



U.S. Department of Justice



U.S. Environmental Protection Agency

MAR 14 1997

MEMORANDUM

SUBJECT: Defining "Matters Addressed" in CERCLA Settlements

FROM: Bruce S. Gelber *Bruce S. Gelber*
Deputy Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

Sandra L. Connors *Sandra L. Connors*
Director, Regional Support Division
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

TO: All EES Attorneys and Paralegals
EPA Regional Counsel Branch Chiefs, Regions I-X

This memorandum revises the policy of the Department of Justice and the Environmental Protection Agency with respect to the content of contribution protection clauses in judicial and administrative settlements under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In many cases it is appropriate for the settlement agreement to contain an explicit definition of "matters addressed" that clarifies the parties' intent regarding the scope of contribution protection. Such a definition will reduce uncertainty and litigation regarding the effect of CERCLA settlements on the contribution claims of other persons, and will promote the rapid entry of decrees. This memorandum will describe the principles to be applied in defining "matters addressed," and will discuss the application of these principles to the most common types of CERCLA settlements. This memorandum supersedes EPA's "Interim Agency Policy on Contribution Protection Clauses in CERCLA Settlements" (Apr. 10, 1991).

A. Background

Section 113(f)(2) of CERCLA provides that:

A party who has resolved its liability to the United States or a State in an administrative or judicially approved settlement **shall not** be liable for claims for contribution **regarding matters addressed in the settlement.** Such settlement does not discharge any of the other potentially liable parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2) (emphasis added). Sections 122(g)(5) and 122(h)(4) of CERCLA provide virtually identical contribution protection provisions for settlements with de minimis parties and administrative cost recovery settlements, respectively.

In the past, CERCLA settlements have generally not included a definition of "matters addressed," but instead have at most contained a statement that the "Settling Defendants are entitled to such protection from contribution actions or claims as is provided in CERCLA Section 113(f)(2)" or the equivalent. This approach has sometimes caused uncertainty regarding the effect of the settlement on the contribution rights of persons not party to the settlement, resulting in delays in the entry of decrees and the entanglement of the United States in subsequent litigation regarding the scope of contribution protection.¹ Several courts

¹ See, e.g., United States v. Alcan Aluminum, 25 F.3d 1174 (3rd Cir. 1994) (reversing denial of motion to intervene by nonsettlers and remanding for determination as to whether consent decree cut off nonsettlers' contribution rights); United States v. Charter International Oil Co., 83 F.3d 510 (1st Cir. 1996) (dispute over scope of contribution protection); United States v. Colorado & Eastern RR Co., 50 F.3d 1530 (10th Cir. 1995) ("CERC") (U.S. argued as amicus that matters addressed in consent decree were limited to EPA's past costs so that prior settlers performing remedy could maintain action against defendant); Akzo Coatings v. Aigner Corp. 30 F.3d 761 (7th Cir. 1994) (amicus brief argued that RD/RA consent decree did not provide contribution protection for early removal action); Dravo v. Zuber, 13 F.3d 1222 (8th Cir. 1994) (amicus brief argued that de minimis AOC provided site-wide contribution protection); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132 (D. R.I. 1992) (same); Waste Management of Pennsylvania, Inc. v. City of York, 910 F. Supp. 1035 (M.D. Pa. 1995) (U.S. argued unsuccessfully as amicus that Section 122(h)(1) Administrative Order on Consent provided broad contribution protection).

have indicated that the United States can reduce this uncertainty by defining "matters addressed" explicitly in its CERCLA consent decrees.²

Defining "matters addressed" in CERCLA settlements will serve the public interest by reducing uncertainty and litigation regarding the scope of contribution protection associated with such settlements, and will enable the United States to maximize the value of its CERCLA recoveries by affording greater certainty and finality to settling parties. In addition, careful crafting of the scope of matters addressed is important to the United States where an agency other than EPA has a potential claim for recovery of response costs that could be extinguished as a result. Therefore, a definition of "matters addressed" should

² United States v. Charter Internat'l Oil Co., 83 F.3d at 517, n. 9 ("The absence of specific language concerning 'matters addressed' might be thought to be of concern to the EPA and the public. Having the scope of 'matters addressed' specifically agreed upon should lead to greater certainty and finality. That certainty and finality are attractive inducements to settle."); CERC, 50 F.3d at 1537 (citing parties' failure to "draft around the 'matters addressed' problem," presumably by defining "matters addressed"); Akzo v. Aigner, 30 F.3d at 766, n. 8 ("if the parties have included terms explicitly defining 'matters addressed' by their settlement, then those terms will be highly relevant to, and perhaps even dispositive of, the scope of contribution protection").

typically be included in the contribution protection section of future CERCLA settlements.³

B. Defining "Matters Addressed": General Principles

The term "matters addressed" should be drafted on a site-specific basis to correspond to the facts of the case and the intent of the parties. Generally, the term "matters addressed" should identify those response actions and costs for which the parties intend contribution protection to be provided. At a minimum, these will be the response actions or costs the settling parties agree to perform or pay; however, "matters addressed" can be broader if the settlement is intended to resolve a wider range of response actions or costs, regardless of who undertakes the work or incurs those costs. This broader contribution protection is typical in most de minimis and ability to pay settlements, as well as in certain RD/RA and cash-out settlements.

In crafting a definition of "matters addressed," the parties should be prepared to satisfy the legal standard for entry, i.e., that the settlement is "fair, reasonable and consistent with the goals of CERCLA."⁴ Where the settlement is intended to extinguish the contribution rights of other PRPs that may incur or be held liable for response costs, the entering court may, as one part of its fairness analysis, require a demonstration that

³ The following model CERCLA settlement documents already contemplate inclusion of a definition of "matters addressed": 1) Revised Model RD/RA Consent Decree (July 13, 1995); 2) Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs (September 29, 1995); 3) Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs (September 29, 1995); 4) Revised Model CERCLA Section 122(g)(4) De Minimis Contributor Consent Decree and Administrative Order on Consent (September 29, 1995); 5) Model CERCLA Section 122(g)(4) De Minimis Administrative Order on Consent and Consent Decree, issued as attachments to the Revised Guidance on CERCLA Settlements with De Minimis Waste Contributors (June 3, 1996).

⁴ United States v. Charter, 83 F.3d at 520; United States v. Cannons Eng'g Corp., 899 F.2d 79, 85 (1st Cir. 1990).

this result is fair to potential contribution plaintiffs whose rights would be extinguished.⁵

Ordinarily, the required demonstration can be accomplished by showing that the response actions or costs within the definition of "matters addressed" were taken into consideration in determining the amount of the settlement, and that the settlors' payment or other contribution represents a reasonable contribution to those costs based on some defensible criterion such as the settlors' volumetric share or ability to pay, or a fair assessment of the litigation risks. Moreover, the impact of the settlement on the contribution rights of any non-parties must be fair under all of the relevant circumstances. In evaluating the fairness of the settlement, it is relevant that the proceeds from the settlement serve to "reduce the potential liability" of all non-settling PRPs. See 42 U.S.C. § 9613(f)(2).⁶

⁵ See United States v. Charter, 83 F.3d 523 (holding that consent decree was not unfair to prior settling parties because it did not bar contribution claims); U.S. v. Alcan Aluminum Corp., 25 F. 3d 1174 (3d Cir. 1994) (a party whose contribution rights may be extinguished should be permitted to intervene for the purpose of opposing entry of a consent decree); but see U.S. v. Rohm and Haas Company, 721 F. Supp. 666, 686-687 (if a decree is otherwise reasonable in light of identified factors, the reviewing court need not separately consider the fairness of the decree to non-settling parties). At most, fairness to other parties is but one dimension of the larger fairness analysis, which has both procedural and substantive dimensions that are beyond the scope of this memorandum. See United States v. Cannons Eng'g Corp., 899 F.2d at 89-90.

⁶ It may be appropriate in some instances to structure a settlement to ensure that PRPs whose contribution rights are being cut off receive an appropriate benefit from the settlement, e.g., through direct reimbursement for work they have performed or through establishment of a CERCLA § 122(b)(3) special account to fund future work. For example, in cases where prior settlors have agreed to perform the remedy and pay most of EPA's costs, it may, in light of that cooperation, be appropriate to allocate the proceeds from a subsequent settlement between the Superfund and the prior settlors in order to ensure the fairness of the settlement. On the other hand, if in the prior settlement the United States compromised its past costs claims on the understanding that it would seek the shortfall from others, the prior settlors may have already received an appropriate benefit through the original compromise, so that it is perfectly fair for the Superfund to retain all of the proceeds from a subsequent settlement.

The scope of the covenant not to sue is relevant to, but not dispositive of, the scope of "matters addressed." A cost or response action is not a "matter addressed" merely because the United States covenants not to sue for it. "If the covenant not to sue alone were held to be determinative of the scope of contribution protection, the United States would not be free to release the settling parties from further litigation with the United States, without unavoidably cutting off all private party contribution rights." Akzo, 30 F.3d at 766 (quoting brief of United States as amicus). The government may have reasons to give such a covenant unrelated to an intent regarding the scope of contribution protection affecting other parties, such as prior settlers. Thus, in some cases "matters addressed" is appropriately defined less broadly than the covenant not to sue. On the other hand, an item that is **not** within the scope of the covenant not to sue is not ordinarily considered to be a "matter addressed" in the settlement. As always, it remains important to keep the concept of "matters addressed" distinct from the scope of the covenant not to sue.

C. Application of Principles to Typical Settlements

The following examples offer some guidance and suggested language for defining "matters addressed" in different types of CERCLA settlements. These are examples only. Site-specific considerations may require changes to the language suggested in these examples.

1. De Minimis Settlements

Typically, de minimis settlements are intended to provide complete relief to the settlers by fully resolving all claims

against them relating to cleanup of the site. To ensure that such settlements achieve their intended purpose, it is important that all costs for which contribution protection is being provided be considered in determining the amount of the payment. Thus, in de minimis (and other) settlements in which PRPs pay a share of specified costs, an item is "addressed" if it is included in the cost total to which the parties' shares are applied. Other items whose costs cannot be estimated at the time of settlement (e.g., additional work that may be required as a result of conditions that are not known or anticipated at the time of the settlement, or work performed by other PRPs for which an accurate accounting is unavailable) may be included in "matters addressed" if the settlors pay a premium that reflects the risk that such costs will ultimately be incurred. Where a diligent effort is made to include all currently anticipated site costs (past and future, government and private) in the cost basis of the settlement, the definition of "matters addressed" should be drafted to include all such costs, as follows:

The "matters addressed" in this settlement are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or any other person with respect to the Site.⁷ The "matters addressed" in this settlement do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations.⁸

⁷ In cases in which a State has or is expected to take response actions or incur response costs with respect to the site, and those actions and costs are not considered in arriving at the settlement amount, this definition should be modified to exclude State response actions or response costs.

⁸ Section 7 of this Memorandum explains the rationale for carving out reserved matters from "matters addressed," and should be consulted in connection with drafting a definition of "matters addressed" that will result in broad, site-wide contribution protection.

Of course, if the settlement is not based on an evaluation of the party's appropriate share of all anticipated site costs (e.g., where it is limited to a particular operable unit, or other portion of site costs), then the definition of "matters addressed" should be modified accordingly.

2. Final RD/RA Consent Decrees

In final RD/RA settlements, there often is no explicit determination of percentage shares, but a group of settlors will agree to perform the remedy and pay all or a portion of the United States' past and future costs. Because such settlors usually bear the bulk of the site costs, it is likely to be fair that they receive contribution protection for all site costs, including those that may have been incurred by other PRPs (such as the costs of doing an RI/FS under an EPA order). In such cases, so long as the costs borne by other PRPs are known (or can be reasonably estimated) and were considered in determining how much the final RD/RA settlors should be required to do and pay, those earlier PRP costs should be included in "matters addressed" along with all of the United States' costs. The definition of "matters addressed" in such a settlement should include all anticipated costs and work, and should be similar or identical to the definition suggested above for de minimis settlements.

If, on the other hand, the United States is unable to conclude that the settlors are paying an appropriate portion of **all** costs, both public and private -- e.g., where the settlors agree to perform a relatively inexpensive remedy, but do not contribute to an expensive RI/FS that was performed by other PRPs -- it may be appropriate either to limit "matters addressed" to costs reimbursed or work performed under the decree or to list specifically the matters for which the settlor is to receive contribution protection, including costs incurred by PRPs to the extent they have been considered or addressed.

3. Partial (Operable Unit) Consent Decrees

In RD/RA settlements for only one of several operable units, the "matters addressed" are likely to be limited to the portion of the cleanup which the settlors are performing or funding. In such cases, the following language should be used:

The "matters addressed" in this settlement are Past and Future Response Costs [**as defined herein; or for specific, described work**] and the Work as defined herein.

However, where a settlor conducts the whole remedy at a site through a series of operable unit decrees, the last operable unit decree should generally use a definition of "matters addressed" that is equivalent to what the settlor would have received if it had performed the whole remedy under one, final RD/RA decree.

4. Past Cost-Only Settlements

In past cost settlements, settlors pay all or a portion of the United States' past costs and the covenant is similarly limited. Such decrees often contain a definition of "Past Response Costs" that limits such costs to those incurred by the United States with respect to the site prior to a given date. In other cases, "Past Response Costs" may be defined as costs relating to a specified set of response actions. In "Past Cost-Only" settlements, the covenant not to sue covers such Past Response Costs only. To prevent disputes regarding the parties' intentions as to the scope of contribution protection in such settlements, "matters addressed" should be narrowly defined as follows:

The "matters addressed" in this settlement are limited to the United States' Past Response Costs, as defined herein.

In some past cost settlements, the definition of "matters addressed" should be even narrower. For example, if prior settlors have already reimbursed part of the United States' past costs, the amount of the settlement in issue may be limited by the amount of the United States' remaining shortfall, so that the settlor's payment may be smaller than what would be a reasonable contribution by the settlor to **all** of the government's past costs. In such a case, it may be appropriate to provide an even narrower definition, such as by limiting "matters addressed" to the past costs settling defendant has agreed to pay or to the United States' past costs that were unreimbursed prior to any payments to be made under the decree.

5. Cash-Out Settlements

In cash-out settlements (where a settlor pays money and typically receives a covenant not to sue under Sections 106 and 107 for both past and future costs and future liability, subject to standard reopeners), the scope of "matters addressed" depends on the circumstances and the intent of the parties. For example, if the settlor's payment represents a reasonable contribution toward all anticipated past and estimated future site costs (including past and future PRP response costs), "matters addressed" should include all such response activities and costs, and the language suggested above for de minimis and final RD/RA settlements is appropriate. If, however, the settlor's payment was determined based on only a subset of site response costs, only that subset is a matter actually addressed. Under these circumstances, the following form should be used:

The "matters addressed" in this settlement are limited to the Past and Future Response Costs, incurred or to be incurred **[by the United States; prior to a specified date; or with respect to specified items of work such as an RI/FS or Operable Unit].⁹**

⁹ Note that one court has held that, because Section 122(h) of CERCLA allows EPA to settle claims only for costs incurred by the government, administrative cash-out settlements under Section 122(h) cannot extinguish contribution claims of private parties with respect to the cleanup costs they incur. Waste Management of Pennsylvania, Inc. v. City of York, 910 F. Supp. 1035 (M.D. Pa. 1995). In light of this decision, it may be prudent in the case of cash-out settlements in which the government intends to afford protection from contribution actions for private party response costs (such as costs incurred by prior RD/RA settlers), to utilize a settlement vehicle other than an administrative settlement based solely on Section 122(h) of CERCLA, such as an administrative settlement based on the Attorney General's inherent authority to settle or a judicially approved consent decree.

6. Ability to Pay Settlements

The purpose of ability to pay settlements is to provide repose to a defendant with limited financial resources, in return for a contribution to the cleanup that takes into account the defendant's limited financial means. Such a settlement often represents a judgment that, given the total anticipated costs (public and private, past and future) at this site, it is appropriate that this impecunious PRP pay a specified portion of its limited funds toward cleanup. So long as cost or work items are considered in such an analysis, they should be included in "matters addressed." Indeed, it may be difficult to secure such settlements without some assurance of broad contribution protection, because PRPs with limited resources may be unwilling to settle if they must retain resources to defend against contribution actions. Therefore, ordinarily "matters addressed" should include all site costs, using the language suggested for de minimis and final RD/RA settlements.¹⁰

Note, however, that ability to pay settlements do not always address all site costs. Partial settlements such as operable unit settlements may contain ability to pay provisions for some parties, without resolving those parties' liability for all site costs. In such cases, a more limited definition of "matters addressed" will be appropriate.

7. Reserved Matters

In most CERCLA settlements, the United States explicitly identifies a variety of matters and claims that it is reserving with respect to the settling defendants notwithstanding the

¹⁰ Note that because CERCLA § 113(f)(3)(C) subordinates private party contribution claims to the rights of the United States, there is nothing unfair about the United States recovering all or substantially all of the settlement proceeds in cases involving a limited ability to pay, so long as the total recovery is reasonable. See United States v. Bay Area Battery, 895 F. Supp 1524 (N.D. Fla. 1995). As noted above, however, it may be appropriate in some cases to consider an arrangement whereby the proceeds of such settlements are shared with potential contribution plaintiffs.

plaintiff's covenant not to sue. There may be an overlap between the subject matter of these reservations and the definition of "matters addressed." Specifically, the definition of "matters addressed" recommended above for certain settlements would provide contribution protection for "all response actions taken or to be taken and all response costs incurred or to be incurred" with respect to the site. Many reservations of rights in CERCLA decrees, such as the statutory reopeners for unknown conditions and new information, by their terms also relate to potential liability for "response actions" and "response costs." By virtue of the fact that the United States has **reserved** its rights to pursue the settlers for such matters, however, in the usual instance such matters are not "addressed" by the settlement.

In order to avoid any uncertainty arising from the overlap between the definition of "matters addressed" and the standard reservations and reopeners, the following language should be added to the definition of "matters addressed," as indicated above, where a broad definition of matters addressed is being used:

The "matters addressed" in this settlement do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree),¹¹ in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations.

It is important that the language excluding reopeners and reservations from the definition of "matters addressed" be drafted to require that the United States invoke the reservation or reopener before a contribution plaintiff can avoid the bar to

¹¹ See, e.g., Model RD/RA Decree ¶¶ 80 and 84.a. The issue of a settling defendant's compliance is between the United States and that defendant. A determination by the United States that the defendant is out of compliance can usually be addressed by such mechanisms as stipulated penalties, motions to enforce, or other steps, and should not automatically expose the settling defendant to third-party contribution actions that would otherwise be barred by operation of Section 113(f)(2) of CERCLA.

contribution suits on the basis of such reservation or reopener. This formulation is intended to preclude contribution claims against the settlors based on frivolous allegations by the contribution plaintiff that the conditions triggering such reservations have been met.

Where consent decrees are not intended to afford broad contribution protection, as in the example of partial and past-cost-only decrees described in Sections C.3 and C.4 above, the more limited definition of "matters addressed" does not overlap with the standard reservations and reopeners from CERCLA model settlement documents, and there will be no need to add any language to the definition in order to exclude such items from "matters addressed" by explicit reference.

D. Purpose and Use of this Memorandum

This memorandum is intended exclusively as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice, and is subject to modification at any time. This memorandum is not a rule and does not create any legal rights or obligations. Whether and how the principles set forth in this memorandum are applied in a particular settlement will depend on the relevant facts. Questions regarding this memorandum should be directed to Daniel C. Beckhard of the Environmental Enforcement Section (202/514-2771) or Janice Linett of the Regional Support Division (703/978-3057).

cc: Lisa K. Friedman, Associate General Counsel,
Solid Waste and Emergency Response Division
Stephen D. Luftig, Director, Office of Emergency and
Remedial Response
Barry Breen, Director, Office of Site Remediation
Enforcement
Letitia Grishaw, Chief, Environmental Defense Section
EDS Deputy and Assistant Chiefs