v. Liviola, ___ F.Supp. ___ (N.D. Ohio 1985). However, the agency need not receive the information it seeks from PRPs
prior to its release of information to them, only within a reasonable time.

4. Settlement Evaluation Guidelines (Parts II, IV, V, IX and X)

These parts of the policy describe the procedure and substantive analysis EPA will follow in evaluating settlement proposals. In summary, the policy provides:

a. minimum threshold for negotiation (Part II):
"No specific numerical threshold for initiating negotiations has been established." The policy requires only that PRPs represent a "substantial portion" of the cleanup costs/work to begin negotiation. This represents a major change from the previous requirement that 80% of cleanup costs or work be guaranteed as a condition precedent to negotiations.

b. partial settlements are acceptable: The government will accept settlement offers of less than 100% of costs or cleanup. This is among most important policy statements contained in the settlement policy. If flexibility does not result from the government's implementation of the policy, a litigative log jam be created. Procedurally, EPA staff must prepare a case evaluation prior to initiating negotiations which will be reviewed by EPA headquarters for national consistency and issues of policy or legal precedent.
The evaluation must consider the settlements criteria set out in Part IV of the policy.

The policy identifies three general categories of cases which may be appropriate for partial settlement:

i cases where evaluation using Part IV settlement criteria justify settlement for less than 100%. Typically, these cases will turn on factual and legal strengths and weaknesses.

ii cases "where the unwillingness of a relatively small group parties to settle prevents the development of a proposal for a substantial portion of costs or the remedy." The purpose here is to isolate and punish recalcitrant PRPs and reward those who cooperate in achieving settlements.

iii cases which regardless of their strength or weakness are too small to warrant all out litigation. These include:

- administrative settlements where total cleanup costs are less than $200,000
- claims in bankruptcy
- de minimis contributors. Although the meaning of de minimis is unclear, it generally refers to volume. Toxicity is
a secondary factor, but high volume, low toxicity wastes are unlikely to be an acceptable candidate for settlement as a de minimis generator. Moreover, the de minimis provision may be illusory. Because the law of release and the respective rights among jointly liable PRPs is unclear, the government may view settlement as too dangerous to its remaining rights against other PRPs to entertain.

c. Partial (phased) Cleanup (Part V): The government is willing to enter into agreements for a phase of an entire cleanup (as distinguished from less than 100% of the cost of cleanup described above). Thus, EPA will consider offers to undertake surface cleanup or other planned removals. However, EPA still will not as a general rule, allow PRPs to undertake only an RI-FS. The prevailing view within EPA remains that negotiating about the RI-FS is too resource intensive and results in delay which could otherwise be spent cleaning up the site. Rather, EPA finds it less expensive and more efficient to undertake the RI-FS itself. However, current EPA guidance allows participation by PRPs in the RI-FS process. See EPA Guidance Document "Participation of Potentially Responsible Parties in RIFS Development"
More guidance in performing RI-FS is expected to be published by EPA in the near future.

The phased settlement approach has been utilized by EPA with success. In many cases, the approach to source control may be obvious - e.g. removal and capping - whereas the selection of further remedial action is unknown or requires additional study. The agency has regularly left the question of ultimate remedy open to further negotiation or litigation in exchange for performance of the initial phase of cleanup by PRPs. So long as PRPs can accept the open-ended nature of this contingent liability, this approach will undoubtedly continue to be acceptable to EPA. Phased settlements involving source control may well be to the advantage of all concerned. First, it removes the hazard reducing the continuing contamination and, presumably, the cost of ground water cleanup. Second, it enables EPA to act on other, more immediate problems. Finally, it builds equities for PRPs with the governmental agencies, the courts and the public.

A difficult, unsettled question is whether EPA will settle for less than 100% of a particular phase of cleanup. The agency agreed to do so in early settlements - Chem-Dyne, South Caroline Recycling Disposal Inc. (SCRDI) - but the current attitude toward them is unclear. One advantage to the government in accepting phased settlements is avoiding
litigative costs and conserving the fund for other projects. To the extent the government must continue litigation or undertake fund financed cleanup at a site, the advantage to accepting less than 100% of a phase of cleanup is marginal. Factors such as the government's desire to perform the work itself to insure its adequacy, particularly at sites which are technically complex or have a high public profile, may militate in favor of such settlements.

d. **timing of negotiations** (Part IX): EPA is attempting to limit negotiations for private party cleanup to 60 days after completion of the RI-FS and the Negotiating Decision Document (NDD) which identifies EPA's chosen remedy. The NDD is the "bottom line" for the government in negotiations. In fact, EPA regularly extends the deadline so long as there is demonstratable progress in negotiations. The sixty day rule is a reminder to PRPs and government alike that the negotiation process must produce results. Otherwise, litigation or cleanup activity will be commenced. Due to resource constraints, the government no less than PRPs desires to avoid litigation which is uncertain and expensive. Therefore, even incremental progress is generally enough to keep negotiations going and stall litigation.

e. **settlement criteria** (Part IV): Part IV of the policy contains the ten settlement criteria the government will employ in evaluating settlement proposals. They express
the government's recognition that while uniformity is desirable, settlement decisions must be based on real world consideration of the strengths and weaknesses of particular cases. Included in this calculus is the government's acute awareness of the resource constraints it faces in conducting litigation at each site. Thus, the government is forced to choose to litigate fully only a few cases. In so doing, it must balance the cost-benefit of litigation: the amount of cleanup or costs recovered against the cost of obtaining it, the public health implications of delay in cleanup pending litigation and the backlog of other cases which require resolution. Viewed in this light, the government is under enormous pressure to settle for the best cleanup it can achieve as quickly as possible.

The ten criteria are:

1. **Volume of wastes contributed to site by each PRP.** This is the most important consideration to the government and PRPs in evaluating settlements and allocating liability for cleanup costs. Toxicity is a factor, but volume is the real measuring stick in determining whether an offer is acceptable. Assuming the government can meet its burden of proof under superfund, PRPs should not generally expect to be able to settle for less than their percentage share by volume of
wastes at a site. Indeed, the government will seek a premium to settle all liability. Typically, utilizing a joint and several liability theory, the government sues or negotiates with PRPs representing less than 100% of waste by volume and expects them to pay 100% or close to it. The government leaves it to the settlers to obtain the overage from PRPs with whom the government has not negotiated or joined as a party. Thus, in structuring a settlement offer, PRPs must be able to demonstrate that more than a "fair share" by volume is represented. The exact amount will obviously depend on the strength of the government's case and the difficulty the government will have in presenting its case in court. The government has declined to act as a policeman of allocation formulae and seldom has looked behind a group's offer to evaluate its adequacy as to individual participation. The government's view, based in large part on resource constraints, is that allocation is a function best left to PRPs.

2. Nature of the wastes contributed. The government will consider toxicity in evaluating a settlement. Based on past history, volume is a base line for cost allocation.
Thus, toxicity is utilized primarily to increase the amount of money the government will accept in settlement from a low or medium volume generator of a highly toxic waste. Mobility, persistence and exacerbated difficulty in cleanup attributable to particular wastes are also considered by EPA. The presence of a low volume high toxicity waste can make settlement difficult if that generator is not part of the settling group. EPA may be reluctant to settle with high volume PRPs which leaves a case primarily against a low volume defendant who will argue that disproportionate cost allocation is inappropriate. EPA's willingness to take the litigation risk associated with that type of settlement will be a bellweather for its sincerity in utilizing the settlement policy.

3. Strength of evidence tracing the wastes at the site to the settling parties. EPA must prove that a PRP's wastes have been sent to and were present at a site to establish liability under CERCLA. The government claims it will adjust its willingness to accept less than 100% of cleanup in direct proportion to the strength or weakness of its evidence connecting PRP to the site. In practice, the government has not
shown a general willingness to consider the circumstances of single PRPs where there are multiple parties. Thus, a PRP may not be able to settle with the government until a group offer is made and substantial cost for attorney and consulting fees incurred. As with the de minimis contributor, unless EPA will evaluate a PRP's claim of weak evidence, this factor may be of little aid to anyone other than the government or a group of PRPs in making or evaluating a comprehensive settlement proposal.

4. Ability of the settling parties to pay.

Insolvency or limited assets are factors to be considered. The government does not intend to waste its resources against a party who cannot satisfy a judgment. Installment payments and other alternatives to lump sum payment are authorized. The government has not shown a predilection to allow parties to make demonstrations of limited financial capacity. Moreover, the government applies a stringent test which essentially turns on whether a defendant would become bankrupt if forced to pay 100%. PRPs should be prepared to offer documentation of insolvency and accept an onerous pay out schedule (both as to amount
and time) to obtain less than 100% settlement on financial capacity grounds.

5. **Litigative risks in proceeding to trial.** This section reiterates the admonition about good quality evidence contained in #3, adding requirements of admissability and adequacy. A third factor - availability of defenses under Section 107(b) - is also considered. The shortness of this section belies its importance. In fact, the government is most vulnerable in the area of the quality and quantity of evidence. Particular problems which should be explored by PRPs include:

- Maintenance of appropriate chain of custody. The number of people involved in sampling and analysis makes proof difficult and onerous for the government.

- Maintenance of required testing and other scientific procedures and protocols. EPA labs often do not comply with their own testing protocols.

- Availability and quality of cost documentation. The Agency has had great difficulties in the timely and complete collection of cost documents in superfund cases. As with lab samples, chain of custody is a problem for the government.
given quality assurance/quality control
problems and the number of persons who
may be needed to authenticate and make
the records admissible. Where state
costs are involved, the problems of proof
are magnified. The government is well
aware of the evidentiary problems it
faces in the proof of its superfund
cases. PRPs should always request cost
documentation (not just summaries) from
the government prior to entering into
settlement in cost recovery cases.

EPA will evaluate Section 107(b)(3)
defenses in determining the worth of its
case. As discussed elsewhere, the
defenses are restrictive.

Act of God, act of war, solely caused by
third party - and analogous defenses
under Section 311 of the Clean Water Act
have been narrowly construed in favor of
the government. As with almost all
equity factors, the government's initial
settlement position will not typically
reflect any reduction for them. PRPs
must ferret out and advocate them at the
bargaining table.

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6. **Public interest considerations.** This section responds to the "Seymour" situation where the state cannot pay its matching share as required by § 104(c)(3)(C) of CERCLA. It enables the government to balance the public interest in obtaining expeditious cleanup against the unavailability of federal funds. The government will undoubtedly limit the scope of this provision to justify settlement of less than 100% "only when there is a demonstrated need for a quick remedy to protect public health or the environment."

7. **Precedential value.** A restatement of government resolve for strong enforcement. This section actually is designed to be used more for rejecting what may be an otherwise acceptable settlement to establish good legal precedent. In fact, the government has not and will not turn down good settlements to make good law. Given the magnitude of the government's enforcement docket and the impetus for settlements, this provision will likely receive little use. More likely it will be used as a
"puffing" mechanism in negotiations to underscore the government's litigative resolve as a negotiating chip with PRPs.

8. **Value of obtaining a sum certain.** By using present value calculations the government will, in effect, discount settlements in current dollars which may not be payable for several years. Using a model developed for this purpose, the agency hopes to be able to encourage "cash out" settlements.

9. **Inequities and aggravating factors.** A general catchall for the use of equitable considerations. By its terms it would allow the government to consider such actions as voluntary removal by a PRP undertaken prior to the government's request that it do so. However, so long as a 100% policy is pursued and the government is apprehensive that it will appear to be lax if it does not pursue all PRPs equally, this provision may only be used to enhance not decrease the amount the government will seek from PRPs.

10. **Nature of the case that remains after settlement.** The decision-makers want to
know the nature of the remaining case, if any, that exists if the government accepts a settlement proposal. Factors include the solvency and culpability of the remaining PRPs, the quality of the evidence against them, the equity of proceeding for the remainder of cleanup against them, and the resource expenditure which the government must make to proceed against non-settlers.

These ten guidelines are in actuality an attempt to codify the application of common sense to the evaluation of settlement proposals. They serve several purposes at once. First, they inform PRPs of the factors utilized to evaluate their offer. Proposals should be structured to address the ten factors in recognition that the EPA staff personnel must justify the settlement to management personnel utilizing them. Second, they instruct EPA of the factors they must consider in evaluating settlement proposals. Regional staff have been delegated authority to make the subjective, factual, site specific determinations which will drive the decision-making process. PRPs should work closely and cooperatively with staff personnel to insure that the most favorable factual picture can be drawn which will bring a proposal within EPA's settlement criteria. As Part IX indicates, headquarters EPA and, in judicial cases, the
Assistant Attorney General of the Department of Justice Land and Natural Resources Division, have final authority to approve settlements. The dynamics of the process are that regional personnel will become advocates for an acceptable proposal to the top decision-makers. The major factors considered by the managerial level in Washington are 1) recommendations of staff; 2) national consistency and 3) non-controversial nature of proposal. Initially, partial settlements will receive intense scrutiny, by EPA headquarters. However, the volume of case work and the pressure to successfully implement the settlement policy will make such close attention impossible in every case. As experience is gained, hopefully more deference will be given to the regional offices.

All judicial settlements receive close attention in Washington. Department of Justice regulations require that every filing and settlement of every superfund suit must be personally received and approved by the Assistant Attorney General of the Land and Natural Resources Division. Pursuant to a Memorandum of Understanding between EPA and the Department, judicial case can be settled unless they jointly concur. Thus, administrative, non-judicial settlements are more quickly approved and consistency and legal precedent are less a factor than if the Department of Justice must concur. Finally, in establishing this elaborate process, EPA is attempting to demonstrate to Congress and the public that
settlements will be evaluated on the basis of public health, environmental and resource considerations.

There is no magical formula for the utilization of the settlement criteria. The government staff will probably boil them down and balance 1) the strength of the case and likelihood of success, 2) the amount of money or extent of cleanup involved, and 3) the ability of the PRPs to pay, to arrive at a subjective evaluation of the value of the case. The success the government has had in court, coupled with criticism the program has received about laxity and delay have made settlement for less than 100% difficult at best. However, the number of cases which will arise under superfund and the resource intensity of them has forced the government to attempt to find a way to achieve settlements.

5. Release and Contribution (Part VI and VII). The issues of the scope of release and contribution may be the most controversial and troublesome for PRPs desiring to settle their superfund liability of the government. Understandably, PRPs believe that a full release is a necessary and appropriate incentive to settlement. However, the government has been unwilling, except in extraordinary circumstances, to give full releases from liability in superfund cases. The government believes that "(t)he need for finality in settlements must be balanced against the need to insure that PRPs remain responsible for recurring endangerments and unknown
conditions." Put simply, the science of groundwater cleanup technology and human health and environmental effects is too uncertain for the government to release PRPs from all contingent liability. The government fears that remedial measures may prove inadequate and lead to future endangerments or fund expenditures whether by reason of design or construction defects, unknown conditions or effectiveness of the remedy. Thus, the government believes this risk of future costs or endangerment should be borne by PRPs and not the superfund. This is the government's position both for cost recovery and injunctive cases, regardless of whether the government has approved the remedy.

The guidance contained in Part VII of the policy does not really portend a complete release from liability. It is intended to explain the extent of release the government believes is possible. If any rule can be drawn from the policy it is that the expansiveness of the release is directly proportional to the known effectiveness and confidence level of the remedy. The policy is intended to force development of permanent remedial solutions such as incineration and to be a disincentive to land disposal or containment remedies. In the government's view, the latter category virtually assures future remedial action will be required. The policy also favors off-site disposal. However, given the vast number of non-complying RCRA disposal
facilities, off-site disposal is being viewed as mere transference of an inevitable environmental problem from one site to another.

The determination of effectiveness and thus the scope of release from future liability will obviously be factually bound and site specific. However, the government will seek consistency with a minimum set of future contingent liabilities. The policy states the general rule:

Regardless of the relative expansiveness or stringency of the release in other respects, at a minimum settlement documents must contain reopeners allowing the government to modify terms and conditions of the agreement for the following types of circumstances:

- where previously unknown or undetected conditions that arise or are discovered at the site after the time of the Agreement may present an imminent and substantial endangerment to public health, welfare or the environment.
- where the Agency receives additional information, which was not available at the time of the Agreement, concerning the scientific determinations on which the settlement was premised (for example, health effects associated with levels of exposure, toxicity of hazardous substances, and the appropriateness of the remedial technologies for conditions at the site) and this additional information indicates that site conditions may present an imminent and substantial endangerment to the public health or welfare or the environment.

In addition, release clauses must not preclude the Government from recovering costs incurred in responding to
the types of imminent and substantial endangerments identified above.

In addition to requiring the ability to reopen a settlement to seek more relief, the policy contains limitations on the timing and scope of release available. Ordinarily, releases are effective upon completion of the cleanup. "Cash out" settlements (so called because PRPs pay money before cleanup costs are incurred) are appropriate typically only when the government can reasonably ascertain the cost of cleanup and PRPs pay a "carefully calculated premium or other financial instrument" (typically a bond) "that adequately insures . . . against these uncertainties." A bond was used in the Seymour, Berlin & Farro and A&F Materials cases. There are eight specifically stated limitations to the scope of release:

- A release or covenant may be given only to the PRP providing the consideration for the release.
- The release or covenant must not cover any claims other than those involved in the case.
- The release must not address any criminal matter.
- Releases for partial cleanups that do not extend to the entire site must be limited to the work actually completed.
- Federal claims for natural resource damages should not be released without the approval of Federal trustees.
- Responsible parties must release any related claims against the United States, including the Hazardous Substances Response Fund.

- Where the cleanup is to be performed by the PRPs, the release or covenant should normally become effective only upon the completion of the cleanup (or phase of cleanup) in a manner satisfactory to EPA.

- Release clauses should be drafted as covenants not to sue, rather than releases from liability, where this form may be necessary to protect the legal rights of the Federal Government.

A ninth limitation is that a release may only extend to work actually done or paid for by a PRP.

As with most other parts of the settlement policy, the possibility exists for exceptions:

In extraordinary circumstances, it may be clear after application of the settlement criteria set out in Section IV that it is in the public interest to agree to a more limited or more expansive release not subject to the conditions outlined above. Concurrence of the Assistant Administrators for OSWER and OECM (and the Assistant Attorney General when the release is given on behalf of the United States) must be obtained before the Government's negotiating team is authorized to negotiate regarding such a release or covenant.
This provision is designed to allow flexibility in situations where the relative strength of the government's case, the availability of superfund to do the cleanup or other similar compelling public interest is present. Thus, a Seymour type settlement - widely criticized when entered - could still occur if a compelling public interest justified it. Particularly in judicial consent decrees, the government has demonstrated limited flexibility in giving full releases from liability. In short, PRPs should expect to live with some uncertainty concerning future liability unless a complete, effective remediation program is guaranteed. In the Hyde Park case involving Occidental Petroleum in Niagara Falls, New York, a full release was given in exchange for a comprehensive, nearly open-ended program of remediation. This case, it should be noted, was settled long before the advent of the settlement policy and the continued availability of such expansive language is open to question.

Related to the issue of release from liability is the government's willingness to provide contribution protection to settling PRPs. Obviously, settling parties wish to be insulated from third party suits should they settle with the government and the government pursue non-settling parties in litigation. Despite the policy's insistence that continued protection is available in limited situations, the United States has uniformly provided this protection in multipart settlements to date. The potential for additional
liability for a settling PRP exists where the government settles with A, then sues B. If B is jointly liable with A, it may seek contribution from A in a third party suit. Normally, the government agrees to reduce any judgment it may obtain against a non-settler to the extent that judgment may be used as a basis for obtaining additional payments from the settling PRP.

The law of contribution and release is unsettled. The government argues, and some courts have held that a right of contribution exists under CERCLA. (Indeed, almost all proposed CERCLA reauthorization bills before Congress make such a right express in the statute.) The government contends that contribution protection clauses are unnecessary because the stated intention of the parties in good faith settlements to terminate contribution rights will control the judicial construction of settlement agreements. It relies on the Uniform Joint Contribution Among Tortfeasors Statutes to reach this conclusion. The policy also commits the government to support termination of contribution rights in litigation of non-settlers against settling PRPs. However, until the statute is amended or the law is settled in this area, PRPs should continue to demand such language in settlement agreements.

The policy requires a written justification before the government may agree to contribution protection language.
The justification must consider: the policy states the government will not provide indemnity nor pay money to adjust subsequent contribution claims. Finally, the government will seek to limit the rights of settling PRPs to pursue claims against non-settlers by requiring subordination of private claims for contribution to the government's claim. This has rarely been agreed to by settling PRPs and may be more often used as a bargaining chip than a non-negotiable demand.

Some commentators have questioned the value of a release from liability, given the contingent, open-ended nature of them. This is a fair comment, to which there is no complete governmental response. However, settlements achieve at least a temporary, and hopefully, permanent cessation of liability and focus the government's enforcement attention on non-settlers. Moreover, whatever reopener provisions may be contained in settlement agreements, the government will undoubtedly bear a difficult burden if it seeks additional relief unless it can show a strong likelihood that public health may be affected or that the remedial plan was improperly implemented. Where the government actually undertakes the remedy, that burden appears even more substantive. Nevertheless, the balance between public welfare and private interests will likely be tipped toward the government where real public health concerns can be demonstrated.