UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

Office of Enforcement and Compliance Assurance

February 5, 1998

MEMORANDUM

SUBJECT: Transmittal of Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites

FROM: Steven A. Herman
Assistant Administrator

TO: Addressees

This memorandum transmits the "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites" (MSW Policy). This policy supplements the "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (1989 Policy) that was issued by the U.S. Environmental Protection Agency (EPA) on September 30, 1989.

Last year the Office of Site Remediation Enforcement (OSRE) formed an EPA work group to examine settlement options at co-disposal sites for parties whose liability relates to municipal solid waste (MSW). On July 11, 1997, EPA announced in the Federal Register issuance of EPA's Proposal for Municipality and MSW Liability Relief at CERCLA Co-Disposal Sites and began a 45-day comment period. The attached MSW Policy reflects EPA's review and consideration of the public comments received during the comment period.

The MSW Policy states that EPA will continue its policy of not generally identifying generators and transporters of MSW as potentially responsible parties at NPL sites. In recognition of the strong public interest in reducing contribution litigation, however, EPA identifies in the MSW policy a settlement methodology for making available settlements to MSW generators and transporters who seek to resolve their liability. In addition, the MSW Policy identifies a presumptive settlement range for municipal owners and operators of co-disposal sites on the NPL who desire to settlement their Superfund liability.

If you have any questions about the policy, please contact Leslie Jones (202-564-5123) or Doug Dixon (202-564-4232).

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Policy for Municipality and Municipal Solid Waste CERCLA Settlements
at NPL Co-Disposal Sites

I. PURPOSE

The purpose of this policy is to provide a fair, consistent, and efficient settlement methodology for resolving the potential liability under CERCLA [1] of generators and transporters of municipal sewage and/or municipal solid waste at co-disposal landfills on the National Priorities List (NPL), and municipal owners and operators of such sites. This policy is intended to reduce transaction costs, including those associated with third party litigation, and to encourage global settlements at sites.

II. BACKGROUND

Currently, there are approximately 250 landfills on the NPL that accepted both municipal sewage sludge and/or municipal solid waste (collectively referred to as "MSW") and other wastes, such as industrial wastes, containing hazardous substances. These landfills, which are commonly referred to as "co-disposal" landfills, comprise approximately 23% if the sites on the NPL. Many of these landfills were or are owned or operated by municipalities in connection with their governmental function of providing necessary sanitation and trash disposal services to residents and businesses.

EPA recognizes the differences between MSW and the types of wastes that usually give rise to the environmental problems at NPL sites. Although MSW may contain hazardous substances, such substances are generally present in only small concentrations. Landfills at which MSW alone was disposed of do not typically pose environmental problems of sufficient magnitude to merit designation as NPL sites. In the Agency's experience, and with only rare exceptions do MSW-only landfills become Superfund sites, unless other types of wastes containing hazardous substances, such as industrial wastes, are co-disposed at the facility. Moreover, the cost of remediating MSW is typically lower than the cost of remediating hazardous waste, as evidenced by the difference between closure/post-closure requirements and corrective action costs incurred at facilities regulated under Subtitles D and C of the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq. (RCRA).

On December 12, 1989, EPA issued the "Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes" (the 1989 Policy) to establish a consistent approach to certain issues facing municipalities and MSW generators/transporters. The 1989 Policy sets forth the criteria by which EPA generally determines whether to exercise enforcement discretion to pursue MSW generators/transporters as potentially responsible parties (PRPs) under §107(a) of CERCLA. The 1989 Policy provides that EPA will not generally identify an MSW generator/transporter as a PRP for the disposal of MSW at a site unless there is site-specific evidence that the MSW that party disposed of contained hazardous substances derived from a

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[1] The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, et. seq.

commercial, institutional or industrial process or activity. Despite the 1989 Policy, the potential presence of small concentrations of hazardous substances in MSW has resulted in contribution claims by private parties against MSW generators/transporters.

Additionally, the 1989 Policy recognizes that municipal owners/operators, like private parties, may be PRPs at Superfund sites. The 1989 Policy identifies several settlement provisions that may be particularly suitable for settlements with municipal owners/operators in light of their status as governmental entities.

Consistent with the 1989 Policy, the Agency will continue its policy to not generally identify MSW generators/transporters as PRPs at NPL sites, and to consider the performance of in-kind services by a municipal owner/operator as part of that party's cost share settlement. In recognition of the strong public interest in reducing the burden of contribution litigation, however, this policy supplements the 1989 Policy by providing for settlements with MSW generators/transporters and municipal owners/operators that wish to resolve their potential Superfund liability and obtain contribution protection pursuant to Section 113(f) of CERCLA.

III. DEFINITIONS

For purposes of this policy, EPA defines municipal solid waste as household waste and solid waste collected from non-residential sources that is essentially the same as household waste. While the composition of such wastes may vary considerably, municipal solid waste generally is composed of large volumes of non-hazardous substances (e.g. yard waste, food waste, glass, and aluminum) and can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D landfills. A contributor of municipal solid waste containing such other wastes may not be eligible for a settlement pursuant to this policy if EPA determines, based upon the total volume toxicity of such other wastes, that application of this policy would be inequitable. [2]

For purposes of this policy, municipal solid waste and municipal sewage sludge are collectively referred to as MSW; all other wastes and materials containing hazardous substances are referred to as non-MSW. Municipal sewage sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage sludge, but does not include sewage sludge containing residue removed during the treatment of wastewater from manufacturing or processing operations.

The term municipality refers to any political subdivision of a state and may include a city, county, town, township, local public school district or other local government entity.

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[2] For example, such other wastes may not constitute municipal solid waste where the cumulative amount of such other wastes disposed of by a single generator or transporter is larger than the amount that would be eligible for a de micromis settlement.

IV. POLICY STATEMENT

EPA intends to exercise its enforcement discretion to offer settlements to eligible parties that wish to resolve their CERCLA liability based on a unit cost formula for contributions by MSW generators/transporters and a presumptive settlement percentage and range for municipal owners/operators of co-disposal sites.

MSW Generator/Transporter Settlements:

For settlement purposes, EPA calculates an MSW generator/transporter's share of response costs by multiplying the known or estimated quantity of MSW contributed by the generator/transporter by an estimated unit cost of remediating MSW at a representative RCRA Subtitle D landfill. This method provides a fair and efficient means by which EPA may settle with MSW generators/transporters that reflect a reasonable approximation of the cost of remediating MSW.

This policy's unit cost methodology is based on the costs of closure/post-closure activities at a representative RCRA Subtitle D landfill. EPA's estimate of the cost per unit of remediating MSW at a representative Subtitle D landfill is $5.30 per ton. [3] That unit cost is derived from the cost model used in EPA's "Regulatory Impact Analysis for the Final Criteria for Municipal Solid Waste Landfills," (RIA). [4]

To calculate the unit cost, the Subtitle D landfill cost model was applied to account for the costs associated with the closure/post-closure criteria of Part 258 [5] (excluding non-remedial costs, such as siting and operational activities) for two types of costs scenarios: basic closure cover requirements at a Subtitle D landfill; and closure requirements supplemented by a typical corrective action response at a Subtitle D landfill. Based on the costs associated with those activities, EPA developed a cost per ton for each scenario. In recognition of EPA's estimate that approximately 30-35% of existing unlined MSW landfills will trigger corrective action under Part 258, [6] EPA used a weighted average of both unit costs to develop a final unit cost. Specifically, EPA averaged the unit costs giving a 67.5% weight to the basic closure cover unit cost, and a 32.5% weight to the multilayer cover and corrective action scenario. The resulting unit cost, $5.30 per ton reflects (as stated in the Subtitle D RIA) is the likelihood that unlined MSW landfills, such as those typically found on the NPL, would trigger corrective action under

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[3] This rate will be adjusted over time to reflect inflation.

[4] PB-92-100-841 (EPA's Office of Solid Waste and Emergency Response); *see also* RIA Addendum, PB-92-100-858.

[5] Part 258 is the set of regulations that establish landfill operation and closure requirements for RCRA Subtitle D landfills.

[6] *See* Addendum to RIA at II-12 n. 13.

Part 258.

In applying the RIA model to develop unit costs, EPA used the average size of co-disposal sites on the NPL, 69 acres. Other landfill assumptions from the RIA that EPA used in running the model include the following: a 20-year operating life (also consistent with the average NPL co-disposal site operating life); 260 operating days per year; a below-grade thickness of 15 feet with 50 percent of waste below grade; a compacted waste density of 1,200 lb/cy;[7] and a landfill input of 289.3 tons per day.[8] The present value cost is calculated assuming a 7 percent discount rate.

When seeking to apply the unit cost to parties' MSW contributions, in some cases a party's contribution is quantified by volume (cubic yards) rather than weight (pounds). Absent site-specific contemporaneous density conversion factors, Regions may use the following presumptive conversion factors that are representative of MSW. MSW at the time of collection from places of generation (i.e., "loose" or "curbside" refuse) has a density conversion factor of 100 lbs./cu. yd.[9] MSW at the time of transport in or disposed by a compactor truck has a density conversion factor of 600 lbs./ cu. yd.[10] In cases involving municipal sewage sludge, a party's contribution may be first converted from a volumetric value to a wet weight value using a water density of 8.33 lbs./gallon[11] and the specific gravity of the municipal sewage sludge.[12] The wet weight may then may be converted to a dry weight using an appropriate value for the percentage of solids in the municipal sewage sludge. These conversion factors, in conjunction with the unit cost, can be used to develop a total settlement for the MSW attributable to an individual party.

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[7] September 22, 1997 memo to the file by Leslie Jones (conversation with Dr. Robert Kerner, Drexell University, head and founder of the Geosynthetic Institute).

[8] The RIA model calculates a ton per day input of 298.3 based on the 69-acre size, the waste density factor of 1200 lb. cy, and a total of 5200 operating days during the life of the landfill.

[9] Estimates of the Volume of MSW and Selected Components in Trash Cans and Landfills" (Feb. 1990), prepared for the Council for Solid Waste Solutions by Franklin Associates, Ltd.; "Basic Data: Solid Waste Amounts, Composition and Management Systems" (Oct. 1985 – Technical Bulletin #85-6), National Solid Waste Management Association.

[10] *Id.*

[11] "Final Guidance on Preparing Waste-In Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA" (Feb. 22, 1991), OSWER Directive No. 9835.16.

[12] Specific density is determined by dividing the density of a material by the density of water.

In order to be eligible for a settlement under this policy, an MSW generator/transporter must provide all information requested by EPA to estimate the quantity of MSW contributed by such a party. EPA may solicit information from other parties where appropriate to estimate the quantity of a particular generator's/transporter's contribution of MSW. Where the party has been forthcoming with requested information, but the information is nonetheless imperfect or incomplete, EPA will construct an estimate of the party's quantity incorporating reasonable assumptions based on relevant information, such as census data and national per capita solid waste generation information.

MSW generators/transporters settling pursuant to this policy will be required to waive their contribution claims against other parties at the site. In the situation where there is more than one generator or transporter associated with the same MSW, EPA will not seek multiple recovery of the unit cost rate from different generators or transporters with respect to the same units of MSW. EPA will settle with one or all such parties for the total amount of costs associated with the same waste based on the unit cost rate. Notwithstanding the general requirement that settlors under this policy must waive their contribution claims, a settlor will not be required to waive its contribution claims against any nonsettling non-de micromis generators or transporters associated with the same waste. However, in regards to these individual payments for the same MSW, EPA will not become involved in determining the respective shares for the parties.

It is an MSW generator's or transporter's responsibility to notify EPA of its desire to enter into settlement negotiations pursuant to this proposal. Absent the initiation of settlement discussions by an MSW, G/T, EPA may not take steps to pursue settlements with such parties.

Municipal Owner/Operator Settlements:

Pursuant to this policy, the U.S. will offer settlements to municipal owners/operators of co-disposal facilities who wish to settle; those municipal owners/operators who do not settle with EPA will remain subject to site claims by EPA consistent with the principles of joint and several liability, and claims by other parties.

EPA recognizes that some of the co-disposal landfills listed on the NPL are or were owned or operated by municipalities in connection with their governmental function to provide necessary sanitation and trash disposal services to residents and businesses. EPA believes that those factors, along with the nonprofit status of municipalities and the unique fiscal planning considerations that they face, warrant a national settlement policy that provides municipal owner/operators with settlements that are fair, reasonable, and in the public interest. As discussed below, EPA has based the policy on what municipalities have historically paid in settlements at such sites.

This policy establishes 20% of total estimated response costs for the site as a presumptive baseline settlement amount for an individual municipality to resolve its owner/operator liability at the site. Regions may offer settlements varying form this presumption consistent with this policy, generally not to exceed 35%, based on a number of site-specific factors. The 20%

baseline is an individual cost share and pertains solely to a municipal owner/operator's liability as an owner/operator. EPA recognizes that, at some sites, there may be multiple liable municipal owners/operators and EPA may determine that it is appropriate to settle for less than the presumption for an individual owner/operator. A group or coalition of two or more municipalities with the same nexus (i.e., basis for liability) to a site, operating at the same time or during continuous operations under municipal control, should be considered a single owner/operator for purposes of developing a cost share (e.g., two or more cities operated together in joint operations; in cost sharing agreements; or continuously where such a group's membership may have changed in part). In cases where a municipal owner/operator is also liable as an MSW generator/transporter, EPA may offer to resolve the latter liability for an additional payment developed pursuant to the MSW generator/transporter settlement methodology.

Under this policy, EPA may adjust the settlement in a particular case upward from the presumptive percentage (generally not to exceed a 35% share) based on consideration of the following factors:

(1) whether the municipality or an officer or employee of the municipality exacerbated environmental contamination or exposure (e.g., the municipality permitted the installation of drinking water wells in known areas of contaminations); and
(2) whether the owner/operator received operating revenues net of waste system operating costs during ownership or operation of the site that are substantially higher than the owner/operator's presumptive settlement amount pursuant to this policy.

The Regions may adjust the presumptive percentage downward based on whether the municipality, of its own volition (i.e., not pursuant to a judicial or administrative order) made specific efforts to mitigate environmental harm once that harm was evident (e.g., the municipality installed environmental control systems, such as gas control and leachate collection systems, where appropriate; the municipality discontinued accepting hazardous waste once groundwater contamination was discovered; etc.). The Regions may also consider other relevant equitable factors at the site.

The 20% baseline amount is based on several considerations. EPA examined the data from past settlements of CERCLA liability between the United States, or private parties, and municipal owners/operators at co-disposal sites on the NPL where there were also PRPs who were potentially liable for the disposal of non-MSW, such as industrial waste. EPA excluded from analysis sites where the municipal owner/operator was the only identified PRP because these are not the types of situations that this policy is intended to address. Thus, settlements under this policy are appropriate only at sites where there are multiple, viable non-de minimis non-MSW generator/transporters. EPA's analysis of past settlements indicated an average municipality settlement amount of 29% of site costs.

In reducing the 29% settlement average to a 20% presumptive settlement amount, EPA considered two primary factors. First, in examining the historical settlement data, EPA considered that the relevant historical settlements typically reflected resolution of the municipality's liability not only as an owner/operator, but also as a generator or transporter of MSW. Under this policy, a municipality's generator/transporter liability will be resolved

through payment of an additional amount, calculated pursuant to the MSW generator/transporter methodology.

Second, the owner/operator settlement amounts under this policy also reflect the requirement that municipal owner/operators that settle under this policy will be required to waive all contribution rights against other parties as a condition of settlement. By contrast, in many historical settlements, municipal owners/operators retained their contribution rights and hence were potentially able to seek recovery of part of the cost of their settlement from other parties.

V. APPLICATION

This policy applies to co-disposal sites on the NPL. This policy is intended for settlement purposes only, and, therefore, the formulas contained in this policy are relevant only where settlement occurs. In addition, this policy does not address claims for natural resource damages.

This policy does not apply to MSW generators/transporters who also generated or transported any non-MSW containing a hazardous substance, except to the extent that a party can demonstrate to EPA's satisfaction the relative amounts of MSW and non-MSW it disposed of at the site and the composition of the non-MSW. In such cases, EPA may offer to resolve the party's liability with respect to MSW as provided in this policy at such time as the party also agrees to an appropriate settlement relating to its non-MSW on terms and conditions acceptable to EPA.

EPA does not intend to reopen settlements with the U.S., nor does this policy have any effect on unilateral administrative orders (UAOs) issued prior to issuance of the policy. At sites for which prior settlements have been reached but where MSW parties are subject to third party litigation, the U.S. may settle with eligible parties based on the formulas established in this policy and may place those settlement funds in a site-specific special account. At sites where no parties have settled to perform work, where the U.S. is seeking to recover costs from private parties, and where the private parties have initiated contribution actions against municipalities and other MSW generators/transporters, the U.S. will seek to apply the most expeditious methods available to resolve liability for those parties pursued in third-party litigation, including, in appropriate circumstances, application of this policy. EPA may require settling parties to perform work under appropriate circumstances, in a manner consistent with the settlement amounts provided in this policy.

Because one of the goals of this policy is to settle for a fair share from MSW generators/transporters and municipal owners/operators, EPA will consider in determining a settlement amount under this policy any claims, settlements or judgements for contribution by a party seeking settlement pursuant to this policy. In no circumstances should a party that receives monies from contribution settlements in excess of its actual cleanup costs receive a benefit from this policy.

The United States will not apply this policy where, under the circumstances of the case, the resulting settlement would not be fair, reasonable, or in the public interest. Regions should carefully consider and address any public comments on a proposed settlement that questions the settlement's fairness, reasonableness, or consistency with the statute.

VI. FINANCIAL CONSIDERATIONS IN SETTLEMENTS

In cases under this policy, EPA will consider all claims of limited ability to pay. EPA intends in the future to develop guidelines regarding analysis of municipal ability to pay. Parties making such claims are required to provide EPA with documentation deemed necessary by EPA relating to the claim, including potential or actual recovery of insurance proceeds. Recognizing that municipal owners/operators often are uniquely situated to perform in-kind services at a site (e.g., mowing, road maintenance, structural maintenance), EPA will carefully consider any forms of in-kind services that a municipal owner/operator may offer as partial settlement of its cost share.

VII. USE WITH OTHER POLICIES

This policy is intended to be used in concert with EPA's existing guidance documents and policies (e.g., orphan share, de micromis, residential homeowner, etc.), and so other EPA settlement policies may also apply to these sites. For example, those parties eligible for orphan share compensations under EPA's orphan share policy will continue to be eligible for such compensation. [13]

VIII. CONSULTATION REQUIREMENT

The first two settlements in each Region reached pursuant to this policy require the concurrence of the Director of the Office of Site Remediation Enforcement (OSRE). All subsequent settlements with municipal owners/operators at co-disposal require the concurrence of the Director of OSRE.

If you have any questions regarding this policy please call Leslie Jones (202) 564-5123 or Doug Dixon (202) 564-4232.

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

[13] The orphan share policy will continue, however, to apply towards total site costs and not an individual settlor's settlement share.