UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OSWER DIRECTIVE
#9834.13

DEC - 6 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes

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TO: Regional Administrators, Regions I - X

I. INTRODUCTION

A) Focus of Interim Policy

This memorandum establishes EPA's interim policy on settlements involving municipalities or municipal wastes under Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). In particular, this interim policy indicates how EPA will exercise its enforcement discretion when pursuing settlements which involve municipalities or municipal wastes.[1] The municipal wastes addressed by this interim policy are municipal solid waste (MSW) and sewage sludge as defined below. This interim policy has been developed to provide a consistent Agency-wide approach for addressing municipalities and municipal wastes in the Superfund settlement process.

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[1] This interim policy does not provide an exemption from potential CERCLA liability for any party; potential liability continues to apply in all situations covered under Section 107 of CERCLA.

Although this interim policy focuses on municipalities and municipal wastes, it addresses how private parties and certain kinds of commercial, institutional, or industrial wastes will be handled in the settlement process as well. It is important to address private parties and certain kinds of commercial, institutional, or industrial wastes in this interim policy because private parties sometimes handle municipal wastes or wastes of a similar nature and because municipal and private party waste streams are sometimes co-disposed at sites, particularly municipal landfills. The kinds of commercial, institutional, or industrial wastes covered by this interim policy include "trash from a commercial, institutional, or industrial entity" and "low-hazardous industrial wastes" as defined below.

There are three fundamental issues addressed by this interim policy. First is whether to notify generators/transporters of MSW or sewage sludge that they are considered to be potentially responsible parties (PRPs) and to include them in the Superfund settlement process. Such parties are usually municipalities, although they may include private parties as well. Second is how municipalities should be handled in the Superfund settlement process when the decision is made to notify them that they are PRPs under Section 107(a) of CERCLA. Third is how the treatment of municipalities and municipal wastes under this interim policy affects the treatment of private parties and certain kinds of

commercial, institutional, or industrial wastes in the Superfund settlement process.

Key questions specifically addressed as part of this interim policy include the following:

- Information Gathering: Should municipalities be included in the Agency's information gathering process? Should generators/transporters of MSW or sewage sludge be included in the information gathering process?
- Notification: Should municipalities be notified that they are PRPs? Should generators/transporters of MSW or sewage sludge be notified as PRPs?
- Settlements: How should municipalities be handled in the Superfund settlement process? What settlement process and settlement tools should be used to facilitate settlement involving municipalities or municipal wastes?
- Private Parties: How does the treatment of municipalities and municipal wastes affect the Agency's treatment of private parties and certain kinds of commercial, institutional, or industrial wastes?

B) Key Terms Used in Interim Policy[2]

The following defines the key terms used in this interim policy:

- The term "municipalities" refers to any political subdivision of a State and may include cities, counties, towns, townships, and other local governmental entities.
- The term "municipal solid waste" refers to solid waste generated primarily by households, but may include some contribution of wastes from commercial, institutional and industrial sources as well. As defined under the Resource Conservation and Recovery Act (RCRA), MSW contains only those wastes which are not required to be managed as hazardous wastes under Subtitle C of RCRA (e.g., non-hazardous substances, household hazardous wastes (HHW), or small quantity generator (SQG) wastes). Although the actual composition of such wastes varies considerably at individual sites, MSW is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and

[2] The definitions provided under this section are for the purpose of this interim policy only. Where possible, this interim policy includes already existing definitions used under other Federal environmental programs (e.g., under the Resource Conservation and Recovery Act or the Clean Water Act). However, nothing in this interim policy affects the regulatory efforts of these other programs.

aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents) as well as small quantity generator wastes.[3] Many industrial solid wastes and some commercial and institutional solid wastes are managed separately from household wastes, but may enter the MSW waste stream.

- The term "municipal landfill" refers to any landfill, whether publicly or privately owned, that has received municipal solid waste for disposal.
- The term "sewage sludge" refers to any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage.[4]
- The term "trash from a commercial, institutional, or industrial entity" refers to waste which is very

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[3] All household wastes, including household hazardous wastes, are unconditionally exempt from the Federal hazardous waste regulations promulgated under Subtitle C of RCRA (See 40 CFR Section 261.4 (b)(1)). With regard to non-household sources of solid waste, if such waste is not a listed or characteristic hazardous waste accumulated in quantities exceeding the small quantity generator limitations (i.e., less than 100 kg/month of hazardous wastes and less than 1 kg/month for acute hazardous wastes), such waste is not required to be managed in a RCRA Subtitle C hazardous waste treatment, storage, or disposal facility (See 40 CFR Section 261.5). "Household hazardous wastes" refers to those wastes which are generated by households and would be managed as hazardous wastes under RCRA Subtitle C if they were generated by a non-household in quantities exceeding the small quantity generator limitations.

[4] The definition of sewage sludge is contained in the National Pollutant Discharge Elimination System Sewage Sludge Permit Regulations published in the Federal Register as a final rule May 2, 1989 (See 40 CFR Part 122.2).

similar to the MSW that is derived from households. This term covers only those wastes that are essentially the same as what one would expect to find in common household trash. This term does not include hazardous substances that are derived from a commercial, institutional, or industrial process or activity.

- The term "low-hazardous industrial wastes" refers to high volume wastes that contain small quantities of hazardous substances derived from an industrial, commercial, or institutional process or activity. Examples may include certain paint sludges or industrial wastewaters.

II. CERCLA LIABILITY

Important questions have been raised about whether municipalities may be PRPs and whether municipal wastes (i.e., MSW and sewage sludge) may be considered hazardous substances under CERCLA.

A) Municipalities as PRPs

The statute does not provide an exemption from liability for municipalities. Municipalities may be PRPs like private parties if municipalities fall within the categories of liability specified under Section 107(a) of CERCLA. In general, Section 107(a) establishes liability for past and present owners or operators of facilities as well as generators or transporters of hazardous substances for the release or threatened release of

hazardous substances. Such parties may be liable for the costs of responding to a release or threatened release of hazardous substances as well as for resulting damages to natural resources. The specific categories of liable parties under Section 107(a) are:

1. the owner and operator of a vessel or a facility,
2. any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, [commonly referred to as "generators"[5]], and
4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment

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[5] Persons who fall into this category are commonly referred to as "generators," although liability under this Section extends beyond "true generators" of hazardous substances to include persons who arranged for the disposal or treatment of hazardous substances owned or possessed by such party or another party. The term "generator" is used throughout this document to refer to any party who is potentially liable under Section 107(a)(3).

facilities, incineration vessels, or sites selected by such person [commonly referred to as "transporters"].

Section 107(a) describes liable parties as "persons" and the definition of "person" under Section 101(21) includes municipalities and political subdivisions of a State. Municipalities may, therefore, be PRPs as part of CERCLA's broad definition of who is potentially liable.

B) Municipal Wastes as Potential CERCLA Hazardous Substances

Similarly, the statute does not provide an exemption from liability for municipal wastes. Municipal wastes may be considered hazardous substances if they are covered under the definition of hazardous substances in Section 101(14) of CERCLA. As indicated under the definitions of MSW and sewage sludge, these municipal wastes are generally characterized by large volumes of non-hazardous substances and may contain small quantities of household hazardous or other wastes, although the actual composition of the waste streams vary considerably at individual sites. To the extent municipal wastes contain a hazardous substance that is covered under Section 101(14) of CERCLA and there is a release or threatened release, such municipal wastes may fall within the CERCLA liability framework.

III. INFORMATION GATHERING

The Regions should include all municipal and private party owners/operators and generators/transporters in the information

gathering process, including the generators/transporters of municipal wastes. This means that municipal owners/operators as well as municipal generators/transporters should generally receive Section 104(e) information request letters and should otherwise be fully included in the information gathering process like private parties. Information obtained through such letters or through other means is important for determining (among other things) whether it is appropriate to notify a party as a PRP, including whether to notify a generator/transporter of MSW or sewage sludge as discussed below.[6]

IV. NOTIFICATION OF POTENTIAL RESPONSIBILITY

A) Owners/Operators

The same approach will be used for both municipalities and private parties when determining whether to notify them as owners/operators. Specifically, such parties will generally be notified where they were past owners or operators of facilities at the time of disposal of hazardous substances, or they are present owners or operators of facilities where hazardous substances have been released or there is a threatened release.

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[6] The Regions may accept and consider credible site-specific information from any party to supplement their own information gathering efforts as appropriate.

B) Generators/Transporters[7]

1. Municipal solid waste: Municipalities and private parties will be treated the same when determining whether to notify them as PRPs when they are generators/transporters of MSW. Specifically, such parties will not generally be notified unless:

- o the Region obtains site-specific information that the MSW contains a hazardous substance;[8] AND
- o the Region has reason to believe that the hazardous substance is derived from a commercial, institutional, or industrial process or activity.

This means that EPA will not generally notify municipalities or private parties who are generators/transporters of MSW if only household hazardous wastes (HHW) are present, unless the truly exceptional situation discussed below exists. The general policy

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[7] The categories of wastes discussed below, i.e., relating to municipal solid waste, sewage sludge, trash from a commercial, institutional, or industrial entity, and low-hazardous industrial wastes, are defined in the "Introduction" to this interim policy (See I.B.).

[8] The term "site-specific" information refers to information pertaining to a particular Superfund site. "Site-specific" information does not generally include, for example, "general studies" conducted by EPA or other parties which draw general conclusions about whether MSW or sewage sludge typically contain a certain percentage of hazardous substances, unless the "general study" includes "site-specific" information obtained from the PRP or Superfund site in question. "General studies" may nonetheless be used to supplement "site-specific" information.

of not notifying parties who are generators/transporters of HHW extends to "HHW collection day programs" as well.[9]

This also means that such parties may be notified as PRPs if the MSW contains hazardous substances from non-household sources. Non-household sources include, but are not limited to, small quantity generator (SQG) wastes from commercial or industrial processes or activities, or used oil or spent solvents from private or municipally-owned maintenance shops.

Notwithstanding the above general policy, there may be truly exceptional situations where EPA may consider notifying generators/transporters of MSW which contains a hazardous substance derived only from households. Such notification may be appropriate where the total contribution of commercial, institutional, and industrial hazardous waste by private parties to the site is insignificant when compared to the MSW.[10] In this

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[9] The term "HHW collection day programs" refers to programs that have generally been sponsored by municipalities or community organizations whereby residents voluntarily remove their HHW from their household waste. The HHW is then typically disposed of in a RCRA Subtitle C hazardous waste facility and the household waste is typically disposed of in a RCRA Subtitle D solid waste facility.

[10] The Regions should consider both the volume and the toxicity of the commercial, institutional, and industrial hazardous waste when determining whether it is insignificant when compared to the MSW. In determining whether the volume is insignificant, the Regions should consider the total volume of such waste contributed by all private parties. In determining whether the toxicity is insignificant, the Regions should consider whether such waste is significantly more toxic than the MSW and whether such waste requires a disproportionately high treatment and disposal cost or requires a different or more costly remedial technique than that which otherwise would be

situation, the Regions should seriously consider notifying the generators/transporters of MSW containing a hazardous substance from households as PRPs and include them in the settlement process where it would promote either settlement or response action at the site.

2. Sewage sludge: Municipalities and private parties will be treated the same when determining whether to notify them as PRPs when they are generators/transporters of sewage sludge. Specifically, such parties will not generally be notified unless:

- o the Region obtains site-specific information that the sewage sludge contains a hazardous substance; AND
- o the Region has reason to believe that the hazardous substance is derived from a commercial, institutional, or industrial process or activity.

3. Trash from a commercial, institutional, or industrial entity: Parties who are generators/transporters of trash from a commercial, institutional, or industrial entity will not generally be notified as PRPs if such parties demonstrate to the Region that:

- o none of the hazardous substances contained in the trash are derived from a commercial, institutional, or industrial process or activity; AND

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technically adequate for the site.

- the amount and toxicity of the hazardous substances contained in the trash does not exceed that which one would expect to find in common household trash.

4. Any other hazardous substance, including low-hazardous industrial wastes: Municipalities or private parties who are generators/transporters of "any other hazardous substance" will generally be notified as PRPs if the Region obtains information that the substance is hazardous or that it contains a hazardous substance. This includes notification of private parties who are the generators/transporters of low-hazardous industrial wastes. "Any other hazardous substance" in this category refers to any hazardous substance covered under Section 101(14) of CERCLA other than hazardous substances that may be contained in MSW, sewage sludge, or trash from a commercial, institutional, or industrial entity (as discussed under IV.B.1., IV.B.2., or IV.B.3. above). The generators/transporters of hazardous substances that may be contained as part of the waste streams discussed under IV.B.1., IV.B.2., or IV.B.3. should be addressed as specified above.

V. SETTLEMENTS

A) Settlement Process

Once the notification decision is made, the general goal and overall process for reaching settlement at sites involving municipalities or municipal wastes is the same as for other sites. The general goal remains to negotiate with PRPs to reach one settlement agreement that provides complete resolution of all

pending CERCLA claims, and is consistent with both applicable statutory requirements and EPA's Interim CERCLA Settlement Policy.[11] This means that at sites where both municipal and private PRPs exist, EPA will attempt to include both types of parties in one settlement agreement.

Although one settlement agreement is the goal for each site, separate settlement agreements may be used at any site to facilitate settlement, where appropriate. This includes sites involving municipalities or municipal wastes. Separate settlements are not automatically available to municipalities and are generally available to such parties under the same conditions as for private parties. Examples of separate settlements are Section 122(g) de minimis settlements and cash-outs which may be used when they are consistent with applicable statutory requirements and existing EPA guidance.[12]

B) Settlement Provisions That May Be Particularly Suitable for Certain Municipalities

As indicated, once parties are notified as PRPs, the overall process and goals for reaching settlement at sites involving municipalities or municipal wastes is the same as for other Superfund sites. Nonetheless, there are some settlement provisions (e.g., delayed payments, delayed payment schedules,

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[11] "Interim CERCLA Settlement Policy", February 5, 1985, 50 FR 5034.

[12] For example, see "Interim Guidance on Settlements with De Minimis Waste Contributors," June 30, 1987, 52 FR 24333.

and in-kind contributions) that may be particularly suitable for facilitating settlement with certain municipal PRPs because they take into account a municipality's status as a governmental entity.[13]

Such settlement provisions are not routinely available to municipalities. As a general rule, they may be considered where a municipality has successfully demonstrated to EPA that they are appropriate (e.g., where valid ability to pay or procedural constraints that affect the timing of payment exist). These settlement provisions may be embodied in separate settlements or they may be folded into a larger settlement that includes private parties. In addition, although these settlement provisions may be particularly suitable for municipalities, they may also be available to private parties, such as certain small businesses, where appropriate.

The following discusses how delayed payments, delayed payment schedules, and in-kind contributions may be used:

1. Delayed payment: If a municipality has demonstrated difficulty providing a lump-sum payment upfront for past costs or

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[13] In some circumstances a municipality's governmental status may impose practical constraints on its ability to carry out its legal obligation as a PRP under CERCLA. For example, a municipality may need to hold a special vote involving its legislative body or its citizens to gain approval to issue a bond or arrange other financing to cover cleanup costs at a Superfund site where it is a PRP. These settlement provisions are designed to take into account these types of unavoidable constraints that may exist.

for cleanup needs, the settlement could be structured to allow the municipality to pay at a specified future date. This would allow the municipality time to raise the money needed to cover its contribution. This may include an interest payment.

2. Delayed payment schedules (payments over time): An alternative to a delayed payment is to allow a delayed payment schedule where the settlement is structured to allow the municipality to pay over time based upon a predetermined schedule of payments. The payment schedule would be adjusted in such a way that the discounted present value of the payment would be greater than or equal to the settlement.[14]

3 In-kind contributions: The settlement could be structured to allow for an in-kind contribution, especially where a municipality can provide only a portion of its share of costs or is unable to provide a monetary payment. In-kind contributions may be made in conjunction with or in lieu of cash. Factors the Regions may use in considering the appropriateness of an in-kind contribution may include the overall financial health of the municipality, the amount of the municipality's share, the

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[14] Delayed payment schedules may include "structured settlements" which are settlements paid over time generally through an annuity. EPA is currently developing guidance, titled "Interim Guidance on the Use of Structured Settlements Under CERCLA," which will establish criteria for evaluating whether a particular site is a good candidate for a structured settlement. EPA expects to issue this interim guidance in the Spring of 1990.

value of the in-kind contribution, and the effect of the in-kind contribution on the overall effort to achieve settlement.

One mechanism for allowing an in-kind contribution could be a "carve-out" order when, for example, the municipal PRP has agreed to provide the operation and maintenance at the facility. Other in-kind contributions could include the use of trucks and equipment to carry out cleanup activities, the installation of fences and the provision of other security measures to control public access to the site, or the use of the municipality's sewage treatment plant.

C) Contribution Protection

Nothing in this interim policy affects the rights of any party in seeking contribution from another party, unless such party has entered into a settlement with the United States or a State and obtained contribution protection pursuant to Section 113(f) of CERCLA.[15]

VI. DISCLAIMER

This interim policy is intended solely for the guidance of EPA personnel. It is not intended and can not be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves

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[15] Under Section 113(f), where EPA determines that settlement is in the best interests of the Federal government, CERCLA provides contribution protection to the settling parties for matters covered by the settlement. This may include a party who has not been notified as a PRP by EPA but wishes to settle its potential CERCLA liability.

the right to act at variance with this policy and to change it at any time without public notice.

VII. FOR FURTHER INFORMATION

For further information or questions about this interim policy, the Regions may contact Kathleen MacKinnon in the Office of Waste Programs Enforcement at FTS-475-9812. Inquiries by other persons should be directed to Ms. MacKinnon at 202-475-6771.