



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

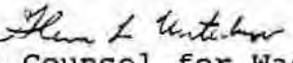
DEC 20 1989

OSWER Directive 9834.7-1B

MEMORANDUM

SUBJECT: Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements

FROM: Bruce M. Diamond, Director 
Office of Waste Programs Enforcement

Glenn L. Unterberger 
Associate Enforcement Counsel for Waste
Office of Enforcement and Compliance Monitoring

TO: Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X

We are attaching the "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements," which is designed to provide practical assistance in the evaluation and development of de minimis contributor settlement proposals and agreements.

One of the issues identified in the "Administrator's Management Review of Superfund," was increased usage of settlement tools. We encourage you to develop de minimis settlements and we are looking into ways to provide incentives for the Regions to utilize this settlement tool. As we gain experience in the use of de minimis settlement tools, we would like to hear from the Regions regarding what barriers they encounter in achieving de minimis settlements. This will help us understand and develop effective ways of supporting the Regions in their use of this settlement tool.

There is a separate document entitled "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property," (issued on June 6, 1989, OSWER Directive 9835.9, published on August 18, 1989 at 54FR34235) that focuses on de minimis landowner settlements.

The June 17, 1988 "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E," OSWER Directive 9012.10-a, provides for delegation of Section 122(g)(1)(A) settlements with generators. However, the first generator de minimis administrative order or consent decree negotiated by each Region must receive the concurrence of the Assistant Administrator for Enforcement and Compliance Monitoring or his designee ("AA-OECM") and the Assistant Administrator for Solid Waste and Emergency Response or his designee ("AA-OSWER"). After the Region has concluded one de minimis settlement with a generator, other such settlement may be entered into by the Regions on behalf of the Agency upon prior consultation with the AA-OECM and AA-OSWER or their designees.

For further information or follow-up questions, please ask your staff to contact Tai-ming Chang of OWPE/CED at (FTS) 382-4839, (mail code OS-510) or Alice Crowe of OECM-Waste at (FTS) 382-2845 (mail code LE-134S).

Attachments

cc: Lisa Friedman, OGC
David Buente, DOJ

December 20, 1989

OSWER Directive 9834.7-1B

**Methodologies for Implementation of CERCLA
Section 122(g)(1)(A) De Minimis
Waste Contributor Settlements**

**United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460**

I N D E X

**Methodologies for Implementation of CERCLA
Section 122(g)(1)(A) De Minimis
Waste Contributor Settlements**

I.	PURPOSE AND INTRODUCTION	1
II.	DEFINITION	2
III.	OBJECTIVES OF <u>DE MINIMIS</u> SETTLEMENTS	2
IV.	BACKGROUND: CRITERIA FOR ELIGIBILITY	3
V.	CHARACTERISTICS OF POTENTIAL <u>DE MINIMIS</u> CANDIDATES	4
VI.	EVALUATION OF A <u>DE MINIMIS</u> PROPOSAL	5
	A. Site Management Plan	6
	B. Communication	6
	C. Timing	7
	D. Determination of Eligibility	10
	E. NBAR Preparation	11
	F. Costs	11
	G. Premiums	12
	H. Calculation of PRP Share	12
	I. Reopeners	13
	J. Settlement Options	14
VII.	NEGOTIATIONS AND SETTLEMENT	16
	A. Distribution of <u>De Minimis</u> Monies Collected	16
VIII.	PURPOSE AND USE OF THIS GUIDANCE	17
IX.	GUIDANCE DOCUMENTS	18

METHODOLOGIES FOR IMPLEMENTATIONOF CERCLA SECTION 122(g)(1)(A) DE MINIMIS WASTE CONTRIBUTOR SETTLEMENTS

I. PURPOSE AND INTRODUCTION

This document has been prepared to provide assistance to the Regional case staff (OSC, RPM, assistant Regional Counsel) in the evaluation and development of de minimis contributor settlement proposals and agreements. The methodologies presented are general suggestions only, as each site is unique and the terms of any de minimis settlement will depend on the individual facts of the case. The Superfund Amendments and Reauthorization Act of 1986 (SARA) codified the concept of de minimis settlements which was originally introduced in the "Interim CERCLA Settlement Policy" (December, 1984). Sections 122(g)(1)(A) (generators and transporters) and 122(g)(1)(B) (landowners) were designed by Congress as enforcement tools for the Superfund process. The focus of this guidance is solely on de minimis contributor settlements.¹

Section II discusses the definition of a de minimis waste contributor. Section III summarizes the objectives in pursuing a de minimis settlement and Section IV outlines the criteria required for eligibility for any de minimis settlement proposal. Characteristics of potential de minimis candidates are covered in Section V. Section VI is an in depth discussion of the development of a de minimis proposal (site management plan, communication, timing, determination of eligibility, NBAR preparation, costs, premiums, calculations of PRP share, reopeners and settlement options). A summary on settlement issues and distribution of de minimis monies collected is covered in Section VII, negotiations

¹A separate document entitled "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property" (issued on June 6, 1989, OSWER Dir. #9835.9, published on August 18, 1989 at 54FR34235) discusses de minimis landowner settlements. Two other guidance documents provide additional information on de minimis generator and transporter settlements: "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA" (issued June 19, 1987, OSWER Dir. #9834.7, published on June 30, 1987 at 52FR24333); and "Interim Model CERCLA Section 122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order on Consent" (issued October 19, 1987, OSWER Dir. #9834.7-1A, published on November 12, 1987 at 52FR43393).

and settlement. A list of guidance documents is provided at the end of this methodology.

II. DEFINITION

The June 19, 1987 "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA" defines a de minimis party as a "potentially responsible party (PRP) who satisfies the requirements for liability under §107(a) of CERCLA and who does not have a valid §107(b) defense, but who has made only a minimal contribution (by amount and toxicity) in comparison to other hazardous substances at the site."

III. OBJECTIVES OF DE MINIMIS SETTLEMENTS

The objectives in pursuing a de minimis settlement are as follows:

- o To resolve de minimis parties' CERCLA civil liability to EPA in a final manner for all past and future response activities at a site.²
- o To resolve de minimis parties' CERCLA civil liability to EPA relatively early in the remedial process to reduce transaction costs for the settling de minimis parties and the government.
- o To obtain a sum certain with, in most instances, a relatively modest effort on the part of the government. This replenishes the Superfund and may (if appropriate and if part of a comprehensive settlement under which response action will be performed by other site PRPs) provide upfront monies for the parties implementing the work at a site.
- o To provide an incentive to non-de minimis parties to settle simultaneously by offsetting the contributions of de minimis parties from the total cost of the response action.

²Nonetheless, under appropriate circumstances, de minimis settlements should contain a reopener that reserves the right of the United States to proceed against the de minimis party if it is later discovered that the party's contribution to the site exceeded that previously stated. The settlement may also contain reopeners to reserve the United States' right to proceed against the de minimis party if there are cost overruns or further response action is necessary in addition to the work specified in the ROD. For a more detailed discussion, including discussion of other standard reopeners, see "Reopeners," pp. 13-14 below.

- o To simplify negotiations and litigation by reducing the total number of parties involved.

Several of the government's objectives in pursuing de minimis settlements also affect the non-de minimis parties at a site. In addition, the non-de minimis parties benefit in the following ways.

- o The non-de minimis parties may not be burdened with third party suits against settling de minimis parties.
- o The non-de minimis parties' transaction costs may be reduced.
- o A de minimis settlement may, where appropriate, provide a source of start-up funds for a RD/RA.

IV. BACKGROUND: CRITERIA FOR ELIGIBILITY

The following criteria are specified in §122(g)(1) and in the de minimis guidance. In the evaluation of any de minimis settlement proposal, all of these criteria must be met.

- o The settlement involves only a minor portion of the response costs at the site. This criterion is applied to the individual de minimis party's settlement payment (as required by §122(g)). The Agency also considers the collective de minimis parties' settlement payment (as a matter of policy). To date, collective de minimis settlement payments have ranged up to 33% of the site response costs.
- o The amount of the hazardous substances contributed by the individual is minimal in comparison to other hazardous substances at the site. To date, settlement proposals have used between 0.2% and 2.0% of total waste at the site.
- o The toxic or other hazardous effects of the substances contributed by the individual are minimal in comparison to other hazardous substances at the site. The June 19, 1987 guidance interprets "minimal in comparison" in the context of toxicity as "not significantly more toxic than...."
- o The settlement is practicable and in the public interest. This is determined through an evaluation of the strength of the overall case including that against viable non-de minimis parties and the impact a de minimis settlement would have on the major party settlement and litigation.

This element also includes an understanding of the government's interests in settling out with de minimis parties. The settlement should initially be based upon adequate information regarding project costs, PRP waste-in contributions, and PRP viability. In addition, the settlement

base payment should be based upon the PRPs' volumetric share augmented by their volumetric share of the orphan share.

The total de minimis PRP settlement should include, in addition, a premium payment³ and/or reopeners for cost overruns during implementation of the remedy and for supplemental remedies or additional work to be performed in the event the implemented remedy is not protective of public health and the environment. Premiums are based on engineering and legal judgement in relation to the certainty of the government's remedy and the litigation risks of the case.

V. CHARACTERISTICS OF POTENTIAL DE MINIMIS CANDIDATES

The characteristics of potential candidates are described below.

- o The PRP must qualify for settlement under §122(g)(1)(A) as quoted above.
- o The waste contributions (volume and toxicity) of each party generally are adequately documented (i.e., good waste-in list). In addition, the liability and viability of the non-de minimis parties are established. The PRP search is the source of this information. If insufficient data exist, generally the site should not be considered a candidate for de minimis treatment. The burden should be on the PRPs to provide information on volume and toxicity to back up any claims of de minimis eligibility.

³Guidance on premium payments is provided in the "Guidance on Premium Payments in CERCLA Settlements" (issued on November 17, 1988, OSWER Dir. #9835.6).

⁴In general, the earlier a de minimis settlement is negotiated in the overall settlement/litigation process, or the greater the site-specific uncertainty regarding remedial costs, the larger the premium should be. Reopeners vary depending on the stage at which the settlement is reached and the estimated accuracy of the site cost estimates. In addition to the reopeners described above, at a minimum, there will be a reopener for additional PRP information gathered that may indicate that a party is not de minimis and a reservation of rights and criminal liability for natural resources damages, unless the Federal Natural Resource Trustee has agreed in writing to a covenant under §122(j) of CERCLA. Reopeners and premiums are used to insure that the government will minimize any unrecovered costs. Where the remedy involves off-site disposal, off-site redisposal liability may be a factor in determining risk premiums. More information on premiums and reopeners is presented in the following sections.

- o Past costs have been well documented.
- o Future remedial response costs are, or can be estimated and appropriate premiums can be developed. Reasonable, reliable and recent estimates for future costs should be available before the settlement is negotiated. Where very small contributors are involved and the site has reached the mid to late RI/FS stage, this criterion may be relaxed.
- o One or more viable non-de minimis (major) PRPs exist against whom the government has a strong liability case. For instance, if all PRPs would qualify for de minimis treatment or if no viable major PRPs exist who would be financially able to undertake RD/RA, the site should not be considered a candidate for a de minimis settlement.
- o De minimis PRPs have expressed interest in a settlement.
- o The de minimis parties are well organized or can organize with limited governmental assistance. The de minimis parties, or the non-de minimis parties, should be willing to do the work necessary to develop and evaluate settlement proposals. Ultimately, however, the government must make the statutory findings that such a settlement is appropriate.

VI. EVALUATION OF A DE MINIMIS PROPOSAL

As indicated by the criteria for eligibility and characteristics of potential candidates described above, to enter into a de minimis settlement, EPA needs information on costs (past and future), wastes (volume, toxicity) and the universe of PRPs.⁵

This section discusses the major aspects of de minimis settlements, including the determinations that need to be made to define the limits of the de minimis settlement and the parties eligible for participation in it. A discussion of timing issues relevant to settlement at various stages of the remedial process, including RI/FS and RD/RA, is provided. Cost recovery (post-RD/RA) settlements and potential settlements at non-NPL removal sites will also be discussed.

Currently, resources for de minimis settlements are contained within the overall budget allowance of RD/RA negotiations.

As with any negotiation process, adequate planning should provide

⁵Parties that do not qualify as de minimis are not disqualified from the use of other types of settlement tools or settlement options.

maximum flexibility in the review and/or development of a de minimis proposal.⁶

SITE MANAGEMENT PLAN

The following are suggestions to be incorporated into any site management planning process.

- o A timeline for development of the de minimis case strategy.
- o Details of PRP search activities required to provide information on candidate PRPs, if necessary, and a description of the resources needed to carry out these additional activities.
- o Allocation of shares, including NBAR, if appropriate.
- o Any available information on past and future costs relevant to determination of de minimis shares and premiums.
- o Communications and information exchange, including information on communications with non-de minimis parties related to potential de minimis settlements.
- o A plan for collection of the settlement backup documentation. Additional information on the documentation required for this purpose is under development.

It should be noted that a particular candidate site or individual PRP may change de minimis status at any time during the remedial process with the development of new information for the site.

COMMUNICATION

During general discussions and when the determination is made that a particular site may be a candidate for a de minimis settlement, it is advantageous to communicate to all PRPs the existence of this settlement tool. Any initial contacts with the PRPs, such as a "kick off" informational meeting following the general notice letters, may be used to educate them as to the availability of the different settlement tools, including de minimis.

This opportunity should be used to provide the PRPs with the information necessary to develop an adequate de minimis proposal, including the model settlement documents and de minimis guidance, and a clear understanding of their role in the process.

⁶As a matter of practicality, the PRPs should be encouraged to take on the burden of the organizational and administrative aspects of the de minimis settlement process.

- o De minimis settlement negotiations are expedited when the PRPs organize themselves into steering committees.
- o Settlement proposals may be developed by the de minimis and/or the non-de minimis parties. A single proposal representing the de minimis parties' agreement should be developed by the de minimis steering committee. The same holds true when more than one de minimis steering committee exists. In unique circumstances, e.g., varied generator types/information, separate proposals may be accepted by EPA; however, this should be the exception rather than the rule.
- o Non-de minimis parties should be informed about any potential de minimis settlement and, in the case of a settlement occurring at the RD/RA negotiation stage of the remedial process, the Region should consider whether the non-de minimis parties should be given the opportunity to incorporate the de minimis settlement into a global remedial settlement.

This communication process will aid the case team in assessing non-de minimis party concerns related to the potential settlement.

TIMING

The determination as to whether or not to pursue a de minimis settlement at a particular point in the Superfund process is dependent upon the case team's knowledge of the site costs.

- o In limited circumstances, a removal de minimis settlement may be appropriate for non-time critical removal actions at non-NPL sites. This option would provide parties meeting the characteristics and criteria the opportunity to cashout in the same manner as with a remedial action, except that the covenant would not release the settling parties for any post-removal costs or injunctive relief.
- o At the early or mid-RI/FS stage, it is often difficult or impossible to determine with any certainty the remedy for a particular site. These sites are not good candidates for early de minimis settlements.

However, at a limited number of sites the basic remedy may be relatively easily determined, and a reasonable cost estimate based on past experience or industry estimates may be calculated. These cases may be considered candidates for early de minimis settlements if the other characteristics and

⁷In general, however, de minimis settlements reached at this point may be too speculative based upon lack of sufficient information to characterize the site.

criteria are met. An example of this type of case is a large landfill where a cap with its components are likely the dictated remedy.

Another exception to this guideline may be the very large multi-generator case where hundreds or more parties with extremely low volumes exist, the toxicities are relatively similar, and a large number of other parties exist. If there are varying toxicities, this factor should be considered in the formulation of a modified volumetric ranking. Any settlement would include a substantial premium for future costs and litigative risks.

A de minimis proposal is more easily developed at the ROD stage. At this point in time, cost estimates for the remedy are available and realistic premiums may be calculated as discussed below. This is the most common time for a de minimis settlement.

A tiered approach to settlements has been used as an incentive to de minimis parties to join a de minimis settlement at the RD/RA negotiation stage. Under this approach subsequent de minimis proposals include higher premiums.

- Example:**
- Initial settlement proposal includes 100% premium (i.e., multiplier of 2.0) and minimum reopeners (to be discussed below.)
 - Second offering includes a 200% premium (i.e., multiplier of 3.0) with more stringent reopeners (perhaps a reopener for cost overruns.)
 - Third offering includes a 300% premium (i.e., multiplier of 4.0) with still more stringent reopeners.

A phased approach may be used in the development of multiple de minimis settlements proposed at different stages of the remedial process where there are multiple PRPs. As multiple negotiations would be required in this scenario, the decision for using this approach should be documented in the site management plan to provide for adequate resource allocation.

- Example:**
- Early RI/FS de minimis settlement proposed to cashout very low volume contributors constituting 0.7% of the total volume. This eliminates 250 generators from the PRP list prior to the RD/RA negotiation phase and

thereby eliminates the need for special notice letters, meetings, correspondence, etc. with these parties.

- Second de minimis settlement proposed at RD/RA negotiation phase with all remaining eligible parties. This provides settlement with the bulk of the de minimis PRPs.⁸

- Third de minimis settlement proposed at cost recovery stage (post-RD/RA) prior to litigation. This eliminates aspects of the litigation such as discovery, depositions, etc. against de minimis parties thereby reserving resources for pursuit of major party recalcitrants. (If the party declined to participate in an earlier de minimis settlement for which it was eligible, an additional premium should be added to the party's payment.)

- o Cost recovery or post-RD/RA de minimis settlements are an option at sites with fund-financed actions or where PRPs are implementing the RD/RA and the government is pursuing recalcitrants for unrecovered costs. This type of settlement may resolve the liability of the parties to the government prior to active litigation thereby allowing the government to concentrate on the non-de minimis party litigation. If a de minimis settlement was offered at the RD/RA negotiation phase of the remedial process, a premium for the cost recovery de minimis settlement may be appropriate because of the parties' earlier recalcitrance.

It is important to note that the primary goals of a de minimis settlement, in most cases, are to get parties out of the case early and eliminate the governmental resource drain of having to deal with a large number of PRPs. Partial de minimis settlements, i.e., those which only extinguish the PRP's liability for past costs or for removal or RI/FS costs, and not for total response actions at the site (e.g. past costs, future response action, etc.) may pose an excessive resource burden on the Agency, and are not the favored approach.

⁸The terms of early de minimis RI/FS settlements and de minimis settlements reached during the RD/RA negotiation phase may differ based on such factors as additional remedy cost information, additional response costs, and the refusal of certain de minimis parties to join the earlier settlement.

DETERMINATION OF ELIGIBILITY

The following determinations should be made to aid in definition of eligible de minimis parties for a particular site. These determinations are interrelated. This information should be clearly defined in a comprehensive de minimis proposal generally provided by the PRPs.

- o The determination of a volumetric or modified volumetric⁹ cut-off including a determination that the individual waste contributions of the parties constitute only a minor portion of the total site response costs. This cut-off is established by the waste-in list such that sufficient viable major parties remain to negotiate or litigate for the response actions at the site. Information pertaining to the development of a waste-in list and generator ranking is available in the "Potentially Responsible Party Search Manual," (issued August 28, 1987, OSWER Dir. #9834.3-1A), and in the document, "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (issued June 29, 1989, OSWER Dir. #9834.3-2a).
- o A determination of the types of wastes disposed of such that a finding of "minimal in comparison" for toxicity or other hazardous effects can be made. Even if multiple waste types exist at a site this should not be burdensome. As noted above, "minimal in comparison" has been interpreted to mean "not significantly more toxic than". However, where a particular class of wastes drives response costs substantially higher than others, the party that contributed that waste type may be disqualified or a separate allocation formula may be necessary. A decision as to whether or not this holds true of a particular waste should be based on the engineering judgement of the case team.
- o A determination that the settlement is practicable and in the public interest.

Example:

- Volumetric cut-off established at 0.8%/generator.
- All parties contributed like substances (VOCs).
- The total volume of waste contributed by the parties below the 0.8%/generator cut-off is 16.84%.

⁹A modified volumetric cut-off may incorporate differing toxicities of hazardous substances contributed by the parties. A non-binding allocation of responsibility, or NBAR, may be useful in developing a modified ranking of PRPs.

There are sufficient liable and viable parties above the 0.8% cut-off with which to pursue settlement or litigation for the remaining activities at the site.

This example assumes like toxicities for all waste contributions.

NBAR Preparation

When the Agency or PRP determines that they cannot allocate 100% of the costs through other settlement tools, another option is the use of a non-binding allocation of responsibility (NBAR). The purpose of an NBAR is to establish a consistent measure for attributing liability to the PRPs. This process requires assembling and assessing the necessary technical and enforcement information that can support allocation formulas based on volumetric contribution, nature of the waste and response cost.

The development of an NBAR should provide for a fair and equitable allocation of liability at the site among existing PRPs. Allocation of non-viable parties and orphan shares should be adjusted to disperse the liability among the viable PRPs. Additional information on the preparation of an NBAR is available in EPA's "Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility", (issued May 27, 1987, OSWER Dir. #9839.1, published on May 28, 1987 at 52FR19919).

COSTS

EPA should provide cost information to the PRPs for use in the proposal development. Estimated future remedial costs should be calculated and accurate past cost information and documentation should be available. This cost information is used to develop and allocate shares, including a premium component.

These costs will include both direct and indirect costs (plus interest for past costs) for:

- o Pre-RI/FS costs (generally removals)
- o RI/FS and ROD
- o RD/RA
- o Oversight costs
- o O&M costs
- o Contingency for unknown future costs

PREMIUMS

The purpose of premiums is to cover the risk of underestimating response costs and of not recovering 100% of EPA's outstanding costs from parties not eligible for or not joining in the de minimis settlement.¹⁰ There is no set formula for determining premiums, however, and the case team must rely on sound engineering and legal judgement. The November 17, 1988 "Guidance on Premium Payments in CERCLA Settlements," (OSWER Dir. #9835.6), provides general information on premiums. Premium payments may be calculated on the parties' volumetric shares, as augmented by the distribution of orphan shares to the volumetric shares.

One important consideration is a premium for future costs (this includes all costs that have not been incurred, including cost overruns during performance of RD/RA and costs relating to unknown circumstances). This premium should be based on whether or not a remedy has been selected, the project manager's engineering judgement of potential problems with a selected remedy, potential cost overruns for the project, and where the remedy involves off-site disposal and any risk of off-site disposal liability. This analysis is conducted by the RPM or OSC with input from appropriate technical support personnel. It must be documented. The availability of the information required to determine this premium is critical to the timing of a de minimis settlement.

CALCULATION OF PRP SHARE

- o The actual dollar amount of each PRP's share is generally calculated in the following manner. For each generator:
 1. Multiply the generator's percentage (volumetric + redistributed orphan share, including non-viable parties) by the total past costs.
 2. Multiply the generator's percentage (as above with redistributed orphan share added) by total estimated future costs.
 3. Multiply '2' above by the premium. (A percentage premium is equivalent to a multiplier premium, e.g., 40% equals 0.4. A premium of 40% would provide a multiplier of 0.4, 100% would equal 1.0.)

¹⁰The future costs include the costs of remediating known conditions, the risk that costs will exceed the expected costs of the cleanup of known conditions, the costs of remediating conditions not known when a remedy is selected, and, if the site will require five year reviews, the uncertainty of changing standards and technologies.

4. Add '1', '2', and '3' above to arrive at individual generator's cost share.

EXAMPLE

Past Costs = \$1,000,000
 (removal, RI, FS costs to date, other pre-remedial costs, enforcement activities, indirect costs, and interest)

Future Estimated Costs = \$30,000,000
 (remaining FS, RD, RA, oversight, O&M, future contingencies)

Premium = 75%
 (based on uncertainties including remedy failure, etc.)

	<u>Generator A</u>	<u>Generator B</u>
volumetric share	0.5%	0.9%
orphan share	<u>0.1%</u>	<u>0.2%</u>
total percentage	0.6%	1.1%
past costs (% X cost)	\$ 6,000	\$ 11,000
future costs (% X cost)	\$180,000	\$330,000
premium (premium % X future)	\$135,000	\$247,500
total payment (past + future + premium)	\$321,000	\$588,500

REOPENERS

In addition to premiums, a variety of reopeners have been used in de minimis settlements. Reopeners allow the government to revisit the settlement according to the particular terms of the reopener. The standard reopeners are briefly summarized as follows.

First, to protect the Agency against the possibility that a de minimis party's full waste contribution to the site has not been discovered, de minimis settlements should include a reservation of rights which allows the government to seek further relief from any settling party if information not known to the government at the time of settlement is discovered which indicates that the volume or toxicity criteria for the sites's de minimis parties is no

longer satisfied with respect to that party.

Second, unless covered by a premium, a reopener should generally be included which protects the Agency against the risk of cost overruns during the completion of the remedial action specified in the ROD. This reopener would generally be written as a cost ceiling, which, if exceeded, would allow the government to seek additional relief from the settling parties.

Third, unless covered by a premium, a reopener should generally be included which protects the Agency from the risk that further response action will be necessary in addition to the work specified in the ROD. This reopener would state that the government may seek further relief from the settling parties if EPA determines, based upon conditions at the site, previously unknown to EPA, or information received, in whole or in part, after [entry of the consent decree/issuance of the AO], that the remedial action is not protective of public health and the environment.

In addition to the de minimis-specific reopeners noted above, de minimis settlements must also include reservations of rights for: 1) any liability as a result of the settling parties' failure to comply with the terms of the settlement; 2) any liability for natural resource damages (unless the Federal natural resource trustee has agreed to a covenant not to sue); 3) criminal liability; 4) any liability for any claim or cause of action not expressly included within the covered matters or within the covenant not to sue; 5) any liability which any non-settling party may have for any claim or cause of action.

SETTLEMENT OPTIONS

The following settlement options are also available when considering a de minimis settlement proposal:

- o Alternative settlement offers may be advantageous in providing settlement options to a large variety of PRPs. This option entails the use of 2 similar offerings with the only difference being in the premium and reopener sections. Some PRPs are more willing to cashout at a higher premium to resolve all CERCLA liability, while other parties would rather pay a lower premium and have broader reopeners. Such an offering provides incentive to both "interests" while still satisfying the government's risks. A single or separate settlement documents may be used in this case.

Example: Offer 1 - premium of 200% with minimum reopeners (i.e., new information on waste contributed to the site, natural resource damages).

Offer 2 - same document (no premiums if there are full reopeners), with minimum reopeners (i.e. new

information on the waste contributed to the site, natural resource damages) and standard reopeners (i.e., cost overruns during completion of remedial action, and unknown conditions/new information indicating that remedial action is not protective).

- o A percentage-based settlement may be agreed upon. In this case, the parties agree to pay a percentage of actual past and future expenditures. This option has not been used to date; however, it is an acceptable settlement tool. Before using this settlement option, however, the Region should consider the financial viability of the settling parties (i.e., will they still exist at the time the delayed payments are due) and the administrative cost to the Agency of sending out multiple billings to many PRPs.

Example: Settling party agrees to pay their volumetric share plus a 10% premium for future liability. The parties will be billed at the conclusion of RD, and at various stages during the RA. They would also normally make an upfront payment toward past costs.

There are also options available for formalizing the agreement in a settlement document.

- o The de minimis settlement may be embodied in a global settlement with the non-de minimis settling PRPs. This agreement would be in a consent decree for the RD/RA. Many times this also provides for the PRPs assumption of future liability for the de minimis parties' share of the work in exchange for receipt of a premium from the de minimis parties. If there is a global settlement where the de minimis settlers provide funds to the major generators, EPA must verify that the de minimis parties satisfy the applicable requirements for de minimis settlements in order to obtain a covenant not to sue under Section 122(g).

Global settlements should be considered when settling a RD/RA negotiation and a de minimis negotiation simultaneously or within a relatively short period of time. A global settlement is advantageous for several reasons: 1) much of the negotiations occur between the majors and the de minimis parties, saving time and resources; 2) the agreement can, if appropriate, be constructed so that the major PRPs receive a portion of the settlement dollars from the de minimis parties and the money goes directly to the cost of the cleanup; 3) the de minimis PRPs not only get a covenant not to sue, but may also be able to negotiate an indemnification provision or may otherwise be protected from liability by the major PRPs from the governments "reopeners" such as the future liability reopener.

VII. NEGOTIATIONS AND SETTLEMENT

The negotiations required for a de minimis settlement should not be resource intensive. The model consent decree and model order provide useful language for the drafting of a site specific decree or order. Negotiations should involve the entire case team, and the appropriate Headquarters and DOJ personnel should be informed about upcoming negotiations. The June 17, 1988 "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E" provides for delegation of Section 122(g)(1)(A) settlements with generators with Headquarters concurrence required for the first case in each Region unless otherwise exempted from delegation by the June 17, 1988 revision (such as settlements which are inconsistent with national policy). Headquarters consultation will be retained for subsequent cases. DOJ approval is required for all de minimis consent decrees and for de minimis administrative consent orders concerning sites at which total past and projected future response costs exceed \$500,000, excluding interest. (See §122(g)(4).) If DOJ approval is required, the DOJ staff attorney should be contacted early in the development of the case strategy to allow for DOJ participation in the development of the settlement terms.

The most common document used when finalizing a de minimis settlement separately from an RD/RA settlement is an administrative order on consent.

The settlement may be embodied in a separate, de minimis only, consent decree. This option is generally used when there is ongoing litigation at the site.

In addition to these options, de minimis parties may, if appropriate, be offered the option to join any non-de minimis settlement in lieu of participating in a de minimis settlement.

DISTRIBUTION OF DE MINIMIS MONIES COLLECTED

In most cases, a de minimis settlement is a "cashout". Therefore, the case team must consider the disposition of "cashout" monies. If the "cashout" is a de minimis settlement and is part of a global Section 122 settlement, it may be appropriate to provide the future cost component and its related premium to the parties implementing the response action as provided for in Section 122(g)(5). However, the settlers receiving "cashout" funds must assume the liability of the de minimis parties contributing the monies.

If the non-de minimis parties are not expected to settle or are not settling within a short timeframe, the total settlement dollars will go to the Trust Fund or be divided between the Trust Fund and the state, if the state is a party to the settlement and has a response cost claim.

If the "cashout" includes a past cost component, these monies are to be counted as cost recovery and deposited for credit to the invested portion of the Trust Fund. The future cost component and the premium component may be held in several ways which provide for fund conservation and where possible the accrual of interest on the settlement funds:

- 1) When immediate fund accessibility is not necessary, the dollars should be deposited for credit to the invested portion of the Trust Fund for later appropriation to the Agency.
- 2) At State-lead sites, the dollars can be deposited to a state managed escrow account or trust fund, where safeguards exist that ensure that the money will be used for the specific site response.
- 3) When EPA will be responsible for implementing the response action or will be transferring funds to other settlers and immediate fund accessibility is essential, the dollars should be deposited for credit to the non-invested portion of the Trust Fund. A site specific "special account" will be established.
- 4) When a global settlement is expected, the dollars may be temporarily deposited to a court managed escrow account for future distribution to major settlers. Court managed accounts should not be utilized for long term funds management.
- 5) For global settlements reached between de minimis and non-de minimis parties, the dollars can be deposited to an EPA approved but PRP established and managed trust fund or escrow account.

VIII. PURPOSE AND USE OF THIS GUIDANCE

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable by law or in equity, by any person. The Agency may take action at variance with this guidance or its internal implementing procedures.

GUIDANCE DOCUMENTS

"Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility" - (issued May 20, 1987, OSWER Dir. #9839.1 - published on May 28, 1987 at 52FR19919).

"Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA" - (issued June 19, 1987, OSWER Dir. #9834.7 - published on June 30, 1987 at 52FR24333).

"Interim Model CERCLA Section 122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order on Consent" - (issued on October 19, 1987, OSWER Dir. #9834.7-1A - published on November 12, 1987 at 52FR43393).

"Guidance on Premium Payments in CERCLA Settlements" - (issued on November 17, 1988, OSWER Dir. #9835.6 - Porter/Adams).

"Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property" - (issued on June 6, 1989, OSWER Dir. #9835.9 - published on August 18, 1989 at 54FR34235).

"Compendium of CERCLA Response Selection Guidance Documents" -
OWPE