

CHAPTER 5

FUNDING AND PRIORITY SETTING

Introduction

As federal agencies continue to implement cleanup programs at an increasing number of sites, and as these sites proceed through the cleanup process, the scope of the federal government's cleanup obligations will mount. As sites proceed through the cleanup process and there is a shift from cleanup studies into the more costly remedial construction phase, the government's annual cleanup funding needs will also increase. The ability of each agency to obtain sufficient funds to ensure execution of projected environmental cleanup activities in a given year will be an important factor in determining the overall success of the federal government's cleanup program.

The question of how to best set priorities and ensure adequate funding for federal facility cleanups was on the forefront of the Federal Facilities Environmental Restoration Dialogue Committee's agenda before it was even chartered as a federal advisory committee (see Appendix C). When the Committee released its Interim Report in February 1993 an entire chapter, "Recommendations for Improving Accountability Through Enhanced Stakeholder Involvement Throughout the Federal Budget Process," was devoted to this subject.

At the time the Interim Report was released it was anticipated that the overall federal budget context would become increasingly constrained as the pressure to reduce the deficit mounted. This expectation has come to pass and the federal budget will likely become even more constrained in the future. As many agencies shift from a study and assessment mode to actually conducting cleanups, the need for reconciliation between budget realities and constraints and ever increasing cleanup needs and desires is now ever more apparent and necessary.

The recommendations contained in the other chapters of the Committee's 1993 Interim Report that addressed information dissemination and public stakeholder involvement, particularly those that called for the establishment of SSABs, have been widely accepted and implemented. In contrast, at least some of the recommendations contained in Chapter 4 of the Interim Report were more controversial. These recommendations addressed two subjects: **consultation** between the lead or regulated agency that is the recipient of cleanup funds and responsible for conducting cleanup, and the regulating agencies and other stakeholders on budget and funding matters; and **allocation** of cleanup funds in the event of a funding shortfall.

The recommendations that addressed consultation issues were far less controversial than those that addressed allocation issues. In fact, these recommendations have, with some exceptions, been accepted and are in the process of being implemented, similar to the recommendations

contained in the other sections of the Interim Report. The Committee believes that the recommendations that addressed allocation issues, while admittedly complex, have been widely misunderstood. As described more fully below, the Committee called, and continues to call for, a flexible "fair share" approach to the allocation of funding shortfalls under certain circumstances, rather than an inflexible pro-rata allocation of funding shortfalls as many have interpreted the Committees recommendations.¹

The recommendations contained in this chapter update and revise those contained in the Interim Report. The primary objectives of the recommendations contained in this chapter are to:

- promote a credible process for planning and conducting federal facility cleanups at a reasonable pace that is protective of human health and the environment; and
- address funding shortfalls in a timely, open, understandable and cost-effective manner.

In order to meet these objectives, this chapter includes recommendations for a process whereby stakeholders are informed of, and to the greatest extent feasible, participate in important decisions that will affect the scope and schedule (i.e., pace) of work to be performed at federal facilities.

In contrast to the recommendations contained in the 1993 Interim Report, these recommendations focus even more strongly on building consensus, at the local facility level on cleanup priorities and budgets at early stages of the budget process, rather than relying solely on the expectation that the agencies responsible for conducting the cleanup will ask for sufficient funds to meet their cleanup obligations and, if Congress does not appropriate sufficient funds, the possibility of modifying cleanup schedules.

Background on the Nature of the Problem

Funding and priority setting for federal facility cleanups involve a dynamic and complex interplay between:

- cleanup studies and remedy selection decision making, including:
 - initial site identification and assessments;
 - remedial investigations and feasibility studies;
 - future use determinations; and

¹ *Improving Federal Facility Cleanup*, Report of the Federal Facilities Policy Group, October, 1995., pages 41-42.

- interim and final remedy selection;
- federal budgeting and appropriations;
- negotiation and implementation of formal cleanup agreements; and
- the stakeholder involvement process.

Several of the principles set forth in Chapter 2 address elements of this complex interplay, including the role of negotiated cleanup agreements (Principle 8), risk assessments (Principle 9), future use determinations (Principle 11), cleanup studies (Principle 12), and stakeholder involvement (Principle 14). The sections that follow explain aspects of the federal facility funding and priority-setting process that were not addressed in the principles and are necessary to understand the recommendations contained in this Chapter.

The Federal Budget Process

The connection between the federal budget process and the need to set priorities for federal facility cleanups is an obvious one—funding constraints in combination with other factors, as described below, require the sequencing of cleanup activities. Even if the resources available for federal facility cleanups were unlimited, there would still be a need to set priorities. However, the availability of funds plays an obvious and ever increasing role in determining how cleanup priorities are established. Notwithstanding the obviousness of the connection between budgeting, funding, and priority setting, it is a connection that is fraught with a high degree of controversy and complexity.

The "Top-Down" Dimension

The federal budget includes both entitlement programs, such as Medicare, and discretionary programs under which all federal facilities cleanup programs are funded. In the context of the overall federal budget, the resources that are made available for federal facility cleanups are often seen as competing for a shrinking pool of discretionary resources.

Discretionary funding is controlled through annual appropriations bills. The Balanced Budget and Emergency Deficit Control Act of 1985 limits discretionary spending by placing caps on budget authority and spending for each fiscal year. If appropriations would exceed the budget cap, the Act establishes a procedure for across-the-board budget cuts. In recent years, Congressional action, through adherence to budget caps on appropriations bills, has limited the funding available for cleanup, as well as for many other needs of the Federal government. Congress makes funding decisions among many priorities, including the amount of funding to comply with Congressional mandates to agencies to meet environmental cleanup requirements. Thus, unlike non-Federal and private sector entities, the financial ability of Federal

facilities to comply with Congressional mandates is determined by the President and Congress.²

This "top down" dimension to the overall federal facility cleanup decision-making and priority-setting process manifests itself in the issuance of agency, department, or program budget "targets" and out year budget projections by OMB. These OMB budget targets and projections play a very important role in the overall federal facility cleanup decision-making and priority-setting process.

The top-down dimension is made even more complicated by virtue of the fact that each Administration handles the budget building process differently. Furthermore, even within a given Administration, OMB may treat one agency differently than another, or treat the same agency differently over the course of an Administration, in terms of the level and scope of cleanup programs and activities to which budget targets apply.

The Cyclical Dimension

In addition to the top-down dimension, another important feature of the federal budget process is the highly complex cyclical nature of the process. At any one moment in time, three budget cycles are occurring in an overlapping and simultaneous fashion. This includes the current execution fiscal year (FY), the upcoming fiscal year (FY+1), sometimes referred to as the budget year, and the following fiscal year (FY+2), sometimes referred to as the planning year. When all goes well, each cycle takes approximately two years to complete from beginning to end. When there are continuing resolutions, such as is the case for the FY96 budget, the process can take longer. The President's budget also includes budget projections that cover the five-year period beyond the year for which the budget is being produced.

The federal budget process when viewed in its totality is a highly complex process, but it can be simplified to its most basic features, as is done in Figure 2. As this chart shows, the fall of any given year marks the beginning of the budget cycle for FY+2, the middle of the budget cycle for FY+1, and the end of the budget cycle for the immediately upcoming fiscal year (FY). As will be discussed later, the cyclical nature of the budget process has implications for regulator and public stakeholder involvement in budget related decisions.

The "Bottom-up" Dimension

Added to these top-down and cyclical dimensions is a very important "bottom-up" dimension. This dimension starts at the local facility and affected community level and includes not only budget formulation and submission, but the site assessments and remedy selection decisions that form the basis of budget estimations and submissions. It is also important to note that

²*Improving Federal Facility Cleanup*, Report of the Federal Facilities Policy Group, October, 1995, page 32.

INSERT FIGURE 2 -- Lotus Chart

the "top-down" dimension comes full circle and completes itself when execution occurs at the local facility and affected community level. In its 1993 Interim Report, the Committee spent a considerable amount of time addressing the "bottom-up" dimension of the overall federal facility cleanup decision-making and priority-setting process. The Committee's recommendations on improving information dissemination, stakeholder involvement through the use of SSABs and other means, and improved consultation and sharing of information on federal facility cleanup budget matters were all intended to build the "infrastructure" that is necessary to support and enhance this "bottom-up" dimension and to improve execution at the conclusion of the "top-down" dimension.

Environmental Requirements and the Role of Executive Order 12088 and Negotiated Cleanup Agreements

Federal agencies must comply with certain laws and rules and regulations when implementing cleanup programs and activities. The laws that most frequently come into play include CERCLA (popularly known as Superfund), RCRA and applicable state law, and the Federal Facility Compliance Act (FFCA) which waives the sovereign immunity of federal facilities for enforcement actions under RCRA. In contrast to a budget-driven, top-down perspective, compliance with these laws is required but the pace of this compliance may be negotiable.

Executive Order 12088

In the development of the consensus that led to the 1993 Interim Report, as well as the consensus that led to the production of this Final Report, the Committee has spent considerable time discussing the role of Executive Order (EO) 12088 in the overall federal facility cleanup decision-making and priority-setting process. This executive order has, both a "bottom-up" and, because it is an executive order, "top-down" quality.

EO 12088, which was issued by President Carter in 1978, requires the heads of federal agencies to request sufficient funds in their budget submissions to OMB to meet all "pollution abatement" requirements. It is commonly understood that this executive order was intended to ensure that OMB was fully cognizant of such requirements as the President's budget was being developed and finalized.

Since this executive order was issued before the passage of CERCLA and before most federal agency cleanup programs were put into place, it was necessary to clarify its relationship to federal facility cleanup activities. In a 1983 letter to Congressman John Dingell, and then again in a 1991 letter to DOE, Department of Justice (DOJ) officials stated that EO 12088 can be extrapolated to cleanup requirements. Since this order cannot be subjected to judicial review and the President has not issued any orders that countermand the DOJ opinion, the Committee acknowledges that this executive order applies to federal facility cleanups, including those requirements that are specified as milestones set forth in negotiated cleanup agreements.

All of the major pieces of federal environmental legislation which have been created over decades of bipartisan effort (Clean Air Act, Clean Water Act, RCRA, CERCLA, Safe Drinking Water Act) contain provisions waiving the federal government's sovereign immunity from the application of analogous state laws, which are typically required for a state to be delegated federal authorities. EO 12088 is a Presidential directive that helps to ensure that Executive Branch decision makers are informed of the cost of complying with these laws. This is consistent with the principle that the federal government should comply with environmental laws in the same manner as private entities, as is recommended by the Committee in Principles 1 and 4 of Chapter 2.

The Committee recognizes, however, that federal agencies are also required by OMB directives to submit budgets that do not exceed predetermined funding levels (i.e., budget targets). In addition many of the requirements that compete with cleanup funds are also required by executive orders, and federal law, as well as domestic and foreign policy objectives established by the President.

Although there are differing views on the Committee of the relative standing or importance of EO 12088 compared to these other requirements, the Committee acknowledges that federal agencies are finding it increasingly difficult to satisfy all of these requirements within either OMB funding targets or the amounts appropriated by Congress. In crafting the recommendations that follow, the Committee has tried to provide some balance between the pressures on federal agencies to satisfy the myriad of policy objectives and legal requirements.

These conflicting requirements come to a head at the level of the agency head. This is the person who is required to submit budgets within the budget targets established by OMB that comply with all legal environmental cleanup requirements, and other federal laws, executive orders, and domestic and foreign policy objectives established by the President. Agency heads often pass this conflict on to agency comptrollers and national program managers, upon whom they must rely when formulating and executing their agencies' budgets.

In addition to OMB targets, agencies have direct relationships with the Congressional committees that ultimately appropriate the funds to meet their cleanup obligations. These relationships typically entail communications between the relevant committee and agency at the early stages of the budget process as to expected funding levels, as well as decisions at the end of the budget process which actually set the funding levels. Members of Congress expect agency heads and national program managers to take these projected funding levels seriously.

Negotiated Cleanup Agreements

In the case of sites or facilities that are on the CERCLA National Priorities List (NPL), legally mandated cleanup requirements manifest themselves in negotiated cleanup agreements that are required by Section 120(e) of CERCLA. Although enforceable cleanup agreements are not required under CERCLA until after a Record of Decision (ROD) has been signed, in Principle 8 of Chapter 2, the Committee recognizes the important role that negotiated

agreements play in establishing and maintaining a credible federal facility environmental cleanup program, and as a mechanism for setting cleanup priorities and schedules even before an issuance of a ROD. The Committee also acknowledges that where regulatory authorities of states and EPA overlap, as they do at many federal facilities (e.g., the so-called RCRA/CERCLA "interface"), negotiated cleanup agreements can play a very important role in coordinating those authorities to minimize differing, inconsistent or conflicting requirements (see Principle 8 in Chapter 2).

While the Committee believes that negotiated cleanup agreements can play an important role in establishing and maintaining a credible federal facility environmental cleanup program, it is aware of criticisms about negotiated cleanup agreements. These criticisms include statements that negotiated cleanup agreements are "unwieldy" and frequently contain "unrealistic schedules" with cleanup milestones extending years or decades into the future. The Committee believes most of these criticisms to be unwarranted and based on misperceptions of the agreements. The Committee attempts to address these criticisms and the tension between the importance of negotiated cleanup agreements and the requirements of the federal budget process in the recommendations on "Budget Consultation and Milestone Setting" that are found below.

The Importance of Strategic Planning, Life-Cycle Cost Analysis, and Project Baselines

Notwithstanding the criticisms of negotiated cleanup agreements, the Committee believes that significant progress has been made in recent years to establish credible environmental cleanup programs and agreements that are based on:

- facility-specific strategic plans that are developed and agreed upon by regulating and regulated agencies, and other stakeholders;
- life-cycle cost analysis of cleanup projects and activities; and
- "baselines" that reflect the agreed upon technical requirements, schedule, and cost of cleanup projects.

Strategic plans typically include a "vision" that guides cleanup efforts at individual facilities toward the achievement of statutory, regulatory and other agreed upon goals that have been developed through consultation with regulators and participation of other stakeholders.

At most facilities, life-cycle cost analysis is applied to a project baseline that is based not only on cost information, but technical and schedule considerations as well. The technical component of the project baseline considers factors such as design requirements and performance standards. The schedule component of the project baseline considers factors such as the logic used for sequencing activities, constraints, assumptions, duration and resources. The cost component of the project baseline considers factors such as direct and indirect costs, management reserve, and cost contingency. The project baseline is established

according to a set of planning assumptions that should be developed in consultation with public stakeholders and agreed to by regulators and regulated agencies.

The Committee believes that the use of these three tools have significantly improved the quality of the cleanup decisions in general and provided for improved consultation with regulators and involvement of other stakeholders. This belief has affected the Committee's recommendations that follow.

The Importance of Stakeholder Involvement

The importance of adequate and meaningful stakeholder involvement has been stressed throughout both the Committee's 1993 Interim Report and this Final Report. Success for improved decision making and building crucial public support hinges on involvement of public stakeholders in the decision-making process. For the purposes of this chapter, suffice it to say that without the support of regulators and affected communities on cleanup priorities and schedules, the agencies responsible for conducting cleanups are not likely to succeed in accomplishing the cleanup tasks that are needed, nor in obtaining the funds that are necessary to accomplish the task.

It is important to note, however, that similar to negotiated cleanup agreements, stakeholder involvement is at different stages of development at different facilities. This is especially true with regard to the establishment and utilization of advisory boards. It is also true that trust issues are more pronounced at some facilities in comparison to others. Notwithstanding these differences, the recommendations that follow are premised on proactive and strong efforts to involve regulators and other stakeholders in the intricacies of the federal budget process as it relates to the establishment and implementation of agreed-upon cleanup priorities.

Summary of the Problem

In summary, the basic problem that is addressed in this chapter of the Committee's report is that a tension exists among the requirements of the federal budget process and the federal facility cleanup decision-making and priority-setting process. The recommendations outlined below include a number of checks and balances that the Committee believes will help reconcile the potential conflict between budget targets on the one hand and cleanup requirements and schedules on the other.

Given the complexities inherent in the nexus between the various steps in the cleanup decision-making process, the federal budget process, the negotiated cleanup agreement negotiation and implementation process, and the stakeholder involvement process, the following recommendations are not intended to specify a detailed or prescriptive approach to priority setting. Instead they point to some key principles, features and options that the Committee believes will help to enhance trust, establish reasonable, credible and successful environmental cleanup programs, and reconcile the inherent conflict between "budgets versus requirements."

Recommendations

I. Overview

In recognition of the important linkage between funding availability and work to be performed, the Committee strongly recommends the active engagement of public stakeholders in the cleanup decision-making process. This applies to all decisions regarding scope, timing, and priority of activities to be performed, and to the greatest extent feasible, budgetary and funding matters. Where public stakeholders cannot provide direct input to the decision-making process because of timing constraints or other reasons, they should be advised of relevant decisions so that they retain confidence in federal agencies' efforts.

To involve public stakeholders in a meaningful manner, advisory boards at federal facilities should be used wherever they exist. In all instances, broad community involvement efforts, as described in Chapter 3, should be used.

In addition to meaningful stakeholder involvement, federal facility cleanups depend upon a high degree of communication, cooperation, and consultation between regulated and regulating agencies. Furthermore, the success of federal facility cleanups requires that where multiple regulators exist (e.g., state, federal, tribal) they work together to eliminate or minimize imposing differing, inconsistent, or conflicting requirements.

The partnerships and relationships that have evolved during recent years are critical because they allow for public stakeholder and regulator "buy-in" to cleanup priorities and schedules during the early stages of the budget cycle. This early buy-in can be critical during later stages of the budget process in the event that a funding shortfall occurs and priorities need to be reestablished.

The recommendations contained in this chapter are designed to apply where negotiated agreements are required by law or otherwise should be used, as well as in instances where negotiated agreements are not appropriate.

II. Pre-appropriation Priority Setting of Cleanup Activities

Prior to appropriation of funds by Congress to an agency and the allocation of those funds to facilities and/or sites, a complex set of activities and interactions occurs that involve regulated and regulating agencies, and other stakeholders. These activities and interactions, which result in the development of cleanup budgets for sites, facilities and agencies, involves prioritizing and scheduling cleanup activities.

The Committee has developed a set of recommendations for a process to set priorities in a consistent, equitable, and understandable manner prior to appropriation and allocation of funds. These recommendations are intended to allow stakeholders to be informed of, and to

the extent feasible, participate in important decisions that will affect the scope and timing of work to be performed at federal agency facilities.

A. Prioritize Activities Rather than Sites or Risk

The Committee recommends that priority setting at the facility level should not be limited to prioritizing the relative risks posed by site contamination but should go further to include prioritizing the activities that are designed to clean up the contamination. Thus, any effort to sequence cleanup priorities as needing to be done now, sooner, or later, or as being of high, medium or low priority, or whatever other priority-setting scheme is utilized, should ultimately focus on setting priorities for cleanup action rather than setting priorities based on the relative risks posed by site contamination. Relative risks will no doubt have a bearing on the setting of priorities for cleanup activities but, as described more fully below as well as in Principle 9, relative risk rankings should not become the de facto priorities. Other factors warrant careful consideration in addition to risk. Furthermore, as current law provides [CERCLA 120(e)(3)], required activities should not be put off indefinitely. Thus, even "low" ranking activities will require action as soon as practicable.

B. "Risk Plus Other Factors" Priority Setting

For some people the term "risk management" is understood to mean the consideration of factors in addition to risk to human health and the environment when making decisions about how to best manage or reduce such risks. For others, risk management still connotes too strong of an emphasis on human health risk. In other words, in certain instances factors that may have very little to do with human health risk may become the overriding factors in setting cleanup priorities. For this reason, the Committee has come to use the term "risk plus other factors" to refer to the consideration of risk to human health and the environment along with other important factors.

The Committee supports efforts of the regulated agencies to use risk-based priority setting to build their cleanup budgets, as long as priorities are set with the agreement of the regulators and in consultation with other stakeholders. In general, high-priority activities should be funded before medium-priority activities, and those should be funded before low-priority activities.

The assignment of priority levels to all agreed-upon activities or sites should provide the basis for reconsidering out year milestones and altering programmatic plans when appropriated funding does not match requested levels and when the affected facility has demonstrated it is developing and implementing cost savings measures. This applies to increases as well as decreases. Thus, even when agencies must respond quickly to Congressional actions, their changes should reflect regulator and public stakeholder input, to the greatest extent possible.

Even within the realm of human health and environmental risks, one of the most important functions of consultation and stakeholder involvement is to weigh the relative significance of dissimilar health impacts. For example, even if the "experts" agree that a specific chemical,

as delivered to a specific population, cause N cancers, M miscarriages, and Q learning disabilities, there needs to be a process by which the seriousness of each problem is agreed upon. While the risk evaluation may indicate potential impacts, it does not indicate what action to take.

As stated in Principle 9, the Committee believes that in many circumstances "risk to human health and the environment is an important and well-established factor that should continue to be a primary consideration in federal facility cleanup decision making, including setting environmental cleanup priorities and enforceable milestones." Principle 9 goes on to state that "other factors warrant consideration in setting cleanup priorities and enforceable milestones."

In this section, the Committee wishes to elaborate on these points by stating that risk to human health, or its corollary, protection of human health is, at many sites, only a starting point for establishing cleanup funding priorities. The Committee also believes that in many other instances protection of the environment is the appropriate starting point for establishing cleanup funding priorities. Furthermore, in other cases, protection of human health and the environment is the appropriate starting point for establishing funding priorities for cleanup. The Committee strongly recommends that in those instances where protection of the environment is not used as a starting point for establishing cleanup funding priorities, it should be considered as one of the factors that are listed below.

Regardless of whether protection of human health or the environment (or both) is the starting point for establishing cleanup funding priorities, the Committee affirms that numerous other factors must be considered in setting priorities for sites and projects. As set forth in Principle 9 in Chapter 2 the factors listed below should be considered in setting cleanup priorities:

- a) cultural, social, and economic factors, including environmental justice considerations;
- b) potential or future use of the facility, its effect on the local communities' economy, vitality, livability, and environmental quality;
- c) the ecological impacts of the contamination and the proposed action to address it (in those instances where protection of the environment is not used as a primary basis for establishing cleanup funding priorities);
- d) intrinsic and future value of affected resources (e.g., groundwater and fisheries);
- e) pragmatic considerations such as availability and continuity of skilled workers, labs, cleanup contractors to complete the activity or the feasibility of carrying out the activity in relation to other activities at the facility (i.e., capacity and work flow logic), or both;

- f) the overall cost and cost effectiveness of a proposed activity and especially the relative risk reduction value obtained by the proposed expenditure;
- g) making land available for other uses, recognizing that land uses may change over time;
- h) the importance of reducing infrastructure costs (e.g., \$300 million is spent each year to monitor tanks at Hanford and \$130 million is spent each year at Rocky Flats to safeguard special nuclear material);
- i) the availability of new or innovative technologies that might accelerate or improve the ability to achieve a permanent remedy;
- j) Native American treaties, statutory rights (e.g., American Indian Religious Freedom Act), and trust responsibilities;
- k) regulatory requirements and the acceptability of the proposed action to regulators and other stakeholders;
- l) supporting accomplishment of other high priority agency objectives;
- m) life-cycle costs; and
- n) actual and anticipated funding levels (the congressional budget appropriation, OMB apportionment, allotments of funds to agencies or departments and the facilities, and out year funding targets).

With regard to anticipated funding levels, the Committee recognizes the constraints on federal agencies to submit budget within OMB target levels, and also recognizes that there may be circumstances that warrant challenging those constraints.

The Committee believes that there is no widely accepted mechanism for integrating human health and environmental risk with other important factors. However, the Committee recommends, for a risk plus other factors prioritization system to work, the following conditions must be met:

- For the prioritization of cleanup actions or studies, the application of standards to remedy selection and the actual selection of remedies should occur independent of the risk ranking. That is, prioritization should only relate to the timing of the action, not how protective the remedy will be.
- There must be confidence, among all stakeholders, in the approach for categorizing sites based on relative risk and, similarly, the risk reduction potential of proposed cleanup activities.

- There should also be confidence, among all stakeholders, in the methodology used to assign priorities once risk rankings are made.
- As part of priority setting, the general range of costs associated with a cleanup activity should be known and generally agreed upon.
- The system of assigning risk levels and setting priorities should be transparent and easily understood. That is, it should not only be understood by "experts" and others who are fully immersed in the process, but by members of the public, the press, and elected officials.

While the Committee believes that agencies should issue general guidance on the types of factors to be considered and how they should be applied to priority setting, ultimately, these agencies, in consultation with public stakeholders at each facility, must decide the mix and relative importance of these factors in setting priorities. Each agency should ensure that its approach is understood and utilized within the agency, by regulators and public stakeholders, and by all facilities in a similar manner to provide for comparability among facilities. In many cases, the best way to ensure that everyone is playing by the rules is to review or evaluate rankings after they are made but before funding allocation decisions are made. In short, the Committee does not believe there is a single best methodology for applying the factors outlined above. Rather, regulating and regulated agencies and public stakeholders at facilities must determine what approach will work best for them.

The Committee does recommend, where possible, agencies and other stakeholders should define, up front, the factors in addition to protection of human health and/or environment that might influence priority setting. Then, when priorities are set, participants in the process should identify which specific factor or factors have caused a site or activity to be assigned a priority category. Participants in the decision-making process might also consider whether each factor moves or "bumps" activities from one priority level to the next level, or are so significant that they "trump" the risk determination.

The evaluation of risk and the establishment of temporal priorities is a dynamic process. Both risk rankings and priorities should be reviewed regularly by all participants, to take into account new information and even new attitudes and perspectives. Each regulated agency should establish, in consultation with other stakeholders, procedures for reopening rankings and priorities outside of the normal budget cycle, should significant new information be discovered.

No matter what specific prioritization scheme an agency adopts, its success depends upon agreement on the process, up front, by all stakeholders. If there is broad confidence in the process, then cleanup progress will be much less subject to delays and other transactional costs historically characteristic of major federal facility cleanup projects.

C. Budget Consultation and Milestone Setting

As the Committee has stated elsewhere in this report, stakeholder confidence in agency cleanup programs is contingent upon continued progress on cleanups and an understanding that an agency has made every effort to plan for, seek funding for, and execute its cleanup obligations. In Principle 8 of Chapter 2, the Committee recognizes the importance of negotiated cleanup agreements in accomplishing this objective.

In this section, the Committee sets forth recommendations for a budget consultation and milestone-setting process that the Committee believes can help accomplish this objective. In making these recommendations, the Committee is not recommending that all existing negotiated cleanup agreements should be renegotiated. However, where all parties agree that existing agreements may benefit from this approach, or where agreements are not yet established, the Committee believes a process such as that recommended below should be considered for inclusion in the agreement at the option of the parties to the agreement. Moreover, the recommended process below reflects a delicate balance and also must be carefully balanced with other elements of the agreements (to be negotiated for each site), which are intended to work together as a whole.

Two of the important features of this process, which is sometimes referred to as a "rolling milestone" process,³ are: 1) for the regulated and regulating agencies to determine the cleanup work that is required to be performed in consideration of, but not necessarily "driven by," budget targets; and 2) to do so in a timeframe that coincides with the federal budget process.

While implementation of the budget consultation and milestone concept described below will vary to some extent from one site to the next because identification and review of milestones is a "bottom-up" process that involves public stakeholders, regulators and site personnel in setting site-specific priorities, the Committee believes that the following recommendations are generally applicable:

- 1) When milestones are first being established using the process recommended below, the regulating and regulated agencies, in consultation with other stakeholders, should use the strategic plan, life cycle cost analyses, and project baselines to establish agreed upon project end dates, out year milestones, and near term milestones:
 - **Project end dates** should be established for major portions of the cleanup or completion of cleanup of the entire facility. The Committee recognizes that many of these dates will be a number of years in the future. By nature, these dates have the most degree of uncertainty. Nonetheless, project end dates serve an important function in establishing the overall pace of cleanup, including the setting of near term milestones.
 - **Out year milestones** should be established for completion of major cleanup activities critical to the completion of the project for the time period beyond the

³ The Committee has purposely not used the term "rolling milestone" process because there have been many proposals that are called rolling milestone processes that differ from the Committee's recommendation.

budget development year until the project end date. Since these milestones are beyond the "planning" year (FY+2), they are not included in the current budget request, but are important to out year fiscal planning.

- **Near term milestones** are critical for both budget development and to show commitment by regulated agencies for cleanup activities that will occur in the next fiscal year (i.e., the "budget" year — FY+1) and the year for which the budget is being developed (i.e., the "planning" year — FY+2).

In order to ensure a sustained commitment to a credible environmental cleanup program that is protective of human health and the environment, and a reasonable and defensible pace of cleanup, the Committee agrees that all parties should work together to achieve the agreed upon near term milestones, out year milestones, and project end dates. This includes making good faith efforts to obtain sufficient funds to accomplish the agreed upon milestones, target dates, and end dates.

The parties expect that projected end dates, out year milestones, and near term milestones will be established in full consultation with public stakeholders, and will consider the best available site information and projected funding levels. The Committee recognizes that near term milestones have more significance in building a budget. Therefore, the Committee believes that near term milestones, out year milestones and project end dates should not be changed without the agreement of the parties, in consultation with public stakeholders. Disagreements on proposed date changes for any milestones will be subject to any agreed upon dispute resolution process.

2) On an annual basis, thereafter:

- a) Prior to the end of a fiscal year, evaluate the status of all activities that were expected to be completed during the current FY, with particular emphasis on those activities that are critical to meeting near term milestones for the upcoming two fiscal years (FY+1 and FY+2);
- b) As soon as possible after Congress appropriates, OMB "apportions," and agencies "allot" cleanup funds (typically at the start the new fiscal year in October or November), the parties to the negotiated agreement should determine if planned work can be accomplished with allotted funds. In the

event of an appropriation shortfall, the parties should, before modifying or extending milestones, determine if planned work can be accomplished through:

- rescoping or rescheduling cleanup activities in a manner that does not cause previously agreed upon near term milestones and out year milestones and project end dates to be missed;
- developing and implementing new cost-saving measures.

A determination by the parties to modify or extend a near term milestone should be based upon consultation with public stakeholders, and if necessary, negotiation between regulating and regulated agencies in light of risk plus other factors, which include consideration of funding allocations. If agreement cannot be reached:

- regulators will retain their authority to determine whether to approve a request to modify or extend existing milestones; and
- regulated agencies retain their right to invoke dispute resolution under the terms of the negotiated cleanup agreement.

c) After OMB issues budget targets to agencies, and agencies issue budget guidance to intermediate levels and/or facilities, in light of the FY and FY+1 milestones, funding circumstances, and all of the other "risk plus other factors" listed above, determine whether the previously agreed upon project end dates and out year milestones for FY+2 (i.e., what was FY+3 and has become FY+2) should become near term milestones. The Committee agrees that all previously agreed upon out year milestones and project end dates should become near term milestones unless otherwise agreed to by all parties in consultation with public stakeholders. The Committee also agrees that the regulating and regulated agencies should make every effort to maintain a credible environmental cleanup program within FY+2 budget targets. This may call for:

- rescoping or rescheduling cleanup activities in a manner that does not cause previously agreed upon near term milestones and out year milestones and project end dates to be missed;
- developing and implementing new cost-saving measures.

However, as with step 2b:

- regulators will retain their authority to determine whether or not to approve a request to modify or extend the near term milestones; and

- regulated agencies retain their right to invoke dispute resolution under the terms of the negotiated cleanup agreement.
- d) If the regulating and regulated agencies, in consultation with public stakeholders, are able to agree on FY+2 milestones that are achievable within budget targets, the regulated agency will submit a cleanup budget to its headquarters that reflects the agreement and the budget-consultation and milestone-setting process has been completed for that year.
- 3) If the regulating and regulated agencies do not agree on the near term milestones that should be established for FY+2, and this disagreement is the result of a discrepancy between the cost of compliance with near term milestones required by the regulatory agency and the budget targets imposed upon the regulated agency, this constitutes a potential **budget building shortfall**. Under these circumstances, the Committee recommends that there be **full disclosure** of this outcome at all levels of decision making. The principles that should guide the regulated agencies in their efforts to achieve full disclosure include:
- a) All information to be provided in the effort to achieve full disclosure will be provided in a manner that is consistent with existing laws⁴ and OMB regulations and policies concerning the disclosure of budgetary information.
 - b) The regulated agency should prepare and make publicly available in a timely manner supplemental reports that will accompany the cleanup budgets that the agency submits from the facility level through the successive levels of its organizational structure (if they exist) up to its headquarters, and from its headquarters to OMB. "In a timely manner" means that this information is made publicly available in a timeframe that to the greatest extent possible allows for regulators and public stakeholders to influence each successive step of the federal budget process.
 - c) The Committee agrees that the precise content and level of detail that is contained in supplemental reports may vary from agency to agency, among the successive layers of any particular agency, and from an agency to OMB. The regulated agency in consultation with regulators and public stakeholders should determine what information is needed to clearly communicate the consequences of policy choices at these various levels by, at a minimum, identifying the types of requirements and estimated costs associated with the

⁴The Committee notes that an agency's cleanup costs are currently disclosed in its: (1) annual financial statement required under the Chief Financial Officers Act of 1990 (131 U.S.C. 3515) as contingencies - unfunded environmental cleanup liabilities, (2) annual report to Congress required under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9620(e)(5)) as cost estimates and budgetary proposals for interagency agreements. However, the type of cost information and level of cost detail found in these documents varies with each agency.

requirements that could not be accommodated within the budget submission. (It should be noted that the Committee does not intend that full disclosure of information regarding disagreements on cleanup priorities between regulating and regulated agencies should result in Congressional earmarking of cleanup funds for specific cleanup projects.)

- 4) If the disagreement over the milestone or milestones covered in the supplemental reports described above persists, the Committee acknowledges that both the regulated and regulating agencies reserve their rights to invoke dispute resolution or take enforcement action. Following any final decision that establishes enforceable milestones that the regulated agency believes cannot be met due to lack of funding, in order to enhance the possibility of meeting near term milestones, the regulated agency should make a good faith effort to comply with such milestones by taking such actions that may include but are not limited to:
- additional rescoping or rescheduling of other activities in a manner that does not cause near term milestones, out year milestones, and project end dates to be missed; and
 - developing and implementing additional cost-saving measures.

If the regulated agency subsequently fails to meet a near term milestone, it retains the right to assert any and all relevant defenses in response to an enforcement action taken by the regulating agencies.

In combination with "risk plus other factors" priority setting, sound strategic planning, life cycle cost analysis, and the use of project baselines, the Committee believes the budget consultation and milestone-setting process described above will provide greater accountability through consideration of fiscal constraints and full disclosure of any discrepancy between budget targets and requirements. The Committee believes it will result in resources being focused on high priority activities, despite fiscal and technical uncertainties.

As noted above, meaningful and effective stakeholder involvement in the establishment of regulatory milestones is critical. Regulated and regulating agencies must be fully knowledgeable of public stakeholder priorities and desires to establish milestones that are supported. Public stakeholders, like regulators, must also be fully informed as to the budget targets and constraints that are faced by the agency and facility managers who are responsible for conducting the cleanup. Public stakeholders need to be provided with access to budget, planning and risk information and the opportunity to participate in the program development process. The means of accomplishing meaningful and effective stakeholder involvement in setting cleanup priorities and milestones are described more fully in Chapter 3.

III. Flexible Fair Share Allocation of Appropriations Shortfalls

As noted above, the recommendations contained in the Committee's 1993 Interim Report called for a "flexible fair share" approach to the allocation of funding shortfalls caused by insufficient appropriations. These recommendations were frequently misinterpreted as calling for an inflexible pro-rata allocation of such funding shortfalls.

In this report, the Committee has recommended that priorities for cleanup activities be set early in the federal budget building process and, where appropriate, be reflected as enforceable milestones in negotiated cleanup agreements based on new and emerging information and the balancing of a variety of important priority-setting factors (i.e., risk plus other factors). The Committee believes these recommendations will greatly facilitate the ability of all stakeholders to subsequently reassess and reset priorities and allocate resources in an understandable, timely and equitable manner in the event of an appropriations shortfall. The Committee believes that appropriation shortfalls necessarily result in at least two and, in some cases, several significant levels or types of decision making. First, national program managers and, for some agencies, agency personnel who have responsibility for multiple facilities within a region or some other intermediate organizational level (e.g., major commands, bureaus, etc.) need to allocate such funding shortfalls among facilities, regions, or other organizational levels. Second, once funding shortfalls have been allocated to facilities, regulating and regulated agencies, in consultation with public stakeholders, must determine how best to allocate the shortfall at their facility.

For either of these types or levels of decision making, the Committee recommends that the original proportion in the proposed cleanup budget should be the starting point for allocating appropriations shortfalls at these various levels assuming that the budget was built: a) in consultation with stakeholders; b) in consideration of regulatory agreements; and c) in consideration of risk plus other factors. However, given the tremendous variation that exists between agencies and agency cleanup programs with respect to their organizational structure, the nature of the environmental problems that they are addressing, the stage of development of their programs, etc., the Committee is not recommending a single unitary approach be taken to address appropriation shortfalls. Rather, the Committee is recommending that each agency or appropriate subset of an agency, in consultation with regulators and other stakeholders, should establish and document an approach that adheres to the flexible fair share features identified below.

The Committee recommends that a flexible fair share approach should:

- 1) to the greatest extent possible, rely on the preappropriation priorities established by regulated and regulating agencies in consultation with stakeholders that are often set forth as enforceable milestones in negotiated cleanup agreements;
- 2) continue to use the "risk plus other factors" approach at the local level when making changes to previously agreed upon priorities;

- 3) strive to reward performance based on preestablished performance criteria or standards (e.g., reward facilities that use resources efficiently and wisely);
- 4) be completed in a timely and efficient manner;
- 5) be conducted in consultation with public stakeholders at the earliest stages possible;
- 6) strive to reconcile the inherent tension between the "bottom up" and "top down" dimensions of the federal facility funding and priority process;
- 7) strive to enhance credibility, trust, and productive working relationships;
- 8) result in equitable and fair allocations (which does not necessarily mean an equal or pro rata allocation); and
- 9) include documentation of the allocation decisions that were made at each significant organizational level.

IV. When Shortfalls Threaten the Ability to Meet Milestones

The Committee anticipates that the processes described in this chapter will significantly reduce the number of situations in which budget building shortfalls are likely to lead to missing milestones in negotiated cleanup agreements. It also recognizes that it is impossible to develop detailed solutions that address all such conflicts in advance. Nevertheless, the Committee believes that the best way to resolve these conflicts is to continue, as much as possible, with the same approach and spirit recommended for earlier stages of the budget process. Therefore, the Committee expects:

- 1) Regulating agencies will consider in good faith the adjustment of milestones and other requirements. This is often the case now, particularly where regulated and regulating agencies have developed working partnerships.
- 2) Representatives of regulated agencies will explore the availability of additional funds within their agency budgets. Again, this is often the case now, particularly when shortfalls are large and unexpected.

The Committee recognizes that its recommendations to mitigate conflicts between budget building shortfalls and milestones might be interpreted, within both the Executive Branch and Congress, as eliminating the legal pressure to complete cleanup activities. It is important, therefore, to remind budget decision makers that budget decisions that "test the envelope" of such "safety-valve" approaches threaten the operation of the entire federal facilities cleanup process, and in particular the growing level of trust resulting, in part, from the Committee's previous recommendations.

V. The Importance of Stable, But Not Necessarily Level, Funding

The Committee believes that a stable funding base over the life of cleanup projects could greatly facilitate pre-appropriation priority setting because it would provide regulated and regulating agencies as well as other stakeholders with a greater degree of certainty and the ability to plan and sequence cleanup activities and projects in an effective manner that is consistent with agreed upon priorities.

The budget-consultation and milestone-setting process described above attempts to balance fiscal constraints with the federal government's obligation to comply with environmental requirements. It does so by first encouraging regulators and public stakeholders to factor federal fiscal constraints into their priority-setting decisions at the facility level, both in terms of establishing cleanup requirements initially, and in considering revisions to these requirements in light of changing circumstances (including fiscal circumstances). The Committee expects that initial efforts to close any gap between cleanup needs and funding availability will be accomplished through the identification and implementation of cost savings.

In recognition of the fact that facility level managers must comply with predetermined budget constraints, consistent with Principles 1, 2, and 4 in Chapter 2, the Committee believes that if the regulators and other stakeholders have made a good faith effort but have not succeeded in accommodating federal fiscal constraints in setting cleanup priorities, Executive Branch decision makers above the facility level should request full funding for the environmental cleanup requirements that could not be accommodated within the predetermined budget constraints. Thus, while the process described above endorses full disclosure of any discrepancy between the OMB budget targets and the funding needed to meet an agency's cleanup obligations, the Committee believes the Executive Branch should make every effort to prevent such a discrepancy from existing in the first place. As noted above, the presentation of such information will be made in a manner that is consistent with laws and OMB regulations and policies concerning the disclosure of budgetary information.

Conclusion

Building on previous chapters, this chapter contained a detailed set of recommendations about how regulated and regulating agencies and other public stakeholders should set cleanup priorities both in advance of and during the budget building process and how to allocate funding shortfalls in the event of insufficient appropriations. All of these recommended processes, as well as the more general community involvement recommendations contained in previous chapters, will require enhanced and expanded capacity on the part of the key participants in federal facility cleanup decision making. The next and final chapter of this report provides specific recommendations on how to enhance the capacity of key stakeholders in order to ensure effective implementation of the Committee's recommendations and, through

implementation, the development of reasonable and credible federal facility cleanup programs.