950707

July 7, 1995

Fletcher's Paint

MEMORANDUM

SUBJECT: Standardizing the De Minimis Premium

FROM: Bruce M. Diamond, Director
Office of Site Remediation Enforcement

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

This memorandum transmits Agency guidance entitled, "Standardizing the De Minimis Premium." This guidance is intended to simplify the premium determination process and promote greater national consistency in this aspect of de minimis settlements.

As part of the Agency's broader effort to streamline the administration of de minimis settlements, the guidance establishes presumptive premium figures and describes the most likely bases for deviating from such figures. Moreover, it recommends a method for effectively communicating the premium determination process to the de minimis settlors and other interested parties at a site. By issuing this guidance, we hope to assist Regional personnel in determining appropriate premium amounts and to provide potential de minimis settlors and other PRPs with a better understanding of this component of the de minimis settlement offer.

This guidance was developed with tremendous assistance from workgroup members representing the Waste Management Divisions, Offices of Regional Counsel, the Office of General Counsel, and the Department of Justice. Their contribution to this effort is greatly appreciated.

This document supplements existing guidance for de minimis waste contributor settlements and, to the extent applicable, supersedes existing guidance.

cc: Superfund Branch Chiefs, Waste Management Division,
Regions I-X
Superfund Branch Chiefs, Office of Regional Counsel,
Regions I-X
Bruce Gelber, Environmental Enforcement Section, DOJ
Earl Salo, Office of General Counsel

Standardizing the De Minimis Premium

STATEMENT OF THE POLICY

In an effort to further streamline the Agency's administration of de minimis settlements, this document provides guidance on determining and documenting the premium component of the de minimis settlement offer. Specifically, this guidance document establishes presumptive premium figures and recommends their use in most cases. The presumptive figures are 100 percent for a settlement without a cost reopener and 50 percent for a settlement with a cost reopener.

However, site specific circumstances may warrant a departure from the presumptive premium (either an increase or decrease). The most likely reasons for such a departure are described under "Adjustment Factors."

The guidance also stresses the importance of effectively communicating the premium determination process to the de minimis settlors and other interested parties at a site. To this end, a model "premium explanation document" is attached for the Regions' use.

I. Introduction

This document provides guidance for EPA's exercise of its enforcement discretion in determining the premium associated with a de minimis settlement under section 122(g)(1)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Section 122(g)(1)(A) authorizes EPA to enter into de minimis settlements with parties who contributed hazardous substances to a facility that are minimal, both in terms of volume and toxicity (or other hazardous effects), relative to the other hazardous substances at the site.

In enacting this provision, Congress signaled its intention to mitigate the impact of Superfund liability on the smallest contributors to a site. While these parties still share in the responsibility for the site, this provision permits EPA to reach settlements with them early in the process and thereby reduce the potentially substantial transaction costs they might otherwise expend. In addition to reducing transaction costs and resolving the liability of small volume contributors, de minimis settlements also serve to reimburse the Agency's past costs and provide funds for future site cleanup.

In an effort to ensure these benefits are gained through the de minimis settlement, EPA has taken numerous steps to simplify negotiations, defuse potential court challenges, and streamline the settlement process.[1] This guidance seeks to simplify an important aspect of the

---

[1] See "Streamlined Approach for Settlements with De Minimis Waste Contributors," OSWER Directive #9834.7-1D (July 30, 1993), hereafter referred to as "Streamlining

settlement process: the premium determination.

II. Purpose

In a report prepared for the Administrative Conference of the United States,[2] EPA was encouraged to "establish presumptively applicable premiums for different stages in the cleanup process." This guidance addresses that request, by providing presumptive premiums to be used in de minimis settlements of different sorts. In addition, this guidance discusses the most common reasons for deviating from the presumptive premium figures and recommends methods for more effectively communicating the premium determination process to the de minimis settlors and other interested parties at a site.[3] The guidance is grounded in EPA's experience in completing more than 150 de minimis settlements, each of which was initially developed under the Agency's enforcement discretion, subjected to public notice and comment and, in the case of judicial settlements, approved by a court.

III. Background

Typically, a de minimis settlement offer comprises both a "base payment" and a "premium."[4] The base payment is normally developed by comparing the percentage of waste contributed to the estimated cleanup cost. The premium is essentially a risk transfer mechanism, similar to an insurance premium. Although the type and magnitude of risks that are shifted by a de minimis settlement vary, in each case, the primary reason for increased risk to EPA and the remaining PRPs is the finality of the de minimis settlement. This finality results from the settlement's "covenant not to sue," contribution protection, and the fact that, in de minimis settlements, EPA omits the settlement reopeners (e.g., for unknown conditions) that are typically included in other Superfund settlements.

By paying a premium as part of settlement, the de minimis party compensates for the finality it obtains and for the risks the Agency and the site's remaining PRPs assume. Thus, the amount of the premium depends on the degree of finality afforded to the settlor and the extent of risk assumed by others.

Guidance."

[2] L. Kornhauser & R. Revesz, De Minimis Settlements Under Superfund, Admin. Conf. U.S. (Nov. 1992).

[3] For a more detailed treatment of this issue, see "Communications Strategy for Settlements with Small Volume Waste Contributors," (September 30, 1993).

[4] See "Streamlining Guidance" at 3-5, for discussion of the "base payment" calculation; see generally "Guidance on Premium Payments in CERCLA Settlements," OSWER Directive #9835.6, November 17, 1988.

IV. Presumptive Premiums

In general, the Regions should assess premiums in de minimis settlements as follows, in accordance with the type of "covenant not to sue" or "reservation of rights" that the settlement includes:

Settlements with a remedy cost reopener	50%
Settlements without remedy cost reopener	100%

The Region should multiply the premium percentage by the future cost component of the settlor's base payment to determine the dollar amount of the premium.[5] Although these "presumptive premiums" are likely to be used in most de minimis settlements, the Region may increase or decrease the presumptive premium where there is a site-specific justification, such as those described under "Adjustment Factors" below.

1. The Remedy Cost Reopener

In general, EPA provides de minimis settlors with substantially greater finality than is normally provided to other settling parties.[6] Most de minimis settlements contain only a few standard reopeners,[7] but otherwise shift to EPA and other PRPs the risk that the remedy will be more expensive than anticipated.

In some cases, however, a remedy cost reopener is included that permits the de minimis settlement to be revisited if the cleanup costs at the site exceed a specified amount. In

---

[5] In some cases, however, it may be appropriate to multiply the percentage by the total base payment (past and future cost components). This approach may be preferable, for example, where there is less uncertainty as to future site costs, but significant uncertainty regarding the waste allocation or the magnitude of the orphan share.

[6] For example, although § 122(f) of CERCLA requires EPA to include a reopener for unknown conditions in settlements with non-de minimis parties, the statute permits this provision to be omitted in de minimis settlements.

[7] For example, frequently used reopeners in de minimis settlements include the reopener for false information knowingly provided to EPA, for new information that precludes the settlor's eligibility for the settlement, for criminal liability, and for non-payment of monies. The frequency with which EPA has included various reopeners in de minimis settlements is reported in "The First 125 De Minimis Settlements," page 23, Office of Waste Programs Enforcement, October, 1993.

general, this "trigger" amount is purposely set high, so the settlement is only affected if the costs increase to a level significantly beyond what was anticipated at the time of settlement. The inclusion of this type of reopener generally reduces the risk borne by EPA and the non-de minimis PRPs; consequently, the premium assessed in such settlements is similarly reduced. Where a cost reopener may be appropriate, the Region should consider offering the potential settlors an option of either paying less and receiving a settlement that contains a cost reopener, or paying the higher premium for a settlement with no cost reopener.

2. Deriving the Presumptive Premium Figures

The presumptive premium figures are based on EPA's substantial experience in executing de minimis settlements. By basing the presumptive figures on historical premiums, this guidance seeks to simplify the case-by-case premium determination as a means of expediting the de minimis settlement process and ensuring greater consistency among premiums assessed. However, as the discussion below specifies, these presumptive numbers may be increased or decreased in accordance with site-specific factors, where appropriate.

a. Settlements that Do Not Contain a Cost Reopener

The most frequently assessed premium to date in de minimis settlements that contain no cost reopener is 100 percent. Moreover, the average premium assessed in settlements to date is 108 percent.[8] Thus, the presumptive premium of 100 percent reflects a conservative interpretation of the historical data, and seeks to balance the risk to EPA and others against the value of providing a final settlement to the de minimis settlors.

There has been little difference between the premiums assessed in pre-ROD and post-ROD settlements to date. Where the settlement did not include a cost reopener, the premiums assessed in the (nearly twenty) pre-ROD de minimis settlements have typically fallen between 50 and 100 percent, despite generally higher risks due to greater uncertainty earlier in the process. This suggests that, although the presumptive premium may be modified to reflect the level of risk transferred by the settlement, the 100 percent presumptive figure should generally be adequate in both pre-ROD and post-ROD settlements.

However, if the timing of a pre-ROD settlement poses significantly greater (or fewer) risks, an adjustment may be warranted. EPA is committed to offering an increasing number of de minimis settlements prior to ROD issuance in recognition of the significant savings in transaction costs that can be effected by early settlements. While the uncertainties at a site are

---

[8] These figures are based on all settlements for which data was available at the time of the issuance of this guidance. If different settlors at a single site paid different premiums (according to whether their terms contained a cost reopener), each different premium accepted by the site's settlors was counted separately.

generally greater earlier in the process, the benefits to all parties of an early de minimis settlement can be significant.

b. Settlements that Contain a Remedy Cost Reopener

While the inclusion of a remedy cost reopener limits the settlor's finality, it may nonetheless be appropriate in some cases, such as if the range of possible site costs is extremely broad, or if the settlor prefers to pay less and retain some risk itself. To date, however, less than 10 percent of settlements have contained a remedy cost reopener. Indeed, nearly all of the settlements containing a cost reopener also offered the settlors an option of paying a higher amount for a settlement without a cost reopener provision.[9] Moreover, almost no settlement with a cost reopener has assessed a premium of greater than 100 percent, and at least one assessed no premium at all.

By recommending a presumptive premium of 50 percent, this guidance seeks to reflect the premiums that have been offered, accepted, and upheld. Set at 50 percent, the presumptive figure implicitly assumes that the risk transferred to EPA and other PRPs by settlements with a cost reopener is approximately half that of the typical de minimis settlement. The accuracy of this assumption depends on the site cost limit that is set for triggering the reopener. Thus, this presumptive premium may be decreased if a site cost reopener is set relatively low, or increased if the trigger is set at a relatively high cost that is particularly unlikely to be exceeded.

V. Adjustment Factors

Premiums are used to address numerous risks assumed by EPA and other PRPs as part of the settlement. The most common risks are listed below. In general, the presumptive figures reflect an adequate premium for most de minimis settlements. However, certain site-specific circumstances may warrant a departure from the presumptive figure in some cases. These circumstances may be called "adjustment factors," and include an unusually high or low level of uncertainty regarding any one of the following factors, or other site-specific factors not reflected here.

- **Remedy costs.** Uncertainty regarding remedy costs may be due to the possibility of cost fluctuations, remedy contingencies, or the possibility of remedy "failure."
- **Magnitude of the orphan share.** Relative uncertainty regarding the orphan share may be reflected in the premium if the orphan share has not simply been reallocated among all PRPs at the site.
- **Waste allocation.** Relative uncertainty in the waste allocation may concern the

[9] In fiscal year 1994, for example, only 5 settlements contained cost reopeners, and 4 of these settlements gave de minimis parties a choice between a lower premium with a cost reopener or a higher premium for a final settlement.

quantity of waste contributed (e.g., where the contribution may be greater or less than estimated, but still within the de minimis cutoff); or the nature or toxicity of the waste contributed (e.g., where the statutory requirement regarding toxicity is met, but some uncertainty remains regarding the relative type or toxicity of waste contributed).

Where one or more of these factors is sufficiently outside the normal range that the use of the presumptive premium would be inappropriate, the Region may increase or decrease the applicable presumptive premium. In such cases, the Region should document its premium decision as described below.

VI. Documenting the Premium Determination

Documenting premium determinations for de minimis settlements serves several goals. First, a clearly written description of EPA's premium determination process serves to explain EPA's process to the de minimis settlors it directly affects, and to non-de minimis PRPs and the public, where appropriate. Second, the documentation can anticipate inquiries or challenges and provide answers to questions that may otherwise have been raised by non-settling de minimis PRPs through the public comment period. Third, adequately documenting the decision may be useful in the event a judicial challenge occurs in connection with the settlement at some point in the future. Finally, consistent premium decision reporting facilitates a national comparison of premium determinations and assessments. Thus, the Region should include the premium explanation document as part of the case file for each de minimis settlement.

The attached model explanation document should serve as a guide.

1. Premium Explanation Document

The "premium explanation document" should include a discussion of why a given number was selected, an explanation of which adjustment factors, if any, were considered, and a description of the factors' effect on the premium decision. Where appropriate, the Region may choose to explain the calculation of the base payment as well. Some of this analysis may have already been documented as part of a case referral to DOJ or as part of the regional ten-point settlement memorandum.[10] If so, relevant points made in either internal memorandum may simply be reiterated here. However, because the explanation document will be publicly available, it should be a stand-alone report.

2. Effective Communication of the Premium Determination

---

[10] See "Submittal of Ten-Point Settlement Analyses for CERCLA Consent Decrees" OSWER Directive #9835.14 (August 11, 1989).

Inclusion of the explanation document in the site case file creates an informative document which should be provided to the PRPs and made available to the general public at the time notice of the settlement is provided in the Federal Register. The Region should strive to include a full explanation of the premium determination in the offer letter, as an attachment to the letter, or as an appendix to the settlement document itself. Where appropriate, a courtesy copy of the settlement package should also be made available to non-de minimis PRPs. This practice may help the non-de minimis PRPs understand the premium calculation, provide for meaningful comment, and reduce challenges to the de minimis settlement.

By effectively communicating with the de minimis and non-de minimis parties about the premium determination, the Region may eliminate the need to answer numerous inquiries individually and may quiet criticisms from non-de minimis parties who challenge the premium selected.

VII. Use of This Guidance

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

VIII. Further Information

For further information concerning this guidance, please contact Nicole Veilleux in the Office of Site Remediation Enforcement at (703) 603-8939.

[This document is designed to be adapted to the specific site and settlement, and then provided in full to the de minimis parties. The Region should consider including the document either as part of the settlement offer letter or as an attachment. In addition, the Region should consider providing this document separately to the site's non-de minimis parties.]

Model De Minimis Premium Explanation Document

After receiving a de minimis settlement offer from the U.S. Environmental Protection Agency, potential de minimis settlors often have several questions. This document is intended to answer questions concerning the de minimis premium.

This document answers three commonly-asked questions:
(1) What is a premium?
(2) What is EPA's general policy on premiums in de minimis settlements?
(3) How was the premium in this settlement determined?

1. What is a premium?

Typically, a de minimis settlement offer comprises both a "base payment" and a "premium." The premium is essentially a risk transfer mechanism, similar to an insurance premium. When a de minimis party obtains a final resolution of liability, it shifts its liability-related risks to the government and, in many cases, to other PRPs. In exchange for a release from liability, EPA normally requires de minimis settlors to pay a premium in addition to their base payment amount. The premium is typically a percentage of the future cost component of the settlor's base payment, and is determined as a matter of EPA's enforcement discretion.

The type and magnitude of risks that are shifted by a de minimis settlement vary. However, in each case, the primary reason for increased risk to EPA and the remaining PRPs is the finality of the de minimis settlement. This finality results both from the breadth of the settlement's "covenant not to sue," and from the fact that, in de minimis settlements, EPA omits the settlement "reopeners" that are typically included in Superfund settlements.

In addition, the extent of the uncertainties at a site at the time of settlement contributes to the degree of risk shifted by the de minimis settlement. These uncertainties include, among others, (1) the cost and extent of future response actions, (2) the potential magnitude of the site's orphan share, and (3) accuracy of EPA's determination of each de minimis party's share.

By paying a premium as part of settlement, the de minimis party compensates for the finality it obtains and for the risks others assume. Thus, the amount of the premium depends on the degree of finality afforded to the settlor and the extent of risk assumed by the Agency and the site's remaining PRPs.

2. What is EPA's general policy on premiums in de minimis settlements?

EPA seeks to offer de minimis settlements to eligible PRPs as early in the site cleanup process as possible. Moreover, EPA makes every effort to craft de minimis settlement offers on terms that will be acceptable to all parties at the site -- including non-de minimis parties. In light of the risks that are transferred to both EPA and to other PRPs by a de minimis settlement, EPA issued a policy in June, 1995 that set forth presumptive premiums to be applied in most de minimis settlements.

This policy states that if the settlement does not contain a remedy cost reopener (and thereby grants the settlors maximum finality), the premium should usually be 100 percent. If the settlement does contain such a reopener, the premium should usually be 50 percent. These presumptive figures are based on the premiums assessed in more than 150 settlements that were developed under the Agency's enforcement discretion, subjected to public notice and comment, and approved by a court.

Although EPA's policy recommends the use of these figures, the premium determination remains a matter of EPA's enforcement discretion. Among the types of circumstances that may justify a Regional Office's deviation from these presumptive premiums are:

- **Remedy costs**. Uncertainty regarding remedy cost may be due to the possibility of cost fluctuations, remedy contingencies, or the possibility of remedy "failure."
- **Magnitude of the orphan share**. Relative uncertainty regarding the orphan share may be reflected in the premium if the orphan share has not simply been reallocated among all PRPs at the site.
- **Waste allocation**. Relative uncertainty in the waste allocation may concern the quantity of waste contributed (e.g., where the contribution may be greater or less than estimated, but still within the de minimis cutoff); or the nature or toxicity of the waste contributed (e.g., where the statutory requirement regarding toxicity is met, but some uncertainty remains regarding the relative type or toxicity of waste contributed).

3. How was the premium in this settlement determined?

[Include the following language if the premium used was 100 percent (with no cost reopener) or 50 percent (with a cost reopener):]

The premium assessed in this settlement is: *[state or explain premium(s) used]*. This premium is consistent with the presumptive premium amount contained in EPA's national policy, issued in June, 1995.

[Include a discussion of site-specific factors (including the "adjustment factors" described above) that justify this premium. This discussion may, for example, anticipate arguments by the de minimis parties that the premium should be less than the presumptive amount specified in the guidance.]

[Include the following language if the Region elected to deviate from the presumptive

premiums specified in the June, 1995 guidance:]

The premium assessed in this settlement is: *[state or explain premium(s) used].*

[Whenever the premium assessed differs from the presumptive figures in the June, 1995, guidance, the Region should describe its reasons for deviating (whether increasing or decreasing) from the presumptive figures. Specifically, the Region should explain how one or more of the "adjustment factors" described in the de minimis premium guidance operate at this site to justify an increase or a decrease from the presumptive figures.]