CHAPTER 26

SETTLING CERCLA ACTIONS

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§ 26.1 Introduction

Hazardous waste is produced in the United States at a rate of 700,000 tons per day, or approximately one ton per year for each person in the United States. As a result of disposal practices which adversely affected public health, Congress enacted in 1980 the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) commonly known as Superfund. The Superfund is a fund of money for cleanup of sites managed by the Environmental Protection Agency. The CERCLA program achieved few successful cleanups in its first years of existence.

Congress sensed that private cleanups of sites were not being performed as frequently as initially hoped and enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA), giving EPA additional authority to compel potential responsible parties (PRPs) to clean up sites and giving added incentives for private cleanups. SARA expanded the program and authorized $10.1 billion for federal cleanup when willing and able PRPs

could not be found. Following SARA's enactment, the average cleanup cost of a facility rose to in excess of $25 million.[1] EPA estimates that total cleanup costs for the current 1,200 Superfund sites will total $30 billion.[2] The Office of Technology Assessment estimates that spending for cleanups at toxic waste sites could eventually reach $500 billion.[3]

Given the enormous costs involved in cleanups, both PRPs and the government realize benefits when CERCLA enforcement actions are settled rather than litigated in court. Settlements save litigation costs for all parties. Cleanups of settled sites need not await the ultimate resolution of a trial. Also, cleanups performed by PRPs generally cost less than those performed by the EPA's contractors. Finally, settlement allows the government to focus on cleaning up the most significant waste sites and allows the PRPs to focus their energies and finances on other matters.

This chapter addresses settlements with EPA and other parties and discusses many of the issues that commonly arise in the process of settling CERCLA cleanup actions. An overview of settlement and enforcement alternatives is followed by a discussion of liability issues that should be addressed when preparing settlement strategies.

§ 26.2 Overview of Settlement and Enforcement Alternatives

EPA's enforcement process begins with a search for PRPs. Once they are identified, EPA may offer to negotiate a settlement with the PRPs for the conduct of a Remedial Investigation and Feasibility Study (RI/FS) identifying conditions at a site and analyzing alternatives for cleanup,[4] for reimbursement of EPA costs incurred responding to the site, or for conduct of the Remedial Design and Remedial Action (RD/RA), which addresses remediation of the site.

Generally, settlements with EPA are of three types. First, PRPs agree to fund and perform a substantial portion, often 100 percent, of the cleanup and to conduct the RD/RA. These settlements often reimburse

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[1] EPA, Unfinished Business: A Comparative Assessment of Environmental Problems (Feb. 1987).

[2] U.S. General Accounting Office, Superfund—A More Vigorous and Better Managed Enforcement Program is Needed, Report to the Chairman, Subcommittee on Superfund, Ocean and Water Protection, U.S. Senate Committee on Environmental and Public Works (Dec. 1989) [hereinafter GAO Superfund Report].

[3] Office of Technology Assessment, U.S. Congress, Coming Clean: Superfund Problems Can Be Solved (Oct. 1989).

[4] The EPA has issued a guidance document which removes the risk assessment component from PRP's conduct of the RI/FS. This Guidance is currently the subject of litigation, on the grounds that the Guidance is a rule, subject to rule making proceedings.

EPA for its incurred costs and costs needed to conduct future oversight of remediation.

Second, EPA and PRPs may enter into mixed funding agreements. Mixed funding uses monies from both the Superfund and the PRPs for remediation. Mixed funding is most likely to be accepted by EPA when some, but not all, of the PRPs are willing to perform the cleanup, and when there are financially viable nonsettlors from whom EPA can recover Superfund's share of the mixed funding agreement.

Third, de minimis and landowner settlements may be entered into by parties who contributed very small amounts of hazardous waste with low toxicity. A de minimis settlement may eliminate numerous small volume contributors from the negotiation and litigation process, which can save all parties time and money. Most frequently, these settlements provide for premiums exceeding the normal share of the settlor's costs in exchange for releases of liability.

Generally, EPA will only consider a settlement proposal from a PRP if the initial offer from the PRP constitutes a substantial portion of the cost of cleanup or the remedial action.[5] EPA may enter into negotiations with PRPs even when the offers from the PRPs do not represent a substantial portion of the cost of cleanup if the proposal is related to an administrative settlement of a cost recovery action in which total cleanup costs are less than $200,000 or involve a bankrupt PRP.

Pursuant to its 1985 Interim Settlement Policy,[6] EPA will analyze settlement proposals using the following criteria:

1. Volume of waste contributed to site by each PRP
2. Nature of wastes contributed
3. Strength of evidence tracing the wastes at the site to the settling parties
4. Ability of the settling parties to pay
5. Litigative risks in proceeding to trial
6. Public interest considerations
7. Precedential value
8. Value of obtaining a present sum certain
9. Inequities and aggravating factors
10. Nature of the case that remains after settlement.

Mixed funding and de minimis settlements are seldom implemented. During the three years following the enactment of SARA, EPA reached

[5] *See* EPA Memorandum, Interim Settlement Policy (Dec. 5, 1984).

[6] 50 Fed. Reg. 5,034 (Feb. 5, 1985).

RD/RA settlements at 78 sites. Of these settlements, EPA reported nine mixed funding and 18 de minimis settlements. The reasons for the limited use of mixed funding and de minimis settlements include: 1) limited EPA staff trained and experienced in these types of settlements; 2) limited EPA staff and financial resources to address issues other than actual cleanup of sites; and 3) lower priority at EPA for settlements that do not address the remediation of the site.

When EPA is unable to reach a negotiated agreement, it has two options under CERCLA to achieve cleanup or PRP response. First, under § 106 of CERCLA, the EPA can issue an administrative order to compel PRPs to clean up the site. Second, EPA can remediate the site using Superfund monies under § 104 and then seek recovery of its cleanup costs from PRPs under § 107.

The EPA has a number of additional investigatory and enforcement tools aside from the negotiated or ordered response. Among other things, it can issue subpoenas to obtain information, file liens against property to recover its cleanup costs, and issue nonbinding preliminary allocations of responsibility calculating each PRP's share of a site cleanup cost.

§ 26.3 Potential Liabilities

Following the passage of CERCLA in 1980, EPA experienced the growing pains normally associated with the start-up of a major program. The courts cooperated in this start-up in an effort to speed cleanups at hazardous waste sites. The courts broadly construed CERCLA liability provisions and deferred judgment on issues of allocation among the parties. Almost every person or entity involved in commerce using or producing hazardous substances or disposing of these substances was said to be subject to strict liability (without fault) and joint and several liability providing that one or all parties were liable for the full amount of remediation costs.

The case law was not instructive on ways to allocate this liability among the various parties. Therefore, settlement theories and strategies are of prime importance. To evaluate settlement theories and strategies, one must first be knowledgeable about the grounds of potential liabilities.

Under § 107 of CERCLA, parties in the chain of treatment, disposal, and storage of hazardous substances[7] may be liable for cleanup costs and penalties. The four classes of liable parties are: (1) owners and operators of

[7] The term *hazardous substance* covers virtually every chemical compound known to man. For example, one judge has held that asbestos lying on the ground constitutes a release or threat of a release, as it may be blown by the wind. *See* United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1149 (D. Ariz. 1984).

facilities where hazardous substances are present; (2) persons who arranged to treat, store, or dispose of hazardous substances; (3) persons who operated disposal sites at the time of the hazardous substance's disposal; and (4) persons who transported hazardous substances to sites they selected. Of the four classes of responsible parties, the generators are the class of parties who most frequently participate in the settlement of CERCLA claims.

The statutory defenses to liability under CERCLA are that: 1) the contamination was caused by act of God or act of war; 2) the problem was solely caused by a third party; and 3) the potential defendant "exercised due care" and "took precautions against foreseeable acts or omissions" of third parties.[8] Additionally, owners of property have a defense if they acquired the property after reasonable precautions were taken to determine the presence or absence of hazardous substances, or if the acquisition was by bequest.[9]

§ 26.4 —Cost Recovery Claims

CERCLA § 104 allows EPA to use Superfund monies for initial response. Subsequently, § 109 allows the EPA to seek the recovery of these monies from PRPs. Under § 113 of CERCLA, parties may be jointly and severally liable for response costs incurred by EPA in connection with a site from which there is a release or a potential release of hazardous substances. Furthermore, CERCLA § 109 allows EPA to assert administrative penalties which, in certain situations, allow assessments of up to $75,000 per day in penalties.

EPA asserts its cost recovery claim against PRPs either by sending a demand letter or by issuing an order. Frequently, EPA asserts the claim at the onset of a remedial action because it is attempting to obtain PRP participation for future actions so that EPA need not commit Superfund moneys for sites at which the PRPs will respond.

PRPs often seek to participate in the performance of a remedy and avoid a more costly recovery action, because EPA's costs of remedy typically exceed those costs which may be incurred by private parties. Also, through negotiation, PRPs may have input on the planned remedy that the EPA selects in its Record of Decision (ROD).

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[8] CERCLA § 107(b).

[9] A lender has an additional defense if its interest in the property was merely to protect its security. At the time of publication, the EPA has proposed rules defining lender liability and several legislative initiatives are pending.

§ 26.5 —Administrative Orders

EPA has increased its use of administrative orders under § 106 of CERCLA, responding to congressional complaints that it was not aggressive in its pursuit of private party cleanups. Under § 106, EPA can order one or more PRPs to undertake a response action to prevent or cease a release from a site at which hazardous substances are located. If a PRP is named in an EPA order and that party fails to undertake the ordered action without "sufficient cause," a court may impose a civil penalty of up to $25,000 per day in civil penalties for the period of noncompliance and also award EPA treble the cost of any response incurred by the Superfund.

CERCLA does not define "sufficient cause." Civil cases have addressed the issue and defined sufficient cause to include the financial inability to perform the order,[10] the lack of a threatened or actual release of hazardous substances,[11] and the failure of a party to be a liable party under CERCLA.[12] In the 1980 debate on CERCLA, Senator Stafford provided the genesis of these defenses by stating that the sufficient cause language was intended to:

> encompass defenses such as the defense that the person who was the subject of the [EPA] order was not the party responsible under the act for the release of hazardous substances. It would certainly be unfair to assess punitive damages against the party, who for a good reason, believed himself not to be the responsible party. For example, if there were, at the time of the order, substantial facts in question, or if the party subject to the order was not a substantial contributor to the release or threatened release, putative damages should either not be assessed or should be reduced in the interest of equity. There could also be 'sufficient cause' for not complying with an order if the party . . . did not at the time have the financial or technical resources to comply or if no technological means for complying was available. We also intend that the [EPA's] order, and the expenditures for which a person might be liable for punitive damages, must be valid.[13]

EPA has issued memoranda on the use and issuance of administrative orders. A September 1983 *Guidance Memorandum on Use and Issuance of Administrative Orders Under § 106(a) of CERCLA* focused on the four factors EPA evaluates in deciding whether or not to issue an administrative order:

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[10] United States v. Reilly Tar, 546 F. Supp. 1100 (D. Minn. 1982).

[11] Solid State Circuits v. EPA, 812 F.2d 383 (8th Cir. 1987).

[12] Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736 (D. Kan. 1985).

[13] 126 Cong. Rec. 30986 (daily ed. Nov. 24, 1980).

1. Financial status of the parties
2. Number of parties
3. Certainty of the needed response
4. EPA's readiness to litigate the merits of the order.

In its February 1989 *Guidance on CERCLA Section 106 Judicial Actions*, EPA refined these points and stated its preference to use orders if relatively few PRPs are available. Also, EPA stated it would consider "carving out" settlements by issuing orders requiring performance of some part of the response work by nonsettling parties.

Section 106 does provide for an opportunity to confer with EPA following receipt of an order. Given the potential exposure for treble damages under § 106 of CERCLA and the lack of clarity in the sufficient cause defenses to the order, there is much incentive for PRPs to attempt to negotiate a settlement of a § 106 order.

Section 106(b)(2) allows a PRP to comply with orders and make a later claim against EPA for reimbursement if it can show that the order was arbitrary or if the party was not responsible under § 107. PRPs with substantial resources may consider this option, although no claim under this section has been allowed by the EPA to date.

§ 26.6 Settlements

After a sufficient number of PRPs have decided that the benefits of a settlement outweigh the costs and risks of litigation, the focus becomes what companies are PRPs, what each PRP contributed, how much each contributed, and how the settlement will be funded by each PRP.

§ 26.7 —Chronology of Settlement

Settlements with the EPA are frequently entered into at the early stages of site cleanup. At the later stages of a cleanup or prior to an offer to EPA to perform the cleanup, PRPs usually attempt settlement among each other. Private party settlements present unique issues. EPA settlements typically focus on total cost recovery and the liability of parties for performance of the remedial work at the site. Private party settlements, however, normally involve establishing mechanisms for technical review of EPA's suggested remediation, assessing monetary shares for expenses, and establishing mutual defense groups.

Prior to settling with either the EPA or other PRPs, the parties typically review the number and alleged involvement of all PRPs at the site. In

order to assess individual exposure at a site, PRPs need to know the relationship of their alleged contributions to the contributions of other viable PRPs. EPA normally has taken the first step to determine who the initial PRPs are at a site. EPA's investigation often starts with the business records of site operators. These records may contain customer lists, shipping documents, and invoices. To identify other possible generators and transporters, EPA (or its contractor) may have conducted interviews with employees at the waste disposal site, waste transporters, and persons who live in the vicinity of the site. This information may be compiled by EPA into a so-called *waste-in list*, which is often an inaccurate and incomplete first cut of PRPs.[14]

EPA typically follows up this list with a questionnaire to the identified parties. This questionnaire, issued under the investigatory authority of CERCLA § 104, is broad in scope and is similar to interrogatories that might be filed in a lawsuit. EPA also has subpoena authority under CERCLA § 122(e)(3)(B) but does not normally utilize that authority.

At most sites, the PRPs interested in settlement gather additional information on other PRPs. Often working with government information obtained from a Freedom of Information Act request, the parties may retain an outside consultant or common counsel to prepare a waste-in list of PRPs at the site. That list includes volume and/or toxicity information about the parties. PRPs perform this task routinely, even if the EPA has previously compiled a list, because PRP-prepared lists are usually more accurate and more inclusive of new potential parties.

CPAs and other financial experts who specialize in environmental litigation consulting often perform these information gathering activities. The experts may perform the following procedures:

1. Collect and review government business records
2. Interview government and business personnel
3. Conduct historical research of site operations
4. Reconstruct chain of title
5. Update PRP names and addresses
6. Conduct PRP corporate historical research
7. Assess PRP ability to pay for the cleanup
8. Consolidate and organize records.

Often, the information gathering continues throughout the negotiation or litigation period. In fact, given the often incomplete records at sites,

[14] One-half of EPA's project managers and attorneys surveyed by the United States General Accounting Office indicated dissatisfaction with EPA's waste-in lists. *See* GAO Superfund Report.

information gathering is seldom finished to the complete satisfaction of all PRPs.

§ 26.8 —Defenses to Liability Impacting Settlement

Two defenses to liability are frequently asserted at Superfund sites to reduce potential settlement shares: the transporter defense and the innocent landowner defense. Under § 107(a)(4) of CERCLA, transporters are only liable for transportation of hazardous substances to disposal sites they have selected. Transporters asserting this defense often locate bills of lading showing direction by shippers. Landowners often assert that they are entitled to the innocent purchaser defense of § 101(35). To establish this defense, the landowner must provide evidence that it acquired the property without reason to know that hazardous substances were disposed of on it.

Although CERCLA § 107(b) provides a defense if releases are caused by acts of God, war, or third parties, no party has been released by EPA from a CERCLA suit on these grounds.[15]

§ 26.9 —Allocations of Liability

The most divisive problem among PRPs is the method of allocating monetary shares for settlement. Section 113(f)(1) of CERCLA provides for allocation based on equitable factors: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[16]

Several cases have set out these equitable factors to be considered in allocations. These factors are based on criteria proposed for CERCLA by Senator Gore in 1980, even though the criteria were not adopted in the original Superfund bill.[17] The Fifth Circuit stated in *Amoco Oil Co. v. Borden, Inc.*[18] that the relevant factors include:

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[15] The third party defense, which holds the most promise to defendants, has been narrowly construed. In United States v. Ward, 618 F. Supp. 884 (D.C.N.C. 1985), the defense was held not to apply if the third party was an agent, employee, or had a contractual relationship to the defendant. In the lower court decision of New York v. Shore Realty Corp., 759 F.2d 1045, 1048–9 (3rd Cir. 1984), the court held that the defense was not applicable to the owner of a site where leakage had occurred during its ownership, even though disposal activities predated its ownership.

[16] CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

[17] See United States v. A&F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (indicating Gore amendment criteria would be considered in an apportionment).

[18] 889 F.2d 664 (5th Cir. 1989).

> The amount of hazardous substances involved; the degree of toxicity or hazard of the materials involved; the degree of involvement by parties in the generation, transportation, treatment, storage or disposal of the substances; the degree of care exercised by the parties with respect to the substances involved; and the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.[19]

Courts have also considered other factors with regard to landowner liability, such as the circumstances surrounding the conveyance of property, the price paid, and any discounts granted. Because allocations vary on case-by-case basis for similarly situated parties, past precedence gives little guidance as to the proper method of allocating liability among PRPs in order to aid in establishing settlement shares.[20]

Settlement allocations are most often based on waste-in lists consisting solely of volumes. Volume allocations are the easiest of the allocation formulas. Toxicity of waste streams is considered at sites at which toxicity of the waste varies and significantly affects the proposed remedy. Toxicity does inject a degree of subjectivity to the list that makes this type of allocation difficult to calculate.

Independent experts can be of great assistance in determining PRP waste contributions and cleanup cost allocations. Technical experts may characterize waste types and quantify the volumes associated with each PRP based upon available records. CPAs may also assist by determining the costs to implement remediation and by allocating the costs among the PRPs based upon a comprehensive cost allocation model. These calculations may assist the PRPs and the government in reaching a settlement acceptable to the largest number of parties.

§ 26.10 —Settlements by Use of Notice Letters

In the 1986 SARA amendments, Congress gave EPA several settlement tools to encourage PRP participation in the remedy at a Superfund site. Section 122 of CERCLA provides opportunities for PRPs to organize and to take over the performance of the cleanup. The EPA may, at its option, initially notify PRPs that it is considering action by sending a *general notice letter* stating that a remedy is being proposed. It provides PRPs with

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[19] *Id.* at 672–73.

[20] *See* United States v. Tyson, 19 Chem. Waste Litig. Rep. (Computer L. Rep., Inc.) 1310, 1324 (E.D.P.A. 1980) (50 percent liability assessed on landowner and operator); *see* United States v. Northernaire Plating Co., 17 Chem. Waste Litig. Rep. (Computer L. Rep., Inc.) 1130, 1131 (W.D. Mich. 1989) (assessed two-thirds of liability on operator and one-third on owner).

time to organize and develop an offer to conduct or finance the selected response or comment on the appropriateness of that response.

Following the general notice letter, EPA may issue a *special notice letter,* which allows selected PRPs a period of time in which to negotiate with EPA to perform the response action. This special notice letter must provide each PRP with the names and addresses of all known PRPs, the volume and nature of substances contributed by each PRP, if available, and a ranking by volume of substances found at the facility, if known. CERCLA § 122(e)(1) also provides that the agency must make this information available in advance of the special notice letter upon a PRP's request. With that information, PRPs may consider the viability of privately funding an RI/FS, determine the likelihood of de minimis cash settlements, and develop an overall settlement strategy.

After the issuance of a special notice letter, EPA may not undertake cleanup or remedial actions at the site for 120 days nor initiate an RI/FS for 90 days. EPA may, however, conduct other studies, including remedial designs, in this moratorium period. If the PRPs have not submitted a good faith proposal to the EPA within 60 days of receipt of the special notice letter, the moratorium period ends and EPA may commence response actions or initiate an RI/FS.

If § 122 settlement procedures are used, the EPA must also notify state and natural resource trustees of any pending settlement negotiations. States have the opportunity to participate in those negotiations, subject to the right to intervene in § 106 actions to secure compliance with any more restrictive state cleanup standards.

PRPs agreeing to perform the remedial action then enter into a consent decree with the government pursuant to § 122(d)(1)(A). The decree is open for public comment, as discussed in **§ 26.13**. If EPA determines not to use the § 122 settlement process, the only statutorily mandated PRP notice is provided in § 113(k)(2)(D), which states that PRPs will be identified and notified "as early as possible" before EPA's selection of a response action.

§ 26.11 —EPA De Minimis Settlements

The EPA is encouraged by CERCLA § 122(g) to enter into prompt settlements with de minimis waste contributors. On June 19, 1987, EPA issued its *Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(a) of SARA,*[21] at 54 Fed. Reg. 34235. This EPA policy encourages de minimis parties to present group settlement offers. To be eligible for a de minimis waste contributor settlement with EPA, a party must have contributed no more than a minimal amount of hazardous

[21] 54 Fed. Reg. 34235.

substances to a facility, and the substances contributed must not be significantly more toxic than other hazardous substances found at the site. These settlements allocate to PRPs their percentage share of liability and normally add a premium payment, to cover cost overruns and future response costs, in exchange for a covenant not to sue.

Prior to determining whether it will entertain de minimis settlements, the EPA obtains an estimate of the cost of cleaning up the contamination. As a general rule, EPA will not consider de minimis settlements until the completion of a PRP search or until the EPA believes that it has adequate information about each settling party's waste contributions.

The first de minimis settlement proposal drafted by EPA under § 122(g) involved the Cannons Engineering site in Bridgewater, Massachusetts. The EPA stated that parties are eligible for early settlement if their "volumetric contribution . . . does not exceed 1% of the total waste volume listed for that site."[22] A settlement premium of 60 percent was added to the volumetric share to reimburse cost overruns incurred following settlement. De minimis settlors paid 100 percent of their volumetric share, plus 60 percent of their volumetric share for unexpected costs, plus an additional 100 percent premium, for a total 260 percent share. Subsequent de minimis settlement proposals at other sites have ranged across the spectrum and vary from site to site.

§ 26.12 —Landowner's Settlement

The landowner faces unique settlement issues in determining whether it can assert the innocent landowner defense. That defense must meet several threshold tests to establish that the landowner is, in fact, innocent. Under CERCLA §§ 101(35) and 107(b)(3), the landowner must have acquired the property by bequest or without knowledge or reason to know of the disposal of hazardous substances.

Technically, the party who has satisfied the statutory burden is innocent and is not liable for any costs.[23] To be innocent, however, the landowner must provide some showing of the exercise of due care at the time it acquired the property. Information is seldom available regarding the condition of the property at the time of purchase. Additionally, the party claiming innocent landowner status should provide documentation and evidence of representations made by the seller at the time of sale. Because the evidence to support the defense is rarely available, the landowner often participates in settlement.

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[22] EPA, *Cannons Engineering* Case *De Minimis* Settlement Offer Draft at 2 (Mar. 4, 1987), United States v. Commons Eng'g Corp., 720 F. Supp. 1027 (D. Mass. 1989).

[23] *See* EPA Interim Settlement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985).

In 1989, EPA issued its *De minimis Landowner's Settlement Policy.*[24] The policy focuses on the amount of evidence a party needs to produce to establish its innocent landowner defense. The policy requires that, to be innocent, a purchaser must obtain property without "actual or constructive knowledge" of its use for disposal of hazardous substances. If the property is acquired by inheritance or bequest, the policy also imposes a standard that the landowner must have conducted "all appropriate inquiry," although the statute does not expressly impose this requirement.[25]

§ 26.13 Negotiating Consent Decrees with EPA

There are the two types of consent agreements that PRPs may negotiate with EPA. The first is a *cash out settlement,* which involves an agreement to pay all or a portion of the costs of the response action the government has determined to be appropriate for the facility. This type of agreement does not require court approval, although it is often obtained.[26]

The second type of consent agreement provides for performance of the remedial work by the PRPs. These agreements typically are more difficult to negotiate. Because future performance by PRPs is mandated, additional provisions are required to address dispute resolution during performance, changed conditions at the site, and failure to perform in accordance with deadlines because of force majeure events. Additionally, these agreements contain stipulated penalties for failure of the settling parties to comply with the terms of the agreement.[27]

Negotiated settlements between PRPs and the EPA for performance of the work and settlement of claims are incorporated into either a consent order or a consent decree. A *consent order* is an administrative order issued by EPA and agreed to by the PRPs. These orders normally involve the PRP's payment of costs incurred by EPA under CERCLA § 107 and performance of work by PRPs. The orders must be published in the *Federal Register* for comment at least 30 days before they become final. The

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[24] 54 Fed. Reg. 32235 (Aug. 18, 1989).

[25] *Id.* at 34238.

[26] A court-issued consent decree often allows the court to retain jurisdiction over future disputes and carries the legal authority of a final judgment. Disputes not resolved by dispute resolution clauses are submitted to the court for a status conference or similar motion. EPA-issued administrative orders lack the authority of final federal judgments. Disputes arising under these orders must be resolved informally with EPA and, if necessary, appealed to the EPA administrator.

[27] Courts reviewing the proposed settlement focus on the impact settlement has on nonsettlors. In one case, New York v. Shore Realty Corp., 759 F.2d 1032 (2nd Cir. 1985), the trial court, in fact, rejected a proposed settlement agreement after it determined that the settlement failed to protect the rights of third-party defendants.

EPA then reviews comments prior to the final acceptance of the order. Nonsettlors may mount a challenge to the EPA's selected remedy set out in the order by filing suit in the federal court pursuant to § 113 of CERCLA. Any challenges to the other terms of the administrative settlement must be brought under the citizens' suit provisions of CERCLA § 310.

Consent decrees normally are sought if PRPs and EPA agree either to settle § 106 orders for response actions or to perform major response actions that will lead to private party cost recovery actions. Pursuant to § 122(d) of CERCLA, the decrees are entered in the United States District Court in which the site is located. Prior to entry, the Department of Justice must review whether the decree is appropriate, proper, and adequate. There is no explicit judicial review mechanism for that determination set out in CERCLA. The final consent decree is then lodged with the court for 30 days prior to final judgment, for public comment.

The parties choosing to settle with EPA must focus on negotiating the terms of the consent decree in a form proposed initially by EPA. The high rate of EPA employee turnover provides an interesting aspect to negotiating the terms of these decrees. The EPA teams may lack negotiation experience, and some PRPs may attempt to use this lack of experience to their clients' advantage. The EPA team, however, may also resist innovative proposals for settlement in order to avoid potential criticism from the EPA hierarchy.

The 1986 SARA amendments required that consent decrees contain several provisions. EPA drafted a Model Administrative Order on Consent for CERCLA Remedial Investigation/Feasibility Study, which was made public on January 30, 1990, incorporating these and other general provisions. The model order has been roundly criticized by the defense bar as being a "wish list" containing all items EPA would like to have in an order, not items reasonably agreeable to PRPs in a final order. These provisions and other typical provisions that may arise are discussed below.

§ 26.14 —Covenants Not to Sue

Whether settling past costs or agreeing to future performance, the settling parties should always insist on a covenant not to sue from the EPA pursuant to CERCLA § 122(c) and (f). The covenant should state that the EPA will not sue settling parties for expenses incurred by the government to date and for those incurred for future activities performed by EPA which may result in statutory liability to the settling parties. As to costs incurred by EPA to the date of the decree, the covenant is effective as of the date the decree is entered. The covenant not to sue for future costs is not effective until EPA "certifies" that remediation has been "completed."

Generally, the scope of the covenant not to sue depends on the nature of the remedy. Typically there will be a more complete release if a more permanent remedy will be instituted. Settling parties should focus on foreclosing all governmental liability by including all relevant federal and state government agencies including natural resource trustees (such as the U.S. Department of the Interior and similar state agencies).

EPA's *Interim Guidance on Covenants Not to Sue*[28] and § 122(f) of CERCLA contemplate two types of covenants not to sue. *Discretionary covenants* provide for a reopener and reserve the right of the EPA to sue for unknown future conditions after it certifies completion of the remedial action. The EPA provides a discretionary covenant if it determines that the covenant is in the public interest, that it would expedite response actions consistent with the National Contingency Plan, that the settling party is in full compliance with the terms of the consent decree, and that a response action has been approved by EPA.

Special covenants typically contain no reopener and will be granted in either of two events. First, EPA will grant a special covenant if it has required PRPs to dispose of hazardous substances off-site despite an offer from PRPs for on-site treatment consistent with the National Contingency Plan. Second, EPA will grant this covenant if the response action will destroy, eliminate, or permanently immobilize waste at the site so that no current or foreseeable future health or environmental risks exist. Special covenants are also appropriate for de minimis settlements or for "extraordinary circumstances" to be determined by the EPA.

In EPA's *Interim CERCLA Settlement Policy* and in its guidance entitled *Drafting Consent Decrees in Hazardous Waste Imminent Hazard Cases (May 1, 1985)*, it indicated that covenants will be limited to remedial work actually performed. This interpretation would provide very limited protection to PRPs, if agreed to, and will not extend the covenant to liabilities associated with off-site disposal of waste. In its *Interim Guidance on Covenants Not to Sue*, EPA stated that it will seek to include a reopener to cover situations in which new information reveals that the earlier remedy no longer protects human health or the environment. EPA agreed, however, that it must demonstrate that the additional remedial action required results from conditions not known at the time the decree was entered.

§ 26.15 —Contribution Protection

If fewer than all PRPs settle, those settlors are exposed to possible action by later sued parties for contribution. Contribution claims are based on

[28] 52 Fed. Reg. 28,039 (July 27, 1987).

and more stringent state law. The EPA has issued its interpretation of the meaning of ARARs in its *Interim Guidance on Compliance with Applicable State and Federal CERCLA Requirements for Remedial Actions,*[31] and in its *Memorandum on CERCLA Compliance With Other Environmental Statutes.*[32] It is EPA's position that *applicable requirements* are cleanup, control, and other environmental protection requirements promulgated under federal or state law that specifically address a similar hazardous substance problem for which those standards are legally required. *Relevant and appropriate requirements* are criteria which may not be legally applicable to the specific circumstances at the site but which address similar problems at other sites. ARARs may be set for levels of chemicals (such as those set by the Safe Drinking Water Act) or levels of action or cleanup (such as those set by RCRA closure regulations). Additionally, local requirements such as siting laws for hazardous waste facilities may be applicable. Federal or state guidance documents are not ARARs, but they may be considered for cleanup levels, particularly if no specific ARARs exist.

During the consent decree negotiation, the EPA may actively seek comments on its proposed ARARs. The parties should be prepared to propose and negotiate the ARARs, because the EPA recognizes that they are set on a site-by-site basis. Also, negotiations should address whether ARARs must be met at all points inside the site or only at the boundaries of the site. Significant savings can result if the ARARs standards need only apply to the area in which waste was disposed.[33]

CERCLA § 121(d) provides some flexibility in the designation of ARARs and allows PRPs to propose alternative concentration limits (ACLs). ACLs are a way to obtain an extra degree of cost effectiveness by setting more relaxed cleanup standards. ACLs have been most effectively used in groundwater cleanups.

EPA typically seeks to require compliance with ARARs at the earliest practical time. It may also require that ARARs' compliance be met for a significant period before allowing the shutdown of other remediation at the site. The costs of continued operations can be expensive. A reasonable time frame for ARAR compliance should be negotiated, because CERCLA does not specifically speak to this issue.

The EPA also may attempt to establish cleanup targets or goals instead of using statutorily required standards. EPA's cleanup goals often focus on improving the quality of the site, rather than removing the contamination. PRPs should resist this, because the remedy should only be what is needed to eliminate the spread of contamination onto adjoining sites.

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[31] 50 Fed. Reg. 32496 (Aug. 27, 1987).

[32] 52 Fed. Reg. 47946 (Aug. 8, 1988).

[33] The ROD often specifies where compliance will be measured.

the theory that the initial settling parties must ultimately pay their appropriate percentage of any costs for which the nonsettling parties may be held liable. Settling parties would point to CERCLA § 122(h)(4), which states that any party resolving its liability to the United States is not liable for claims of contribution "regarding matters addressed in the settlement." This section potentially provides broad protection for settlors from actions brought by the nonsettling parties. The section also benefits nonsettlors because it provides for a reduction in potential liability of nonsettlors if an administrative or judicially approved settlement is entered.

Pursuant to § 122, contribution protection extends only to matters addressed in the settlement. There has been controversy as to whether or not the contribution protection provisions extend to causes of action from private parties incurring response costs. In EPA's *Guidance on Covenants Not to Sue*, the EPA suggests that contribution protection for settlors should correspond to the items covered in EPA's covenant not to sue (that is, EPA's expenses).

To qualify for contribution protection, the consent decree must be "judicially approved."[29] The court approval may be as little as a review of the decree and supporting affidavits to as much as a full evidentiary hearing.[30]

§ 26.16 —Remedy Selection

The consent decree formalizes the remedy selected by the ROD if settling parties will be performing work. CERCLA § 117(c) requires that the EPA explain any significant difference between the ROD and the work to be performed as set out in the consent decree.

The selected remedy is often referred to as the *remedial action plan* (RAP). In negotiating compliance with the RAP, consideration should be given to the possibility that the actual conditions at the site may differ from that set out in the RAP. Parties should provide in the agreement with the EPA for independent negotiation of changes to the RAP required by these changed conditions. That negotiation provision should provide for input from technical experts in order to maximize the likelihood that technical solutions will be reasonable and cost effective.

Under § 121(d) of CERCLA, the remedial action must comply with applicable, relevant, and appropriate requirements (ARARs) of federal law

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[29] CERCLA § 113(f)(2).

[30] *Compare* United States v. Hooker Chem. & Plastics Corp., 607 F. Supp. 1052, 1056–57 (W.D.N.Y. 1985) (formal judicial opinion was issued after four days of hearings) *with* United States v. Westinghouse, IP 81-488C, IP 83-9-C (S.D. Ind., Aug. 22, 1985) (technical affidavits sufficient to support entry of decree).

EPA provides certifications when construction is completed and before commencement of maintenance activities. This certification period allows EPA to determine that the remedy is achieving the requirements set forth in the RD and ROD. EPA typically does not alter the ROD or impose additional cleanup requirements in the period following completion of the remedy unless a previously unknown condition has been discovered. The settling parties should be careful, however, to ensure that the certification decision does not allow the EPA to have an increased time to require additional work without having to use any negotiated reopener provision. EPA has indicated in the past that it would include a limitation on certification decisions, upon request.

Other suggestions for dealing with remedy selection and completion in consent decrees include the following:

1. State a preference for effective cleanups, not a requirement to complete remediation by a set date.
2. Avoid over-committing to the extent of making the required cleanup if it exceeds the levels set out in an ARAR.
3. As much as possible, avoid an unlimited time period for operation of a specific treatment component.
4. Specify that the PRPs' cleanup, if conducted in compliance with the EPA's design, be *cost effective*. The language in the decree can be helpful in any later private cost recovery action in which the PRP must prove its costs were reasonable and cost effective. Cost effective means that the remedy implemented should be efficient and achieve the appropriate level of health and environmental protection.[34]
5. Keep in mind that, although a complete release of liability may be obtained for the total destruction of hazardous substances, this may necessitate a more extensive cleanup. The legal benefits of a complete release should be balanced against the cost of achieving that result.

§ 26.17 —Incurred and Future EPA Costs

Pursuant to CERCLA § 107(a), EPA is authorized to recover, among other things, previously incurred response costs and future oversight costs. Significant savings can result from using technical consultants to analyze EPA's claim of past and future costs.

[34] *See* definition in H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 245 (1986).

The EPA has taken the position that personnel and program overhead costs necessary to support the Superfund operations are recoverable. These expenses include Superfund's share of rent, utilities, telephones, administrative support, program management, and fringe benefits.[35] In connection with PRP performance of the RI/FS, § 104(a)(1) of CERCLA, however, only requires that settlors reimburse the Superfund for "any costs incurred . . . under, or in connection with, the oversight contract or arrangement (for the cleanup)." As to cleanups conducted by the government, § 107(a)(4)(A), (B), and (D) only provide recovery of removal, response, or remedial costs and health assessment costs. PRPs often argue that the statutory language does not contemplate recovery of indirect costs.

The settling parties should attempt to limit future EPA costs to a fixed dollar amount, to require strict accounting of these costs, to retain the right to challenge the appropriateness of the costs, and to limit recovery of state oversight costs above and beyond the federal oversight costs.

Technical experts should review the EPA's government cost accounting and procurement methods. The cost claim should not include costs that have been excessive, duplicative, unnecessary, or inadequately documented.[36] Additionally, settling parties should evaluate whether government expenditures resulting from technical foul-ups have increased the overall cost of government activities. PRPs at several sites have avoided paying some indirect costs, such as duplicative EPA office rent already recovered at other sites, excessive technical services, and undocumented contractor charges, which were initially included in EPA's cost claim. EPA's lack of accounting for payment of outside contractor costs is also a fertile ground for reduction. Sometimes these costs are attributable to contracts at other sites that are not properly chargeable to the site in question.

Expert assistance is essential to analyze the costs incurred by the EPA, Department of Justice, contractors, and other claimants. Furthermore, the government may delay filing claims until millions of dollars have been expended at a particular facility, and it is wise to retain an expert to monitor and control costs as soon as significant expenses are incurred by the government. In addition, experts should be retained to analyze the cost allocation methodologies used by the government, which may yield unfair costs charged to PRPs.

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[35] *See* Financial Management Division, EPA, Memorandum: Recovering Indirect Costs Related to Superfund Site Clean Up (Dec. 12, 1985).

[36] *See* General Accounting Office, EPA Needs to Control Contractor Costs (July 1988); EPA Memorandum: CERCLA Response Claims (undated 1988). *See also* EPA Memorandum from V. Goeri, Recovering Indirect Costs Related to Superfund Site Cleanup (Dec. 12, 1985).

Numerous procedures can be undertaken by CPAs and other experts to analyze incurred costs and cost allocations. Settlors should consider retaining experts to perform tasks such as the following:

1. Compute the cost of government response actions determined to be inconsistent with the National Contingency Plan
2. Identify and challenge unnecessary, duplicative, excessive, or improperly performed work
3. Challenge indirect costs allocated inappropriately to the facility by EPA and other federal government agencies
4. Review the adequacy of incurred cost documentation
5. Identify and challenge excess costs resulting from multiple layers of contractors and subcontractors
6. Determine appropriate contractor costs and indirect cost rates
7. Analyze the propriety of contractor allocations to sites
8. Compare contractor costs to market rates
9. Evaluate compliance with government contracting requirements
10. Compare actual incurred costs to budgeted costs
11. Determine the costs applicable to individual PRPs.

§ 26.18 —Dispute Resolution Provisions

CERCLA § 121(e) requires that consent decrees contain some dispute resolution mechanism. These clauses are important because modifications to the RD and RA arise frequently during cleanup and should be expeditiously resolved.

The burden of proof established by these clauses is significant. In the 1985 consent decree guidance memorandum, the EPA took the position that the invocation of dispute resolution should not stay the obligation of settling parties to perform work required under the order. Additionally, the guidance placed the burden of proof in dispute resolution on settling parties to demonstrate that their position is correct and that EPA's position is arbitrary and capricious.

PRPs should consider the scope of the review and argue that limited review using the arbitrary and capricious standard should not apply. At a minimum, parties should exempt those issues that are not related to the adequacy of the remedy, such as oversight cost and adequacy of reports, from the arbitrary and capricious standard. To the extent the review of the EPA's administrative record is provided for in the decree under the arbitrary and capricious standard, the parties should preserve their right to supplement the record with other materials.

§ 26.19 —Stipulated Penalties

Section 121(c) of CERCLA requires that stipulated penalties be included in consent decrees. These penalties may be provided in lieu of possible civil, administrative, and judicial penalties that may be assessed pursuant to § 109 of CERCLA. Stipulated penalty amounts are usually in the $1,000 to $5,000 range and seldomly reach the § 109 penalty maximum of $25,000 daily for the initial violation and $75,000 for second and subsequent violations. Although actual penalties vary significantly from site to site, one clear principal, set out in EPA's January 24, 1990 *Memorandum on the Use of Stipulated Penalties in Settlement Agreements*,[37] is that penalties will be set higher after the initial penalty, because the party is a "repeat offender."

These penalties are especially significant if imposed during any period of dispute resolution. If EPA refuses to stay obligations to perform the disputed activity under the order, penalties could be assessed in the absence of a stay. However, EPA is often unwilling to forego stipulated penalties unless there are legitimate disputes related to modifications of the work. EPA's concern that dispute resolution may be invoked frivolously has often lead to EPA's waiving penalties only if the PRPs prevail in dispute resolutions. This risk of PRPs' losing dispute resolution and facing significant penalties, however, may deter the settling parties from presenting valid disputes.

Settling parties often request provisions allowing a chance to "cure" a failure to perform prior to the imposition of stipulated penalties. This type of provision can help parties avoid costly fines if they fail to meet one deadline and that failure pushes back other deadlines, triggering cascading penalties. Also, language in EPA's model consent order provides that if EPA extends one deadline, that extension does not also extend later deadlines. Stipulated penalties should not accrue for missing the later deadlines if the delay is directly related to a previously extended deadline. Parties should also not be responsible for penalties for insubstantial requirements, such as reporting and record keeping obligations, and for delays caused by EPA's actions in reviewing and evaluating material.

In 1987, EPA retained Clean Sites, Inc. (see **Chapter 24**) to conduct an analysis of stipulated penalties with input from various groups in the environmental bar. On May 4, 1988, Clean Sites issued its *Agreements in Principle on Stipulated Penalties*, which should be consulted in crafting a stipulated penalty provision. This report developed a consensus on 11 principles that should guide parties in developing stipulated penalty provisions. These principles include a forgiveness of penalties during certain force majeure events.

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[37] 1 Federal Laws, 41 Env't Rep. (BNA) 3581.

The analysis of stipulated penalties is another area in which CPAs and other financial experts may provide useful assistance to PRPs. CPAs may provide documentation and expert support to challenge the appropriateness of EPA's determination of penalties. CPAs can analyze the appropriateness of the underlying assumptions in EPA's penalty determination models. They can calculate the economic benefits that may be derived due to the failure of the PRP to comply and test the sensitivity of the economic benefit to changes in assumptions used in the penalty determination model. CPAs can also analyze the impact of additional factors on penalty calculations, including the significance of violations, the extent of health and environmental harm, the number of violations, the duration of noncompliance, the history of recalcitrance, and the PRP's ability to pay.

§ 26.20 —Mixed Funding

Settling parties often attempt to obtain a *mixed funding agreement* with EPA. CERCLA § 122(b) allows Superfund moneys to be used in connection with private response dollars, provided the EPA "pre-authorizes" the use of fund money. Typically, the preauthorization is triggered by the PRPs' filing of a formal request for mixed funding.

Reimbursement from the Superfund is limited to amounts that should have been the responsibility of any unidentified or nonsettling parties. This includes "orphan shares" for parties who are "unknown, insolvent, similarly unavailable or (who) refuse to settle."[38] EPA typically attempts to obtain reimbursement of Superfund expenditures from these nonparticipating parties by way of a § 107 cost recovery action. EPA may require settlors to waive or assign their claims against those nonsettlors in exchange for the mixed funding. Alternatively, EPA has, at some sites, agreed to assert a claim against nonsettlors and for a fixed period of time attempt settlements with those nonparticipating parties. Failing settlement or judgment, EPA then may obtain reimbursement of the mixed funding portion from the initial settlors.[39]

EPA may agree to provide mixed funding for additional remediation or actions required due to changed conditions, in proportion to the amount provided by the original mixed funding agreement, under § 122(b)(4).

United States v. General Motors Corp.[40] was one of the first mixed funding agreements reached under CERCLA. That agreement required

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[38] H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 252 (1986).

[39] *See, e.g.*, United States v. Air Prods. & Chems., Civ. Action No. 87-7352 (E.D. Pa. Nov. 17, 1987).

[40] No. 87-464 (D. Del. 1987).

General Motors to conduct a cleanup estimated to cost over $9 million. General Motors obtained one-third of its costs from the Superfund. EPA has typically refused to consider mixed funding proposals in which the government component exceeds the percentage agreed to in the GM cleanup.

§ 26.21 —Miscellaneous Provisions

A number of other issues typically arise based on the particular facts of each settlement. These miscellaneous issues include the following.

Disclaimer of Liability. The parties should include a disclaimer of liability. This disclaimer should state explicitly that participation in the consent agreement is not admission of liability for any purpose. CERCLA § 122(d)(1) contemplates that no admissions of liability need to be obtained by EPA. The disclaimer is especially important in settlement of claims which will be later asserted against non-settling parties.

Site Access. If the PRPs do not own the site, EPA will require that the parties use their "best efforts" to obtain access to the site. The decree should specify that, if these efforts fail, EPA will secure site access under statutory authority at CERCLA § 104(e)(j).

Financial Security. Consent decrees often include requirements to provide financial security, such as bonds. If a participating company is in a strong financial position, the parties may be able to avoid the cost of these security mechanisms by providing financial information. CPAs may assist PRPs by performing audits or other procedures that help document the financial position of the company.

EPA Indemnity. EPA may seek to require that settlors indemnify EPA against liability related to remedial work, without regard to fault. The government, however, is unwilling to provide a similar indemnification for its actions. The indemnification obligation should relate only to liability that arises from the acts of the settlors and their contractors. Additionally, it should be worded to encompass claims for which the parties may obtain insurance.

Parties Bound. EPA's standard form consent order includes language that binds "officers, directors and principals" of settling companies. This language should be avoided because the corporate fiduciary duties of officers and directors do not include being personally liable under a consent order with EPA.

Findings of Fact. The EPA's draft order also includes a section on findings of facts. In order not to be bound in subsequent proceedings, parties should suggest that the findings be denominated as EPA's findings, without an admission by the settling party.

§ 26.22 —Benefits to Settling Parties

EPA always has the option of cleaning up a Superfund site without involving PRPs. Most experienced parties know that it is best to become involved in site assessment and participate in the RI/FS early in the process in order to influence the selection of the remedy, thereby reducing future liability and costs.

It is also in EPA's best interests to maximize the use of the private sector's technical resources and financial contributions through settlement. From a technical standpoint, the private sector typically has greater technical expertise than EPA and can provide valuable input.[41] The private sector also has more incentive to design an effective remedy in order to minimize future liability. If the EPA elects to perform the cleanup itself, past experience shows that the cleanup will be more costly than if the PRPs perform the work. Estimates indicated that the EPA's costs are 30 to 40 percent higher than equivalent private cleanups.[42]

Retaining CPAs and other financial experts to perform economic analyses of remedial alternatives may both increase the likelihood of settlement and reduce the settlement amount. Technical experts can review the appropriateness of cleanup criteria. For example, experts can determine whether appropriate concentration limits have been set. Experts can analyze underlying assumptions for reasonableness and consistency among alternative remedies. CPAs can verify the accuracy of calculations and test the sensitivity of a proposed remedy's cost estimates to changes in key assumptions. CPAs may also compare site cost estimates to a variety of standards, including industry standard costs, quotes obtained independently from contractors, costs estimated for similar remedial solutions at other sites, and actual costs incurred for remedial solutions at other sites.

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[41] *See Lautenberg Criticizes Lack of Progress in Superfund Program, Cites Turnover Rate*, 18 Env't Rep. (BNA) 918–19 (July 31, 1987).

[42] Anderson, *Negotiation Ends In Formal Agency Action: The Case of Superfund*, 2 Duke L.J. 261, 301–02 (1985).

§ 26.23 —Failure of Settlement

If settlements fail, it is often EPA's practice to sue some, not all, of the PRPs.[43] Target defendants typically are large generators and financially solvent companies. These companies therefore have additional incentive to settle.

The sued parties have limited success in arguing that the action should be dismissed due to the government's failure to join indispensable parties.[44] Typically, third parties are brought in by the initial defendants pursuant to Rule 14 of the Federal Rules of Civil Procedure, which provides the basis for defendants to add third parties in a contribution action.

Adding additional PRPs may facilitate settlement in some cases and lead to confusion and administrative problems in others. Typically, PRPs only add other "deep pockets" because the cost of assembling PRPs without financial resources increases the transaction costs and may delay final settlement. Also, parties should consider whether addition of other parties will affect their position regarding joint and several liability. If this liability is imposed, a Superfund defendant may be required to pay more than its proportional share. Addition of parties is also warranted if PRPs may wrongfully conclude that they are not potentially responsible because they are not named in the lawsuit.

Superfund cases are among the most complex, costly, and time-consuming of all litigations. Therefore, the use of case management orders and bifurcation of issues has assisted in the prompt resolution of these cases. Discovery is often staged so that the initial discovery issues address the links between generators and hazardous substances found at sites. Counsel for the private litigant should rely upon partial motions for summary judgment to attempt to resolve as many liability issues as possible within the scope of this stage of discovery. Even if these motions are not granted, they provide an opportunity for the government or the private litigant to make its best case.

Settlements are frequently not obtained in appropriate cases due to the inexperience of counsel and corporations in this complex area. Parties often miss crucial opportunities to resolve issues short of trial. Because Superfund liability is increasingly costly, parties should commit to promptly assessing exposure and defining their desired course of defense.

By utilizing the technical and legal resources available, PRPs may avoid long-term financial drain by settling liability at reasonable dollar amounts at early stages in the proceedings.

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[43] Typically, the landowner is named a party in order to facilitate access to the site.

[44] *See* United States v. A&F Materials Co., 578 F. Supp. 1249, 1260–61 (S.D. Ill. 1984); United States v. Conservation Chem. Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,207, 20,209 (W.D. Mo. 1984).