



U.S. ENVIRONMENTAL PROTECTION AGENCY



U.S. DEPARTMENT OF JUSTICE

AUG 20 2003

MEMORANDUM

SUBJECT: Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA § 107(p)

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Director, Emergency and Remedial Response Division, EPA Region II
Director, Hazardous Site Cleanup Division, EPA Region III
Director, Waste Management Division, EPA Region IV
Directors, Superfund Division, EPA Regions V, VI, VII and IX
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I. Introduction

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (SBLRBRA), Pub. L. No. 107-118 (also referred to herein as “the Act”). Section 102(a) of the Act amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, et seq., to provide a qualified exemption from liability for response costs under section 107 to certain residential, small business and non-profit generators of municipal solid waste (MSW) at Superfund sites on the National Priorities List (NPL).¹ CERCLA § 107(p).

This interim² guidance discusses the statutory provisions of CERCLA § 107(p) and identifies some factors to be considered by EPA and DOJ staff in exercising their enforcement discretion pursuant to section 107(p) with respect to parties who arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of MSW at an NPL site (referred to herein as “MSW generators”). This discussion includes who qualifies for an exemption under section 107(p) (referred to herein as “exempt MSW generators”), exceptions to the exemption, and the definition of MSW. This interim guidance also briefly discusses the provisions included by Congress to deter litigation against exempt MSW generators: (1) the prohibition of contribution actions against owners and operators of residential property; (2) the shifting of the burden of proof in actions against small businesses and non-profit organizations; and (3) the recovery of attorneys’ fees by exempt MSW generators.

The interim guidance next addresses the relationship of the new statutory exemption in CERCLA § 107(p) to existing EPA policies³ regarding MSW parties, including the “Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes,” OSWER Dir. 9834.13 (Dec. 12, 1989) (hereinafter “1989 MSW Policy”) and the “Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites” (Feb. 5, 1998) (hereinafter “1998 MSW Policy”). As discussed more fully below, these documents generally provide that EPA does not intend to pursue generators and transporters of MSW and that EPA may settle with these parties if they are pursued by other parties at a site.

¹ EPA does not intend to reopen any agreements or settlements with the United States. Pursuant to section 103 of SBLRBRA, CERCLA § 107(p) does not apply to “concluded actions,” which are defined by the Act to include any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State prior to January 11, 2002.

² This document is an interim guidance because as EPA and DOJ gain more experience implementing section 107(p), it may be necessary to revise this guidance.

³ For additional information on existing EPA guidance, visit EPA’s web page at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

Finally, this interim guidance includes three attachments for use by Regional and DOJ staff at their discretion: (1) a sample notice letter and questionnaire for MSW parties; (2) sample responses for MSW parties; and (3) model MSW waiver language for agreements at NPL sites.

II. Evaluating the Applicability of the Exemption

EPA generally does not pursue MSW generators, some of whom may qualify for the exemption in CERCLA § 107(p). Furthermore, generators who qualify for the exemption should not be pursued in contribution by potentially responsible parties (PRPs).⁴ In fact, the Act includes several provisions designed to discourage unwarranted litigation against exempt MSW generators, e.g., burden shifting and recovery of attorney's fees (discussed below). As a result, EPA and DOJ expect that it will only rarely need to make determinations of whether the exemption applies.

However, in exercising their enforcement discretion at sites where an MSW generator may be threatened with contribution litigation, Regional and DOJ personnel may need to determine whether a party qualifies under section 107(p), or whether a settlement under this interim guidance or the 1998 MSW Policy is appropriate.⁵ Accordingly, this guidance discusses the applicability of section 107(p) and provides some factors and examples to be considered by Regional and DOJ personnel in evaluating the potential applicability of section 107(p) on a site-specific basis.

A. Exempt Parties

CERCLA § 107(p) conditionally exempts three categories of MSW generators from liability for response costs⁶ under CERCLA § 107(a)(3): (1) owners, operators or lessees of residential property; (2) certain small businesses; and (3) certain non-profit organizations. The conditional exemption does not apply to parties liable as owners or operators under section 107(a)(1) or (2) or transporters under section 107(a)(4).

⁴ These exempt generators should not be considered "orphans" under EPA's "Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996). As with other exempt parties, it is EPA's position that these newly exempt generators should not be assigned any share in an allocation because they are not PRPs.

⁵ Attachments 1 and 2 include a sample notice letter/questionnaire and a sample written response for use by Regional personnel in making these determinations. These samples may be revised to address site-specific facts and issues.

⁶ This policy addresses CERCLA response costs only and does not address natural resource damages.

1. An owner, operator or lessee of residential property⁷

Under CERCLA § 107(p)(1)(A), an owner, operator, or lessee of residential property from which all of the person's MSW was generated with respect to a facility may be exempt. Examples of "residential property" may include single-family dwellings, such as single-family houses, townhouses, individual apartment units, and individual condominium units, and multi-family dwellings, such as duplexes, apartment buildings, and condominium buildings. At mixed-use properties (e.g., a large apartment building with some commercial tenants), it may be necessary for a Region to consider whether waste generated by commercial tenants was commingled with MSW from residential tenants when evaluating whether the owner or operator of a building qualifies for the exemption.

2. A small business

CERCLA § 107(p)(1)(B) exempts a "business entity . . . that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. § 631, *et seq.*)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility."

Under section 107(p)(1)(B), a "business entity" is defined to include a parent, subsidiary or affiliate of the entity. Section 107(p)(1) further provides that the term "affiliate" has the meaning provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act, 15 U.S.C. § 631, *et seq.* The SBA's regulations may be found at 13 C.F.R. § 121.103 (<http://www.sba.gov/library/cfrs/13cfr121.pdf>) and provide a thorough discussion of the general principles of affiliation.

To qualify under section 107(p)(1)(B), a "business entity" may not employ on average more than 100 full-time individuals or the equivalent thereof. Examples of an "equivalent" may include part-time employees whose combined schedules equal a full-time employee (e.g., two half-time employees may be considered to be one full-time employee). Unlike the provision for non-profit organizations described below, section 107(p)(1)(B) does not make the determination of the number of individuals employed location-specific. Rather, the number of individuals employed is determined by adding together the number of employees at each location of the business.

⁷ This interim guidance is not intended to modify or supersede the definition of "residential property" in EPA's "Policy Towards Owners of Residential Property at Superfund Sites," OSWER Dir. 9834.6 (July 31, 1991).

The conditional exemption provides that the determination of the number of individuals employed should be made based on the 3 taxable years preceding written notice of potential liability to the business. However, consistent with the 1989 and 1998 MSW policies, EPA does not generally pursue generators who sent only MSW to a site and, therefore, normally would not issue them a general notice of potential liability. If a Region learns that a potentially exempt generator is being or may be pursued by a third party, the Region has the discretion to issue a hybrid notice of potential liability and questionnaire to gather information related to the party's eligibility for an exemption. See Attachment 1 for a sample notice letter and questionnaire. At those sites, after evaluating the information, it then would be appropriate in most cases for the Region to provide a written statement regarding the potential applicability of the exemption to the party. See Attachment 2 for a sample response.

Finally, a "business entity" must qualify as a "small business concern" within the meaning of the Small Business Act, 15 U.S.C. § 631, et seq. Section 632(a)(1) of that Act provides that a "small business concern" "shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation" Section 632(a)(2) further provides that the "Administrator [of the Small Business Administration] may specify detailed definitions or standards by which a business concern may be determined to be a small business" The small business size standards promulgated pursuant to section 632(a)(2) may be found in 13 C.F.R. § 121.101 (<http://www.sba.gov/library/cfrs/13cfr121.pdf>).

3. A non-profit organization

CERCLA § 107(p)(1)(C) conditionally exempts from liability for response costs an organization that meets the description in section 501(c)(3) of the Internal Revenue Code of 1986 and is exempt from tax under section 501(a) of that Code -- commonly referred to as a 501(c)(3) organization. See 26 U.S.C. § 501 (<http://www4.law.cornell.edu/uscode/26/501.html>). To qualify for the conditional exemption, the organization, during its taxable year preceding the date of transmittal of written notice of liability, may not employ more than 100 paid individuals at the location from which all MSW was generated. For those non-profit organizations with multiple locations, Regions generally should treat each location separately when making this determination.

Similar to the small business provision, the conditional exemption for non-profit organizations provides that the determination of the number of paid individuals employed should be made based on the taxable year period preceding written notice of potential liability to the business. As discussed above with respect to small businesses, EPA generally does not send a general notice of potential liability to an MSW-only party. However, at certain sites, it may be appropriate for a Region to issue a hybrid notice of potential liability and questionnaire and, if necessary, to provide a written statement regarding the potential applicability of the exemption to the party, as discussed above.

B. Exceptions

CERCLA § 107(p)(2) provides that the conditional exemption does not apply where: (A) the MSW “contributed significantly,” either individually or in the aggregate, to the cost of response or natural resource restoration; (B) the person has failed to comply with an information request or administrative subpoena issued by the President; or (C) the person has impeded or is impeding a response action or natural resource restoration with respect to the facility.

EPA believes that a determination of whether an exception applies is highly fact-specific and should be made on a case-by-case basis.⁸ When evaluating whether the MSW “contributed significantly” at a particular site, a Region may consider the quantity of MSW sent by a generator. With respect to the phrase “in the aggregate,” the legislative history indicates that the phrase refers to “all of the municipal solid waste generated by that owner, operator, or lessee, business entity or charitable organization and sent to a facility which otherwise qualifies for the municipal solid waste exemption” and is not meant to “be interpreted to encompass all of the municipal solid waste contained in a landfill disposed of by different persons or business entities.” See H.R. No. 70, 107th Cong., 1st Sess., pt. 1, at 7 (2001).

EPA expects that these exceptions will apply relatively infrequently. However, pursuant to section 107(p)(3), any determination by EPA that an exception applies is not subject to judicial review.⁹

⁸ By Executive Order 13308, the President revised Executive Order 12580 to delegate the authority to make determinations under section 107(p) to the Administrator of EPA (and to the heads of Executive departments and agencies for facilities under their jurisdiction, custody or control). 68 Fed. Reg. 37,691 (June 20, 2003). Under Delegation 14-14-I, the Administrator redelegated the authorities in section 107(p)(2) to the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance with the authority to further delegate to the Division Director level. Delegations Manual, 14-14-I (Small Business and Brownfields Liability Clarifications) (July 28, 2003).

⁹ If a Region would like to proceed with an enforcement action against a generator based on the determination that an exception in section 107(p)(2) applies and, therefore, the generator is not exempt under section 107(p), Regions are required to consult with the Director of the Regional Support Division, Office of Site Remediation Enforcement, prior to proceeding with the action. In addition, if a Region’s decision to proceed is based upon a determination under section 107(p)(2) regarding natural resource restoration, the Region is required to consult with the natural resource trustee prior to proceeding with the action.

C. Definition of MSW

For purposes of the conditional exemption in CERCLA § 107(p), SBLRBRA defines MSW as waste material:

- (i) generated by a household (including a single or multifamily residence); and
- (ii) generated by a commercial, industrial or institutional entity, to the extent that the waste material –
 - (I) is essentially the same as waste normally generated by a household;
 - (II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and
 - (III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

CERCLA § 107(p)(4)(A). The legislative history indicates:

The relative quantity refers to the percentage of hazardous substances to total municipal solid waste. The Committee intends that the percentage of hazardous substances in the municipal solid waste for commercial, institutional and industrial entities that qualify for this exemption should be no greater than the percentage of hazardous substances in municipal solid waste that a typical single-family household generates and sends to a landfill.

See H.R. No. 70, 107th Cong., 1st Sess., pt. 1, at 7 (2001). Examples of MSW include “food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.” CERCLA § 107(p)(4)(B).

SBLRBRA excludes from the definition of MSW: “(i) combustion ash generated by resource recovery facilities or municipal incinerators; or (ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.” CERCLA § 107(p)(4)(C).

The SBLRBRA definition of MSW differs in many respects from the definition of MSW contained in EPA’s 1998 MSW Policy, which remains in effect for purposes of settlement under that policy. For example, unlike the 1998 MSW Policy, the SBLRBRA definition of MSW does not specifically include municipal sewage sludge (MSS). Accordingly, EPA will continue to address generators that sent MSS under the 1998 MSW Policy. See III.A. below.

D. Prohibition of Certain Actions, Burden of Proof,

and Recovery of Attorney's Fees

CERCLA § 107(p) contains several provisions which are designed to reduce the burden on generators who may qualify for the exemption. Section 107(p)(6) generally prohibits any private party from bringing a contribution action against another private party who qualifies as an owner, operator or lessee of residential property under section 107(p)(1)(A). With respect to generators described in paragraphs (1)(B) (small business) and (C) (non-profit), the statute contains no general prohibition against contribution actions against such parties. Section 107(p)(5) provides, however, that the burden of proving that these parties do not meet the exemption shall shift under certain circumstances:

- (1) If the MSW was disposed of before April 1, 2001, the burden of proof is on the party (private or governmental) bringing the action.
- (2) If the MSW was disposed of on or after April 1, 2001, the burden of proof is on: (a) the private party who brings an action against another private party; or (b) the private party asserting the applicability of the exemption if a federal, state or local governmental entity is bringing the action against that private party.

Furthermore, if a private party brings a contribution action after January 11, 2002, against a generator found to be exempt under section 107(p), the party bringing the action is liable to the exempt generator for all reasonable costs of defending the action, including attorney's and expert witness fees. CERCLA § 107(p)(7). These provisions are designed to act as a significant deterrent to litigation against parties whom Congress intended to exempt from CERCLA liability for response costs.

III. Relationship to Existing EPA Policy

As discussed above, SBLRBRA created a conditional exemption from liability under CERCLA § 107(a)(3) for certain generators – residential property owners, small businesses and non-profit organizations who meet the statutory criteria – regardless of the amount of MSW sent by that party to the site.¹⁰ For most of these generators, the new exemption should adequately protect them and, as a result, application of EPA's existing policies to these parties should no longer be necessary. For generators not covered by the new statutory exemption, however, most aspects of EPA's existing policies regarding MSW remain in effect and should be applied where appropriate.

¹⁰ However, as discussed more fully in Section II.B., the quantity of MSW sent may be a factor for a Region to consider in determining whether an exception to the exemption applies.

A. Current MSW Policies

EPA's 1989 MSW Policy sets forth the criteria by which EPA generally determines whether to exercise its enforcement discretion not to pursue MSW generators or transporters as PRPs under CERCLA. See "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes," OSWER Dir. 9834.13 (Dec. 12, 1989). This policy provides that EPA generally will not identify a generator or transporter of MSW as a PRP unless there is site-specific evidence that the MSW disposed by that party contained hazardous substances derived from a commercial, institutional, or industrial process or activity.

Building upon the 1989 MSW Policy, the 1998 MSW Policy states that EPA will continue its policy of generally not identifying generators and transporters of MSW as PRPs at NPL sites. See "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (Feb. 5, 1998). In an effort to reduce contribution litigation by third parties, the 1998 MSW Policy also identifies a methodology for calculating the share of response costs to be paid by a generator or transporter of MSW and/or municipal sewage sludge (MSS) at an NPL site who wants to resolve its potential liability in a settlement with the United States. Finally, the 1998 MSW policy identifies a presumptive settlement range for municipal owners and operators of co-disposal sites on the NPL.

Because CERCLA § 107(p) does not apply to certain generators, parties liable as owners/operators or transporters, or to parties involved at non-NPL sites, the 1989 and 1998 MSW policies remain potentially applicable to these MSW parties. Section 102 of SBLRBRA does not limit EPA's authority to exercise its enforcement discretion to enter into settlements with such parties. To the contrary, the legislative history of SBLRBRA expressly states that Congress did not intend to limit EPA's authority to exercise its enforcement discretion to enter into settlements with parties not covered by the exemption.¹¹ Accordingly, EPA intends to continue to exercise its enforcement discretion, where appropriate, to settle with parties not covered by new section 107(p) in a manner consistent with the 1989 and 1998 MSW Policies.

¹¹ The Report of the Committee on Transportation and Infrastructure states that "[t]he Committee does not intend that the Small Business Liability Protection Act give rise to negative implications with respect to the Agency's existing settlement authorities for potentially responsible parties that are ineligible for the Act's exemptions. In particular, although the "de micromis" and "municipal solid waste" exemptions do not apply at sites that are not on the National Priorities List, the Committee does not intend to affect the authority to reach settlements with other potentially responsible parties under the Act." H.R. Rep. No. 70, 107th Cong., 1st Sess., pt. 2, at 5 (2001); see also H.R. No. 70, 107th Cong., 1st Sess., pt. 1, at 8 (2001).

B. De Micromis Policies

In 1996, EPA and DOJ jointly issued the “Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors” (June 3, 1996) (hereinafter 1996 De Micromis Guidance). Under the 1996 De Micromis Guidance, if an MSW-only generator or transporter contributed less than 0.2 percent of the total waste at a site, the party was considered to be a de micromis contributor of MSW and a Region had the enforcement discretion to not pursue these parties. If these MSW-only contributors were threatened with a lawsuit, EPA had the discretion to enter into a settlement involving no monetary payment (also referred to as a zero dollar settlement) with the party to afford them contribution protection.

SBLRBRA, however, added a new conditional exemption to CERCLA for de micromis contributors of hazardous substances only. CERCLA § 107(o). As a result, EPA and DOJ recently issued a settlement policy to address the impact of the new statutory exemptions on the 1996 De Micromis Guidance. See “Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties” (November 6, 2002). The new policy supersedes the 1996 De Micromis Guidance and, consistent with the new statutory exemptions, does not address small quantity contributors of MSW as de micromis parties.

However, at certain sites, it still may be appropriate to offer a zero dollar settlement to a party who does not qualify for the statutory MSW exemption (e.g., a transporter, a generator who is not a small business), yet only contributed a very small amount of MSW to a site, e.g., 0.2 percent or less of the total waste at a site. Although EPA generally intends to exercise its enforcement discretion to not pursue these parties, they could be pursued in contribution by other PRPs. As stated above, SBLRBRA does not limit EPA’s authority to exercise its enforcement discretion to enter into settlements with such parties. Accordingly, Regions may, at their discretion, consider the appropriateness of, and resource requirements for, a settlement with a generator or transporter whose MSW contribution represents 0.2 percent or less of the total waste at an NPL site where the party has been sued or faces a concrete threat of a lawsuit by other PRPs.¹²

C. Model Waiver Language

Historically, EPA and DOJ staff routinely have included in RD/RA consent decrees and other types of agreements (unless a broader waiver of claims against all persons was already included in the agreement) a provision whereby settling PRPs agreed to not bring contribution actions against certain small volume hazardous substance and MSW-only contributors. Over

¹² A Region may not need to produce a waste-in list if it has sufficient site-specific information to determine that a settlement is appropriate. However, a Region should use a waste-in list if it is available and complete.

time, the MSW waiver language in this provision has been revised to bring it into conformance with EPA policy regarding MSW contributors.

Since the enactment of SBLRBRA, MSW generators that meet the requirements of CERCLA § 107(p) are protected by the statute and should no longer be pursued by PRPs. These generators should not need to be protected by a waiver and, therefore, a waiver for those generators generally is not required. However, as discussed above, EPA intends to continue to protect certain generators and transporters whose MSW contribution represents 0.2 percent or less of the total waste at an NPL site if they do not fall within the scope of the MSW exemption. Therefore, a waiver regarding these parties generally should continue to be required in RD/RA consent decrees and other types of agreements at NPL sites which received MSW. See Attachment 3.

IV. Disclaimer

This document and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Government. This document is not a rule and does not create any legal obligations. Whether and how the United States applies this document to any particular site will depend on the facts at the site.¹³

Attachments

cc: Paul Connor (OSRE)
Sandra Connors (OSRE)
Mike Cook (OSWER)
Henry Friedman (DOJ)
Linda Garczynski (OSWER)
Patricia McKenna (DOJ)
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¹³ Questions regarding this guidance may be directed to Susan Boushell in EPA's Office of Site Remediation Enforcement (202-564-2173, boushell.susan@epa.gov), Douglas Dixon in EPA's Office of Site Remediation Enforcement (202-564-4232, dixon.douglas@epa.gov), or Patricia McKenna in DOJ's Environment and Natural Resources Division (202-616-6517, pmckenna@enrd.us.doj.gov).

ATTACHMENT 1

SAMPLE NOTICE LETTER/QUESTIONNAIRE FOR MSW PARTIES

[Name]
[Address]

Re: Notice and Information Request Regarding the [name] Site

Dear [Name]:

The United States Environmental Protection Agency (EPA) has been informed that you have been contacted by a party involved at [name and location of site] who is asking you to help pay for site cleanup costs. [If recipient already has been sued, insert instead: “The United States Environmental Protection Agency (EPA) has been informed that you have been named as a defendant in a private lawsuit entitled [case name, court, civil action number] seeking your contribution to site cleanup costs.”] This letter is intended to provide you with information about EPA’s policy regarding municipal solid waste (MSW) parties at Superfund sites and the new statutory exemption for certain MSW parties. [If the recipient is a small business or non-profit organization, insert: “and to serve as the notification referenced under section 107(p)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9607(p)(1).”]

It is EPA’s longstanding policy generally not to seek cleanup and other response costs from individuals or businesses that sent only MSW or transported only MSW to a Site. Recently, CERCLA was amended to provide an explicit exemption from liability for response costs for certain residential, small business and non-profit generators of MSW at sites on the National Priorities List, EPA’s list of high priority hazardous waste sites. See 42 U.S.C. § 9607(p). The statutory exemption includes provisions intended to deter lawsuits against exempt parties. For example, if an exempt party is named in a lawsuit filed after April 1, 2001, CERCLA § 107(p)(5) requires the party bringing the lawsuit to prove that the exemption does not apply. In addition, if a court determines that a party is eligible for the statutory exemption, CERCLA § 107(p)(7) provides that the party bringing the lawsuit may be liable to the exempt party for the reasonable costs of defending the action, including their attorney’s and expert witness fees.

This statutory exemption and its relationship to existing EPA policies addressing liability for MSW is discussed in the “Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA § 107(p)” (August 20, 2003) (“2003 Interim Guidance”) (copy enclosed) (<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw->

exempt.pdf). The 2003 Interim Guidance also explains that EPA may, at its discretion, enter into a zero dollar settlement with any MSW party who does not qualify for the statutory MSW exemption, but whose MSW contribution was 0.2 percent or less of the total waste at a NPL site. This settlement provides the settling party with protection against lawsuits brought by other responsible parties.

If a person is not eligible for the statutory exemption or a settlement under the 2003 Interim Guidance, a person may be eligible to settle with EPA under the Agency's 1998 "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" ("1998 MSW Policy") (copy enclosed) (<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/munic-solwst-mem.pdf>). For parties who fall within its scope, the MSW 1998 Policy provides a methodology for calculating the share of response costs to be paid by the MSW and/or municipal sewage sludge (MSS) party who wants to resolve its potential liability in a settlement with the United States. This settlement also provides the settling party with protection against lawsuits brought by other responsible parties.

If you would like EPA to assess your potential eligibility for the statutory exemption provided by CERCLA § 107(p) or a settlement with the United States under either the 1998 MSW Policy or the 2003 Interim Guidance referenced above, please provide the information requested in the attached questionnaire. Upon receipt and evaluation of this information and any other information EPA may have, EPA will, in most cases, be able to provide you with its assessment of the potential applicability of the statutory exemption and/or the possibility of a settlement with the United States under one of the MSW policies.

Please remember that this process is entirely voluntary and that you do not have to respond to the questionnaire or to enter into a settlement with the United States. However, you will need to complete the questionnaire if you want EPA to provide you with an assessment of your potential eligibility for the statutory exemption or the potential applicability of the MSW settlement policies.

If you have any questions, please call me at _____.

Sincerely,

[NOTE: When using the questionnaire, questions may be modified, added, or deleted, as necessary, to reflect known site-specific information.]

[INSERT SITE NAME] QUESTIONNAIRE

CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. § 9607(p)(1) (CERCLA § 107(p)(1)), provides that certain categories of persons shall not be liable with respect to response costs under CERCLA § 107(a)(3) for disposal of Municipal Solid Waste (MSW) at a facility on the National Priority List if they comply with certain conditions. This questionnaire is designed to gather information about the material you may have sent to the **[insert name]** Superfund Site located in [insert location] and any other involvement you may have had with this site. Your answers to this questionnaire will be used by the United States Environmental Protection Agency (EPA) to assess your potential eligibility for an exemption from liability or the possibility of a settlement with the United States. This questionnaire is not subject to the requirements of the Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq.*

Please fill out this questionnaire as completely and accurately as possible. Your answers should reflect your best recollection of the quantity and types of MSW or other material you may have sent to the site and any other involvement you may have had with the site. When answering questions, you may rely on records or other documents, such as receipts, canceled checks, invoices, contracts, etc., as well as other sources of information, including discussions with others. If your answers do not fit in the spaces provided, you may continue them on additional sheets of paper. Please write your name and the name of the site on the top of any additional sheets of paper and please identify the number of the question that is being continued.

If you have any questions about this form, please call:

[insert Regional contact's name and phone number].

I. CERTIFICATION

I, _____ (insert your name), certify that I am authorized to complete this questionnaire on behalf of _____ (insert name of party for whom you are responding, or if you are responding on behalf of yourself as an individual, insert "self"), and that I am authorized to make the representations set forth below.

I further certify that I have made a thorough, comprehensive, and good faith search for all records, documents, or other information in the possession or control of _____ (insert name of party for whom you are responding, or if you are responding on behalf of yourself as an individual, insert "self") to obtain all information

which relates in any way to the ownership, operation, transportation, treatment, storage, and/or disposal of MSW or other material at the **[insert site name and location]**, including having discussions with persons who have or may have knowledge about these matters. Based upon my review of such records, I certify that the answers stated below are true, accurate, and complete to the best of my knowledge.

I DECLARE UNDER PENALTY OF PERJURY THAT THE INFORMATION SUBMITTED IN RESPONSE TO THIS QUESTIONNAIRE IS TRUE, ACCURATE, AND COMPLETE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF:

Signature: _____ Date: _____

Print Name: _____

Title (if any): _____

Address: _____

Telephone (including area code): _____

II. BACKGROUND INFORMATION

A. Identity of Party

Name: _____

Address: _____

Telephone (including area code): _____

B. Attorney

If you have an attorney representing you for matters relating to this site, please give the following information about your attorney:

Name: _____

Address: _____

Telephone (including area code): _____

III. SOURCES OF INFORMATION

A. Please check the sources of information you used to fill out this questionnaire (more than one may apply):

- Personal knowledge
- Written records
- Information from other persons

B. If your responses are based on information from other persons, please give the names, addresses, and telephone numbers of the other persons and a description of the information that they were able to provide:

C. Please attach copies of any records or other documents you used to fill out this questionnaire. Documents may include items such as receipts, canceled checks, invoices, contracts, or written agreements. Please write your name and the name of the site on the top of each attachment.

IV. DEFINITION OF MSW

A. For purposes of this questionnaire, “municipal solid waste” shall mean waste material:

1. Generated by a household (including a single or multifamily residence); and
2. Generated by a commercial, industrial or institutional entity, to the extent that the waste material:
 - a. Is essentially the same as waste normally generated by a household;
 - b. Is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and
 - c. Contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in

waste material generated by a typical single-family household.

Examples include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

- B. For the purposes of this questionnaire, “municipal solid waste” does not include:
1. Combustion ash generated by resource recovery facilities or municipal incinerators; or
 2. Waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households; or
 3. Municipal sewage sludge (e.g., any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage sludge).

V. MATERIAL SENT TO THE SITE

A. Arrangements

1. Did you arrange for the disposal or treatment, or arrange with a transporter for the disposal or treatment, of any MSW at the **[insert site name and location]**? ___ yes ___ no
 - a. If yes, provide an estimate of the amount of MSW you arranged to dispose or treat at the site (e.g., volume and frequency):

 - b. If yes, identify the time period the MSW was disposed or treated:

2. Did you arrange for the disposal or treatment, or arrange with a transporter for the disposal or treatment, of any other material (i.e., non-MSW) at the **[insert site name and location]**? ___ yes ___ no
 - a. If yes, identify the other material: _____

 - b. If yes, provide an estimate of the amount of other material you arranged to dispose or treat at the site (e.g., volume and frequency):

 - c. If yes, identify the time period the other material was disposed or treated: _____
3. If you answered “no” to questions 1 and 2, please go to section VI.

B. Source

1. Single Residence (e.g., single-family house, individual apartment)
 - a. Was a single residence the source of any of your MSW that ended up at the site? ___ yes ___ no
 - b. Was a single residence the source of any of your other material that ended up at the site? ___ yes ___ no
 - c. Is there a business or commercial enterprise (e.g., dry cleaner, beauty shop, automobile repair, electroplating operation, or furniture repair) that operates or has operated from this single residence? ___ yes ___ no

If yes, please state the type of business or commercial enterprise and briefly describe the nature of its operations:

2. Multifamily Residence

- a. Was a multifamily residence (e.g., apartment building, condominium building) the source of any of your MSW that ended up at the site? ___ yes ___ no

If yes, please state the number of residential units: ____

- b. Was a multifamily residence (e.g., apartment building, condominium building) the source of any of your other material that ended up at the site? ___ yes ___ no

If yes, please state the number of residential units: ____

- c. Is there a business or commercial enterprise (e.g., dry cleaner, beauty shop, automobile repair, electroplating operation, furniture repair) that operates or has operated from this multifamily residence? ___ yes ___ no

If yes, please state the type of business or commercial enterprise and briefly describe the nature of its operations:

3. Business or Commercial Establishment

- a. Was a business or commercial establishment the source of any of your MSW that ended up at the site? ___ yes ___ no

- i. If yes, please state the type of business or commercial establishment and briefly describe the nature of its operations: _____

- ii. If yes, please provide any information, records, or documents available to you that, for purposes of the MSW liability exemption under CERCLA § 107(p), demonstrate:

- A) You are a business entity (including a parent, subsidiary, or affiliate of the entity) that during your 3 taxable years preceding **[insert date of the notice letter]**, employed on average not more than 100 full-time individuals, or the equivalent thereof (e.g., part-time employees whose combined schedules equal a full-time employee). You must include the number of individuals employed by any parent, subsidiary, or affiliate. (The term “affiliate” has the meaning of that term in the definition of “small business concern” in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631, et seq.))
- B) You are a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631, et seq.)).

b. Was a business or commercial establishment the source of any of your other material that ended up at the site? ___ yes ___ no

If yes, please state the type of business or commercial establishment and briefly describe it: _____

4. Non-Profit Organization

a. Was a non-profit organization the source of any of your MSW that ended up at the site? ___ yes ___ no

i. If yes, please describe the organization and the nature of its operations: _____

ii. If yes, please identify each location of the non-profit organization that contributed MSW to the site and the number of paid individuals at each location: _____

iii. If yes, please provide any information, records, or documents available to you that, for purposes of the MSW liability exemption under CERCLA § 107(p), demonstrate:

A) You are an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such code; and

B) You employed during the tax year preceding **[insert date of the notice letter]** not more than 100 paid individuals at the location from which the MSW attributable to your organization was generated and disposed at the **[name]** site.

b. Was a non-profit organization the source of any of your other material that ended up at the site? ___ yes ___ no

If yes, please describe the organization and the nature of its operations: _____

5. Government Entity

a. Was a government entity the source of any of your MSW that ended up at the site? ___ yes ___ no

If yes, please state the type of governmental entity: _____

b. Was a government entity the source of any of your other material that ended up at the site? ___ yes ___ no

If yes, please state the type of governmental entity: _____

C. Identification of Material

1. Household Waste

- a. Did the MSW that you produced and disposed at the site contain household waste? ___ yes ___ no

If yes, please describe the type of material that was contained in this household waste: _____

- b. Did the other material that you produced and disposed at the site contain household waste? ___ yes ___ no

If yes, please describe the type of material that was contained in this household waste: _____

2. Commercial, Institutional, or Industrial Process or Activity

- a. Was the MSW that you disposed at the site from a commercial, institutional, and/or industrial process or activity? ___ yes ___ no

- i. If yes, please describe the process or activity, including whether it involved any manufacturing or processing operations: _____

- ii. If yes, please describe the type of materials contained in this waste. In particular, please identify all materials that contained hazardous substances. Please attach any Material Safety Data Sheets you may have for these materials, and any other documents showing the contents of these materials:

iii. If yes, was the waste essentially the same as household waste? ___ yes ___ no

If yes, describe the waste: _____

iv. If yes, was the waste collected and disposed with other MSW as part of normal MSW collection services? ___ yes ___ no

If yes, please describe such services: _____

v. If yes, did the waste contain a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material by a typical single-family household? ___ yes ___ no

If yes, please explain how you made this comparison, including the amount of hazardous substances contained in the waste and its ratio to the total amount of waste:

vi. If yes, did the waste contain combustion ash that was generated by resource recovery facilities or incinerators? ___ yes ___ no

If yes, please describe: _____

b. Was the other material that you disposed at the **[name]** site from a commercial, institutional, and/or industrial process or activity? ___ yes ___ no

i. If yes, please describe the process or activity:

ii. If yes, please describe the type of materials contained in this waste. In particular, please identify all materials that contained hazardous substances. Please attach any Material Safety Data Sheets you may have for these materials, and any other documents showing the contents of these materials:

4. Measures

a. Did you separate MSW from other types of trash or other material?
___ yes ___ no

If so, please describe the manner in which you separated MSW from other types of trash or other material and how you disposed

of

the other material: _____

5. Hauling or Transportation

a. Did you haul or transport MSW to the **[name]** site yourself?
___ yes ___ no

i. If yes, please provide the approximate dates during which you did this hauling or transporting: _____

ii. If no, please state the name, address, and telephone number (if known) of the hauler or transporter. If more than one hauler or transporter was used, please give the names,

addresses, and telephone numbers of each and please give the dates each were used: _____

- b. Did you haul or transport other material to the **[name]** site yourself? ___ yes ___ no
 - i. If yes, please provide the dates during which you did this hauling or transporting: _____

 - ii. If no, please state the name, address, and telephone number (if known) of the hauler or transporter. If more than one hauler or transporter was used, please give the names, addresses, and telephone numbers of each and please give the dates each were used: _____

6. Municipal Sewage Sludge

- a. Did the MSW that you produced and disposed at the **[name]** site contain municipal sewage sludge? ___ yes ___ no
- b. Did the other material that you produced and disposed at the **[name]** site contain municipal sewage sludge? ___ yes ___ no

VI. MISCELLANEOUS QUESTIONS

- A. Do you currently own or control, or have you ever owned or controlled, any of the real property at the **[name]** site? By “own or control” we mean hold title, an easement, or a right-of-way through the property, or rent or lease the property. By _____ real property we mean land, buildings, or other fixtures (any items intended to stay attached to the property permanently): ___ yes ___ no

If yes, please explain this ownership or control:

- B. Have you ever worked at the **[name]** site or been involved in the operation of the site in any capacity? ___ yes ___ no

If yes, please describe the work you did, the dates of the work, and your title, if any: _____

- C. Please provide any additional information which you believe may be useful to EPA in assessing your involvement at the **[name]** site.

[NOTE ON USE OF SAMPLE DOCUMENT: This sample document and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.]

ATTACHMENT 2

SAMPLE RESPONSES FOR MSW PARTIES

Sample A - Statutory Exemption May Apply

[Name]
[Address]

Re: Response to Information Submitted Regarding the **[name]** Site

Dear [Name]:

Thank you for taking the time to complete the questionnaire attached to our **[date]** notice letter concerning your involvement with the **[name]** Site. The United States Environmental Protection Agency (EPA) has carefully reviewed the information you submitted in response to the questionnaire.

Based upon the information you provided and any other information we have received to date, we have concluded that you likely qualify for the statutory exemption under section 107(p) of CERCLA at this site. See 42 U.S.C. § 9607(p). As we discussed in our **[date]** letter to you, EPA generally does not bring enforcement actions seeking cleanup or recovery of response costs from generators and transporters of municipal solid waste (MSW). Moreover, CERCLA § 107(p) generally protects exempt parties from lawsuits seeking contribution for cleanup costs brought by other parties through its provisions for attorneys' fees and burden shifting.

If you have any questions or wish to discuss this letter, please feel free to call me at

_____.

Sincerely,

Sample B - 2003 Interim Guidance May Apply

[Name]
[Address]

Re: Response to Information Submitted Regarding the [name] Site

Dear [Name]:

Thank you for taking the time to complete the questionnaire attached to our [date] notice letter concerning your involvement with the [name] Site. The United States Environmental Protection Agency (EPA) has carefully reviewed the information you submitted in response to the questionnaire.

Based upon the information you provided and any other information we have received to date, we have concluded that you do not likely qualify for the statutory exemption under CERCLA § 107(p). However, we have determined that your municipal solid waste (MSW) contribution likely represents less than 0.2 percent of the total waste at the site. Therefore, you may be eligible for a settlement under the 2003 “Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA § 107(p).”

As we stated in our [date] letter, EPA generally does not pursue generators and transporters for response costs for disposal of MSW. However, we have been informed that you have been contacted by a party associated with the site who is asking you to contribute to site cleanup costs. [If recipient already has been sued, insert instead: “However, we have been informed that you have been identified as a defendant in a private lawsuit.”] Therefore, we would be willing to discuss a potential settlement with you under the terms of the 2003 Interim Guidance. **Please remember that a settlement with the United States is entirely voluntary.**

If you are interested in discussing a settlement with the United States or have any questions, please feel free to call me at _____.

Sincerely,

Sample C - 1998 MSW Policy May Apply

[Name]
[Address]

Re: Response to Information Submitted Regarding the [name] Site

Dear [Name]:

Thank you for taking the time to complete the questionnaire attached to our [date] notice letter concerning your involvement with the [name] Site. The United States Environmental Protection Agency (EPA) has carefully reviewed the information you submitted in response to the questionnaire.

Based upon the information you provided and any other information we have received to date, we concluded that you do not likely qualify for the statutory exemption under CERCLA § 107(p). However, you may be eligible for a settlement under EPA's 1998 "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites."

As we stated in our [date] letter, EPA generally does not pursue generators and transporters for response costs for disposal of MSW. However, we have been informed that you have been contacted by a party associated with the site who is asking you to contribute to site cleanup costs. [If recipient already has been sued, insert instead: "However, we have been informed that you have been identified as a defendant in a private lawsuit."] Therefore, we would be willing to discuss a potential settlement with you under the terms of the 1998 MSW Policy. **Please remember that a settlement with the United States is entirely voluntary.**

If you are interested in discussing a settlement with the United States or have any questions, please feel free to call me at _____.

Sincerely,

Sample D - Statutory Exemption/MSW Policies Do Not Apply

[Name]
[Address]

Re: Response to Information Submitted Regarding the [name] Site

Dear [Name]:

Thank you for taking the time to complete the questionnaire attached to our [date] notice letter concerning your involvement with the [name] Site. The United States Environmental Protection Agency (EPA) has carefully reviewed the information you submitted in response to the questionnaire.

Based upon the information you provided and any other information we have received to date, we concluded that you do not likely qualify for the statutory exemption under CERCLA § 107(p). In addition, we determined that you likely are not eligible for a settlement with the United States under the 2003 “Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA § 107(p)” or the 1998 “Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites.”

If you wish to discuss other potential settlement opportunities at this site or you have any questions, please feel free to call me at _____.

Sincerely,

[NOTE ON USE OF SAMPLE DOCUMENT: This sample document and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.]

ATTACHMENT 3

REVISED MODEL MSW WAIVER LANGUAGE FOR ALL AGREEMENTS AT NPL SITES

[NOTE: The following definition should be used, as appropriate, if the Decree, Order or Agreement contains a waiver of contribution rights against certain MSW parties at the Site as provided in paragraph 100.]

“Municipal solid waste” shall mean waste material: (i) generated by a household (including a single or multifamily residence); or (ii) generated by a commercial, industrial or institutional entity, to the extent that the waste material – (I) is essentially the same as waste normally generated by a household; (II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

[NOTE: Use paragraph 100 if there is MSW at the Site unless a broader waiver of CERCLA claims against all persons is already included in the settlement.]

100.1. Settling [Defendants/Respondents] agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person’s liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of Municipal Solid Waste (MSW) at the Site, if the volume of MSW disposed, treated or transported by such person to the Site did not exceed 0.2 percent of the total volume of waste at the Site.

100.2. The waiver in Paragraph 100.1 shall not apply with respect to any defense, claim, or cause of action that a Settling [Defendant/Respondent] may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Settling [Defendant/Respondent]. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines that: (a) the MSW contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; (b) the person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. § 9604(e) or § 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927; or (c) the person impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site.

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the United States Government. They are not rules and do not create legal obligations. The extent to which the United States uses them in a particular case will depend on the facts of the case.]