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February 10, 1999

Ms. Sherry Estes
Associate Regional Counsel
United States Environmental Protection Agency - Region V
77 West Jackson Blvd.
Chicago, Illinois 60604-3507

Re: Skinner Landfill - Municipal Solid Waste Settlement
For the City of Blue Ash

Dear Ms. Estes:

Pursuant to our earlier conversations, I have enclosed the following client specific materials ("shared information") for the City of Blue Ash:

1. An excerpt from the Allocator's Preliminary Allocation Report assigning 948 cubic yards (uncompacted) to the City of Blue Ash. This excerpt is specific to the City of Blue Ash and does not disclose any information about other parties;

2. The Position Paper for the City of Blue Ash; and

3. The City of Blue Ash's ADR Questionnaire Responses.

These materials are being provided to you in an attempt to reach a mutually agreeable settlement pursuant to the terms of the EPA's Policy for Municipality Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (hereafter the "Policy") for the municipal solid waste allegedly deposited at the Skinner Landfill by the City of Blue Ash.

According to the terms of the Policy and adopting the Allocator's findings, the City of Blue Ash's liability for the municipal solid waste disposed at the Skinner Landfill would be $251.22 (948 cu yds * 100 pds/1cu yd * 1 ton/2000 pds * $5.30/1 ton = $251.22).

As you requested, the City of Blue Ash is willing to sign a waiver regarding the applicable statute of limitations. If you need additional information or if you have any questions, please do not hesitate to contact me at your earliest convenience.

Very truly yours,

Jeffrey S. Goldenberg

Enclosures

cc: Bruce E. Henry (w/o enclosures)
John C. Murdock, Esq. (w/o enclosures)

THE CITY OF BLUE ASH ("Blue Ash")

The City of Blue Ash was incorporated in 1955. From 1955 - 1985, the City collected municipal solid waste ("MSW") and other solid wastes. Thereafter, Blue Ash arranged for the collection of residential and commercial waste by others. According to the City, it used waste disposal sites other than the Skinner Landfill. Specifically, the City says that its investigation produced the following list of disposal sites for the following years:

	1955 - 1960
	1961 - early 1980s
	1980s -1984
	1978 - 1984
	1984 - 1986
EPA approved disposal facility	1986 - 1990 (under contract with BFI)

The City stated that no drums, sludges or other containerized wastes were accepted by it. It collected municipal solid waste from households plus commercial wastes. The City described the type of commercial waste it collected as including office waste, plastic bottles, cardboard, glass and scrap wood. Blue Ash does not believe that any of its waste went to Skinner. Blue Ash also had no sewage or wastewater treatment plants during the relevant time period, I was told, in response in part to Ray Skinner's belief that it may have been a source of lime.

The City estimates its self-hauled waste volume as follows:

Residential	Two 25 - 34 cy load packers/day
Commercial - roll-offs	Unknown
Front end loaders	Three 25 - 34 cy load packers/day

It estimated its contracted volume as follows:

1978 - 1984 [Clarke]:

Total residential volume: 20,280 tons
Total commercial volume: 107,592 tons [not including roll-offs which did not go to Clarke]

1986 - 1990 [BFI]:

Total residential volume: 24,696 tons
Total commercial volume: 148,380 tons

The City submitted to me confidentially minutes of City Council meetings and other documents for the time period 1956 - 1960, 1963, 1964, 1969, 1971 - 1973, which discuss waste collection issues. Skinner was not mentioned in these documents. The City did not produce documents for other years which I assume means that the City did not locate any such documents.

In its response to follow-up questions, Blue Ash explained that its record retention policy is to keep checks, check stubs and check registers for six years. The guidelines of the Ohio Municipal Records Manual require that such documents be kept for three years after audit.

For this investigation, the City reviewed its permanent expenditure reports, which date back to 1978. This review revealed no connection to the Skinner Site.

The City contacted counsel for BFI, its waste transporter, to inquire as to the existence of any relevant documents regarding the City and Skinner. The attorney responded that he was discussing the permissible scope of the plaintiffs' request for information but he did not believe that BFI had any documents linking Blue Ash to Skinner. The City also contacted counsel for Clarke Incinerator and was told that no such documents were discovered during Clarke's investigation.

Blue Ash discovered additional documents which relate to its waste disposal practices in the early 1960s and produced them to me confidentially because they list other waste disposal sites used by the City. They do not contain any reference to Skinner.

Maria, Ray and Elsa Skinner and Charles Ringel discussed Blue Ash as a user of the Landfill. Maria said that Blue Ash used the Landfill in the 1980s every day. She described the use of a small dump truck with red and black writing. Elsa Skinner said that Blue Ash used the Site many times for hauling tree cuttings. She described a pick up truck or a larger truck and a usage pattern of once a month for four or five years in the early years of the landfill.

Ray Skinner described Blue Ash as a regular customer for many years bringing in road side cleanup waste and other wastes (guardrails, black top, road debris, shop waste, *sweepings, cans, buckets, litter, shop rags, and tires). He described a 5-7 cy capacity* vehicle that said Blue Ash on the side of the truck in the early 1950s and 1960s and suggested that Blue Ash hauled to the Site until it closed but later backed off this statement and said that he could not be sure of the years but that Blue Ash hauled waste to the Landfill "quite a bit." He also recalled the Fire Department tearing down a couple of houses and bringing the demolition debris to the Site in the early years. Finally, he discussed the disposal of salt waste at the Landfill from a facility near Crosley Field.

Charles Ringel testified that he saw City of Blue Ash packer trucks hauling garbage to the Site in 16-20 cy packers (he remembered two of them). He placed the disposal sometime after 1962 - 1963 and before 1968 and said he saw these vehicles in the Landfill from time to time for a 1-2 year period. He knew that the City used the Morrow Landfill and said that the City returned to Morrow when it stopped using the Skinner Site but could not say whether Blue Ash used the Site exclusively.

I am not crediting Maria Roy's testimony. A daily usage of the Landfill in the 1980s was not corroborated by any other witness. I have also decided to partially credit Ray Skinner and Elsa Skinner's testimony and to credit Mr. Ringel's testimony. Nothing in the submittals made to me by Blue Ash conflicts with the former testimony with respect to tree and brush and roadside waste disposal in a pick up truck or slightly larger truck. Mr. Ringel was clear and not at all hesitant in his recollection during the deposition.

Waste-in Amount. Blue Ash suggests that Mr. Ringel's testimony be interpreted as representing 10% of waste disposed of for a 1-2 year period which it estimated at 180-360 tons by determining that it collected about 150 tons per month (12 months times 150 tons is 1,800 to 3,600 tons for 1-2 years, times 10%). A collection rate of 150 tons per month in a packer vehicle would represent about 50 cys per month based on a density of 600 pounds

per cy (150 tons x 2,000 pounds divided by 600), or less than 12 cys per week. That seems very low to me. At a density of 100 pounds per cy, 150 tons a month would represent 300 cys per month, or a little less than 75 cys per week.

I have taken a different approach. As a default, I am treating Mr. Ringel's testimony as representing disposal one time per month for 1.5 years in a packer vehicle with a capacity of 18 cys (the midpoint between 16 and 20 cys). I have further applied a compaction ratio of 2:1, which is conservative, to convert the compacted cys to loose cys. That gives Blue Ash a waste-in amount of 648 cys based on Mr. Ringel's testimony.

I am further assigning Blue Ash a solid waste amount based on the Elsa and Ray Skinner testimony of 300 cys determined by assuming one load per month at 5 cy per load for a five year period.

Blue Ash's total waste-in amount, therefore, is 948 uncompacted cys.

Skinner Landfill
Alternative Dispute Resolution Process
Position Paper for the City of Blue Ash

I. Waste Calculation as Requested by Allocator in May 8, 1998 Correspondence

Best Case

After completing a "full and thorough" investigation, including the review of all available records, and after conducting interviews with prior service department employees and city counsel members dating back to the late 1950s (the City of Blue Ash was not incorporated until 1955), no evidence whatsoever was uncovered linking the City of Blue Ash to the Skinner Landfill. In fact, as a result of its investigatory efforts, the City has been able to reconstruct its waste disposal history and landfill usage dating back to the middle 1950s (See Waste Disposal History Table For City of Blue Ash, pp. 4-5) which prove that the City did not frequent the Skinner Landfill. These findings are consistent with Elsa Skinner's log book entries which do not mention the City of Blue Ash as a customer of the landfill. When combined with the inconsistent, unbelievable, self-serving, and exaggerated testimony from the members of the Skinner family (see Section B below for detailed discussion of the Skinner family members depositions), the results of the City's investigation and the City's absence from the log book lead to the logical conclusion that the City of Blue Ash did not transport any waste materials to the Skinner Landfill.

Even if one were to conclude that the City of Blue Ash did dispose of waste materials at the landfill, there is no evidence indicating that these materials contained hazardous substances. Consequently, the City of Blue Ash should receive a "zero" allocation.

Worst Case

Although his identification of City of Blue Ash compactors may be mistaken, Charles Ringle stated during his February 20, 1998 deposition that he remembers seeing City of Blue Ash compactor trucks at the Skinner Landfill "once in a while" (Ringle deposition, February 20, 1998; p. 55, lines 6-8). When asked to estimate how long the City of Blue Ash trucks used the landfill, Mr. Ringle stated "probably a year or two" during the early 1960s. (*Id.* at p.55, lines 21-23 and lines 9-12). Mr. Ringle went on to estimate the size of the City's compactor trucks to be 16-20 cubic yards (*Id.* at p. 54, lines 10-15). Importantly, when asked whether he thought the City of Blue Ash used the Skinner landfill exclusively during this

one to two year period, Mr. Ringle did not know and indicated that the City may have been using other landfills at the same time. *Id.* at p. 56, lines 3-8. As the Waste Disposal History Table For City of Blue Ash indicates, the City was in fact using a landfill in Morrow, Ohio during this time period. Consequently, assuming Mr. Ringle's testimony was accurate, at most his testimony reflects very sporadic use of the Skinner Landfill by the City of Blue Ash during this one to two year time period.

Considering Mr. Ringle's testimony in conjunction with the results of the City's investigation which detail the landfills which the City used during all relevant time periods, one may conclude that Mr. Ringle's testimony reflects isolated incidences during a one to two year period during which the City of Blue Ash delivered waste materials to the Skinner Landfill. Accepting this conclusion as true only for the purpose of providing this "worst" case estimation, the City of Blue Ash presents the following calculation:

Estimate of the City's residential waste production during the early 1960s:

- approximately 150 tons per month (See Second Affidavit of Michael T. Melampy, attached as Exhibit 1).

Estimate of the Residential waste generated during the relevant one to two year period:

- 1800-3600 tons (150 tons/month * 12 months/year * 1 or 2 years)

Estimate of the percentage of residential waste material that may have reached the Skinner Landfill as opposed to the City's primary landfill in Morrow, Ohio during this time period:

- Ten percent

Estimated number of tons of residential waste material that may have reached the Skinner Landfill:

- 180-360 tons.

II Factual Argument

A. Review and Analysis of Available Documents

The one piece of evidence uncovered during this ADR process which does not suffer from the same bias, self-servedness, memory lapses and post-hoc rationalizations that infect the Skinner family member deposition testimony is Elsa Skinner's log book. Importantly, the City of Blue Ash is nowhere to be found in Elsa's log book. In an effort to explain away the City's absence, Elsa suggests that the City's use of the landfill is represented by the "cash" transactions which are recorded in the log. In other words, Elsa argues that the City's drivers would pay in cash when they allegedly frequented the landfill. However, it was not, nor has it ever been, the City's policy to give cash to its drivers to pay for landfill services. (See Second Affidavit of Wilbur E. Brewer, Sr., attached as Exhibit 2)

In addition to its absence from the log book, the City discovered absolutely no evidence during its "full and thorough" investigation which links it to the Skinner Landfill. A review of the City Council minutes dating back to the formation of the City in 1955 failed to yield any reference whatsoever to the Skinner Landfill. Furthermore, no employees or City Council members could recall the City ever using the Skinner Landfill. Wilbur E. Brewer, Sr. has worked for the City's Service Department since 1960 and has absolutely no recollection of the City ever using the Skinner Landfill. In fact, the only landfill he recalls using from 1960 through 1975 was a landfill located in Morrow, Ohio. (See affidavits attached as Exhibits 2) . Furthermore, Robert G. Proctor, a City Council Member during the late 1950s, had absolutely no recollection of the City of Blue Ash using the Skinner Landfill at any time during his tenure (See City of Blue Ash's Responses to Proposed Follow-Up Questions).

As a result of the City's investigation, the following table was constructed outlining its disposal history since its year of incorporation (1955):

Waste Disposal History Table For City of Blue Ash

Years	Landfill Name	Source of Information	Type of Waste
1930-1955	The City of Blue Ash was not incorporated until 1955.		
1955-1960		Wilbur E. Brewer, Sr. Affidavit attached as Exhibit 2	Residential waste.
1961-1975		Wilbur E. Brewer, Sr. Affidavit attached as Exhibit 2; Michael T. Melampy Affidavit attached as Exhibit 1; and the confidential documents supplied to the Allocator.	Residential waste.
1975-1978		Wilbur Brewer, Sr. Affidavit attached as Exhibit 2; Michael T. Melampy Affidavit attached as Exhibit 1.	Residential waste; commercial front load and roll-off.
1978-early 1980s		Michael T. Melampy Affidavit attached as Exhibit 1.	Roll-off commercial waste. (Residential waste taken to Clarke Incinerator, Inc.)
Early 1980s-1984		Michael T. Melampy Affidavit attached as Exhibit 1.	Roll-off commercial waste
1978-1984		Michael T. Melampy Affidavit attached as Exhibit 1.	Residential and front-load commercial waste (no roll-off)
1984-1986		Michael T. Melampy Affidavit attached as Exhibit 1.	Residential and commercial front-load and roll-offs.

1986-1990	The City of Blue Ash contracted with BFI to collect and dispose of the residential and commercial waste generated within the City. According to the terms of the contract between the City of Blue Ash and BFI this material was to be disposed of at an EPA approved disposal facility (see section 12 of the contract between the City of Blue Ash and B.F.I., attached as Exhibit 3). (See also Michael T. Melampy Affidavit verifying that this waste material was disposed at the _ , attached as Exhibit 1).

As you can see from the above Table, the City of Blue Ash can account for the disposal locations of its waste materials during the relevant time period which is the subject of this ADR process (1930-1990). Furthermore, the City has reviewed all records within its possession, custody or control. This review failed to turn up any documents whatsoever directly referencing or indirectly linking the City to the Skinner Landfill. In addition, the City has interviewed current and prior service department employees whose employment experience date back to as early as 1960. Once again, these interviews failed to turn up any connection linking the City of Blue Ash to the Skinner Landfill (see Wilbur Brewer affidavit, attached as Exhibit 2).

B. Review and Analysis of Deposition Testimony

Elsa Skinner

As a member of the Skinner family, Elsa Skinner has everything to gain by drawing additional "deep pocket" parties into this process in order to dilute her family's liability. As such, it is not surprising that she has chosen to conveniently recall the fact that the City of Blue Ash frequented the family's landfill, despite the fact that the City does not appear anywhere in her log book. Nevertheless, when describing the types of materials brought to the landfill by the City of Blue Ash, Mrs. Skinner limited her description to trees and brush (November 19, 1997 deposition, p. 237, lines 20-24). When asked whether she specifically recalled any municipal solid waste contained in the trees and brush allegedly brought to the landfill by the City of Blue Ash, Elsa responded that she had no knowledge of that type of waste coming into the landfill from the City of Blue Ash and reiterated the fact that she only recalls the City of Blue Ash bringing in trees and similar items (*Id.* at p. 238, lines 5-6).

Despite what appears to be a concerted effort by the Skinner family members to name as many users of the landfill as possible during recent depositions, Mrs.

Skinner failed in her attempt to reel in the City of Blue Ash. Mrs. Skinner's unsupported allegations that the City disposed of trees and brush are not sufficient to impose Superfund liability as these materials do not constitute hazardous substances.

Maria Skinner

The concerted effort by the Skinner family to rope in as many participants as possible is no more evident than with Maria Skinner Roy's testimony. During her deposition, Maria testified that the City of Blue Ash used the dump on a daily basis from the mid-1980s until the landfill closed (1990). (December 11, 1997 deposition; p. 150, lines 18-24). The absurdity of this testimony is evident when one views all other available evidence. First, the City of Blue Ash has been able to reconstruct its landfill usage from the City's inception in 1955 until 1990. No records reveal a consistent use, or for that matter a sporadic use, of the Skinner Landfill. A sophisticated city such as Blue Ash would certainly have records indicating usage of the Skinner Landfill on a **"daily"** basis as testified to by Maria Skinner. The fact that no such records exist reiterates the most likely explanation for Maria's far-fetched deposition testimony – self interest and self preservation.

In addition to the complete absence of any records linking the City of Blue Ash to the Skinner Landfill, current and prior service department employees, including those who operated the City's waste disposal vehicles since as early as 1960, specifically deny using the Skinner Landfill (see affidavits of Michael T. Melampy and Wilbur E. Brewer, Sr. attached as Exhibits 1 and 2). Furthermore, as part of its "full and thorough" investigation, the City reviewed its check registers for the late 1980s to insure there were no references to the Skinner Landfill. Not surprisingly, no checks made payable to the Skinner Landfill or to any member of the Skinner family were discovered. This fact, when considered in conjunction with Maria's statement that the City paid with checks (December 11, 1997 deposition; p. 158, lines 9-13) effectively discredits Maria's claim that the City of Blue Ash used the landfill on daily basis during the middle 1980s.

Not only is Maria's testimony completely unsupported and contrary to common sense, it also is inconsistent with her mother's testimony. During her deposition, Elsa Skinner testified that the City of Blue Ash allegedly used the landfill during the early years only up through the early 1960s. Elsa went on to claim that the City of Blue Ash used the site for approximately four or five years (November 19, 1997 deposition; p. 239,lines 9-24). Furthermore, Elsa Skinner stated that the City of Blue Ash only used the landfill once per month (*Id.* at p. 240, line 3).

Maria's testimony is wholly inconsistent with her mother's testimony.

Even if Maria's incredulous testimony were to be taken as true, it is still insufficient to impose CERCLA liability upon the City of Blue Ash. In order to impose CERCLA liability upon a party, that party must have disposed of hazardous substances at the site. According to her own testimony, Maria was unable to link any hazardous substances to the City's alleged disposal. When asked whether she could remember any city bringing municipal solid waste into the landfill, Maria stated that she could not (*Id.* at p. 352, lines 20-24).

As further evidence that Maria's testimony should be given little, if any, weight, Maria testified that she recalls the City's trucks as being red in color with black writing. According to Michael T. Melampy, who has worked at the City's service department since 1973 and has direct knowledge of the colors of the City's trucks, the trucks are (and have been since at least 1973) yellow while the writing on the trucks is blue. (see Affidavit of Michael T. Melampy, attached as Exhibit 1).

When viewed against verifiable and undisputed facts, as well as her mother's own deposition testimony, Maria's self serving testimony falls apart and does not establish a basis to impose CERCLA liability upon the City of Blue Ash.

Ray Skinner

Ray Skinner's deposition testimony regarding the City of Blue Ash is as unbelievable as his sister's. Not satisfied with the mere five or six years usage described by his sister Maria, Ray testified that the City of Blue Ash was a regular customer of the Skinner Landfill (January 7, 1998 deposition; p. 702, line 12) from the 1950s through 1990 (*Id.* at pp. 703-704, lines 21-24, 1-15). Once again, as was the case with Maria and Elsa, a Skinner family member's deposition testimony strains the imagination and smacks of bias and self-interest.

According to Ray, the City of Blue Ash used the Skinner Landfill for over 40 years. Yet, there is absolutely no documentary evidence indicating even a hint of usage by the City of Blue Ash during the 40 year period testified to by Ray Skinner. In fact, as outlined in the Waste Disposal History Table For City of Blue Ash, the City's disposal practices are clearly spelled out with documentary evidence to support each claim. Giving Mr. Skinner the benefit of the doubt that any records from the 1950s and perhaps even the 1960s and 1970s might have been destroyed or conveniently "lost" by the EPA (a theory espoused by Elsa Skinner to explain the City of Blue Ash's absence from the log book), a

sophisticated city such as Blue Ash would certainly have some records linking it to the landfill, especially in light of the City's alleged 40 year usage. Yet, no such documents exist. The explanation for this absence of documentary evidence is simple: the City of Blue Ash did not use the Skinner Landfill as described by Ray Skinner.

Ray's testimony regarding the color of the trucks allegedly brought to the landfill on behalf of the City of Blue Ash further detracts from the credibility of his testimony. Ray stated during the deposition that the City's trucks were labeled with "black trees and red on the other side" (January 7, 1998 deposition; p. 703, lines 6-15). The City's trucks, however, do not contain any pictures of black trees and do not have any red painting or writing on them whatsoever (see Affidavit of Michael T. Melampy, attached as Exhibit 1).

Further detracting from the credibility of Mr. Skinner's testimony are his statements related to the City's disposal of lime at the Skinner Landfill. At the conclusion of his testimony regarding City's alleged use of the Skinner Landfill, Ray stated that he "believed that the City of Blue Ash also hauled lime into the landfill." (January 7, 1998 deposition; p. 708, lines 23-24). The implication from this testimony is that the City operated its own water treatment facility. This statement is absolutely false, as the City of Blue Ash has never operated its own water treatment facility (see affidavit of Michael T. Melampy, attached as Exhibit 1).

Equally unpersuasive is Mr. Skinner's testimony regarding the City's alleged disposal of salt at the landfill (December 12, 1997 deposition, p. 270, lines 19-21). According to Mr. Skinner, this salt came from a City of Blue Ash facility located near the area where a replica of Crosley Field baseball stadium was built. While it is true that a salt storage facility was located in the City of Blue Ash near this location, the salt storage facility was owned and operated by State of Ohio, Department of Transportation (see affidavit of Michael T. Melampy, attached as Exhibit 1).

It is also worth noting that Ray Skinner's testimony linking the City of Blue Ash to approximately 40 years of usage at the landfill is inconsistent with the testimony of the other members of his family. Ray's mother, Elsa, stated that the City of Blue Ash allegedly used the landfill only during the early years until the early 1960s. Maria Skinner, on the other hand, testified that the City of Blue Ash allegedly used the landfill from the mid 1980s until they closed around 1990.

The outlandish nature of Mr. Skinner's testimony is also apparent from his statements regarding the Clarke Incinerator. According to Ray, whenever the Clarke Incinerator was not operating because of a malfunction, Mr. Clarke directed his customers to the Skinner Landfill for disposal of their waste. (December 12, 1997 Deposition; p. 135, line 17). According to Dick Clarke, however, this simply was not the case. As Mr. Clarke stated during his deposition, it would make absolutely no sense for the Clarkes to recommend Skinner Landfill when their incinerator was not working because the Clarke's operated their own landfill near Morrow, Ohio from which they could reap the benefits of additional use (Richard Clarke Deposition; February 18, 1998; p. 220, lines 8-12).

Throwing aside these inconsistencies, as well as the self-serving nature of his testimony, Ray's testimony is inadequate to impose CERCLA liability upon the City of Blue Ash. Ray admitted during his deposition that he never saw any garbage compactor trucks from the City of Blue Ash enter the landfill (December 12, 1997 deposition; p. 272, lines 21-24). The only trucks allegedly from the City of Blue Ash which Ray Skinner recalls were dump trucks with a seven cubic yard capacity (January 7, 1998 deposition; p. 703, line 3). According to Ray's own testimony, the only city from which he recalls compactor trucks entering the landfill were trucks from the City of Sharonville. As for the City of Blue Ash, Ray stated, "I can't truthfully say they was Blue Ash." (February 18, 1998 deposition; p. 142, lines 10-20). Thus, Ray's testimony does not establish the fact of disposal of municipal solid waste.

As for the seven cubic yard dump trucks which Ray claims entered the landfill from the City of Blue Ash, the contents of these trucks are also inadequate to thrust CERCLA liability upon the City of Blue Ash. When asked to describe the types of wastes contained in these seven cubic yard trucks, Ray stated that he could recall "road debris, brush, maybe a yard fence tore down, guard rails, small little poles that held the guard rails, some shop waste, sweepings, cleanings, brush, lots of leaves, paper, plastic bags, Styrofoam cups, buckets, cans, whatever you see people litter where they would clean up and try to keep their [community], how you say it, clean" (January 7, 1998 Deposition; p. 702, lines 15-24). None of this material described by Ray constitutes a hazardous substance. The only item described by Ray which might contain hazardous substances would be the "shop waste". However, as Ray clarified during his subsequent depositions, he could not recall ever seeing shop waste in the materials being brought to the landfill by the municipalities. Furthermore, it is apparent that Ray's reference to "shop waste" is merely his way of describing floor cleanings and sweepings.

Q. Were municipalities generally, Mr. Skinner, a source of what you have been referring to as shop waste or shop materials, municipalities?

A. I can't say it was shop waste. All I can, there was lots of brush . . . broken glass, lights, street signs, posts, storm drains that was broken, concrete sidewalks, road pavement.

Q. That's the type of waste that you've been describing as road cleanup?

A. Yes. And shop waste. This gentleman [referring to someone other than himself] mentioned shop waste. I didn't know how to explain it. Floor cleanings, sweepings. He's the one mentioned this. I did not bring it in.

(February 18, 1998 deposition; pp. 1310, 1311, lines 11-24, 1) (See also February 18, 1998 deposition, pp. 1224, 1225, lines 10-24, 1-14 where Ray states that he "truthfully" cannot remember shop waste being brought into the landfill by a particular municipality.

It is also apparent from Ray's testimony that he equates shop waste with road debris. Thus, even if one were to conclude that the City of Blue Ash frequented the Skinner Landfill, Mr. Skinner's testimony fails to indicate the disposal of any hazardous substances.

Other Testimony

The deposition testimony of other individuals who worked at or frequented the Skinner Landfill also detracts from Elsa, Maria and Ray Skinner's biased and self-serving testimony. For example, Rodney Miller, who has worked at the property since 1973 and has lived there since 1978 (December 15, 1997 deposition; p. 12, line 17) was unable to recall the City of Blue Ash as a user of the landfill, despite the fact that the path taken by the trucks entering the landfill was located directly

next to his metal storage area, thereby enabling him to see the trucks as they proceeded toward the landfill (December 15, 1997 deposition; p. 93, line 16-24) (see also David Jividen deposition, December 17, 1997; p. 109, lines 7-12; When asked whether Rodney Miller was in a position to see the trucks coming into the landfill and proceed toward the dump, Mr. Jividen responded, "He could've seen them, yeah".)

If the City of Blue Ash used the Skinner Landfill on a daily basis as testified to by Maria Skinner, Mr. Miller would have recalled seeing at least one of the City's trucks. Yet, when asked if he could remember any municipalities using the landfill, Mr. Miller stated that he could only recall one municipality (not the City of Blue Ash) who used the landfill on an irregular basis (December 15, 1997 deposition; p. 102, lines 1-20). More specifically, when asked directly whether he remembered ever seeing any trucks from the City of Blue Ash, Mr. Miller declared that he never saw any of the City's trucks. (*Id.* at p. 158, lines 1-6).

Further detracting from the Skinners' credibility is David Jividen's testimony. Mr. Jividen worked at the landfill during the late 1980s. Although Mr. Jividen could recall the fact that cities did use the landfill, he could not specifically recall the name of any particular municipality (December 17, 1997 deposition; p. 80, lines 1-6). Furthermore, the only types of materials described by Mr. Jividen as being dumped in the landfill by these municipalities were non-hazardous materials (*Id.* at p. 80, lines 1-6) ("old guard rail and the wood pieces that go in the guard rail and the dirt").

Lloyd Gregory's testimony also supports the City's investigation results. Mr. Gregory lived on the Skinner property from 1987 or 1988 until 1993 (December 16, 1997 deposition, p.14, line 6). Once again, if the City had in fact used the Skinner Landfill on a daily basis up until the time the landfill was closed as testified to by Maria Skinner, or if the City had used the landfill on a more occasional basis up until the landfill was closed as testified to by Ray Skinner, it would make sense for someone who lived on the property to see the City's trucks entering and/or leaving the landfill. Yet, when asked specifically if he recalled whether the City of Blue Ash used the landfill, Mr. Gregory said no (*Id.* at p. 74, lines 23-24).

Roger Ludwig's deposition testimony also supports the conclusion that the City of Blue Ash did not use the Skinner Landfill. Mr. Ludwig began frequenting the landfill around 1974-75 as a result of his business relationship and dealings with John Skinner (February 3, 1998 deposition; p. 45-46, lines 10-24, 1-8). When

asked specifically whether he had any recall of the City of Blue Ash using the landfill, Mr. Ludwig had no recollection whatsoever linking the City to the landfill (*Id.* at p. 242, lines 8-16).

Clarke Incinerator, Inc.

Finally, it is important to address the City's use of the Clarke Incinerator, Inc. (transfer station) from 1978 to 1984. During this time period, the City of Blue Ash would collect residential municipal solid waste as well as non-hazardous commercial solid waste with its own trucks and deposit this material at the Clarke Incinerator (See Second Affidavit of Michael T. Melampy, attached as Exhibit 1). Clarke Incinerator vehicles would then transfer this material to either the Schlicter or the Stubbs Mill Landfill. None of these materials were taken to the Skinner Landfill. (Marty Clarke deposition; May 4, 1998, citation unknown) (Richard Clarke deposition; February 18, 1998, p. 220, lines 6-12; Richard Clarke states that when the incinerators were shut down, wastes from the transfer station were taken to the Clarke's own landfill) (*Id.* at p. 53, lines 6-7 stating that the Clarkes operated the Stubbs Mill Landfill in Morrow, Ohio until it was sold to B.F.I. around 1983).

Conclusion

When one evaluates the credibility of the testimony from the Skinner family members (particularly Maria and Ray), it is helpful to ask one simple question: Does it make sense for a large, sophisticated municipality like the City of Blue Ash to have frequented the Skinner Landfill for nearly forty years (up to and including 1990) without possessing any documentation whatsoever evidencing this usage? Of course not. As a result of its "full and thorough" investigation, the City of Blue Ash has documented its landfill usage from the middle 1950s through 1990. None of the records produced reference the Skinner Landfill because the City of Blue Ash did not use the landfill.

III. USEPA Municipal Solid Waste Policy

On February 5, 1998 the US Environmental Protection Agency Office of Enforcement and Compliance Assurance released a memorandum entitled Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL CO-Disposal Sites (attached as Exhibit 4). According to the memorandum "the purpose of this policy is to provide a fair, consistent, and efficient settlement methodology for resolving the potential liability under CERCLA of generators

and transporters of municipal sewage and/or waste at co-disposal landfills on the National Priorities List (NPL). *Id.* at 1. The basis behind the EPA's municipal solid waste policy is the fact that "although municipal solid waste may contain hazardous substances, such substances are generally present only in small concentrations. Landfills at which municipal solid waste 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 waste, are co-disposed at the facility. Moreover, the cost of remediating MSW is typically lower than the cost of remediating hazardous waste." *Id.*

According to this policy, the EPA calculates a municipality's share of the response costs by multiplying the known or estimated quantity of municipal solid waste contributed by the municipality by an estimated unit cost of remediating municipal solid waste at a representative RCRA Subtitle D landfill (*Id.* at 3). EPA's cost per unit estimate for remediating municipal solid waste is $5.30 per ton.

If it is determined that the City of Blue Ash disposed of municipal solid waste at the Skinner Landfill, the above described formula should be used to calculate the City's potential liability.

IV. Legal Arguments

A. No Joint and Several Liability

Pursuant to *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, No. 2:94-876, 1996 U.S. Dist LEXIS (S.D. Ohio March 18, 1996)(attached to Questionnaire Responses), Potentially Responsible Parties ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, et seq. ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 ("SARA"), may not bring a claim pursuant to 42 U.S.C. § 9607(a), CERCLA § 107(a). In *AT&T Global Info. Solutions Co.*, the controlling authority for this action, the court held "that plaintiffs, as potentially responsible parties, are not entitled to seek full cost recovery for all expenses incurred in the cleanup, but are limited to contribution recovery." *Id.* at *38 (citations omitted).

The *AT&T Global Info. Solutions Co.* court reiterated its holding in a March 31, 1997 Memorandum and Order stating:

> Plaintiff initially sought joint and several liability against defendants pursuant to CERCLA § 107(a). Defendants subsequently moved to dismiss the complaint on the basis that plaintiffs, as potentially responsible parties [PRPs], are not entitled to pursue a joint and several liability claim to recover all costs plaintiffs incurred in complying with the Consent Order. In the alternative, defendants argued that plaintiffs should be limited to contribution recovery for those expenses that plaintiffs incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to CERCLA § 113(f)(1) . . .
>
> By Memorandum and Order dated March 18, 1996 [Record No. 192] the Court granted defendants' alternative motion to limit plaintiffs' claims to contribution recovery of plaintiffs' excess costs. **The Court held that plaintiffs, as potentially responsible parties, were not entitled to seek full cost recovery for all the expenses that plaintiffs incurred in the cleanup.**

AT&T Global Info. Solutions Co. v. Union Tank Car Co., No. 2-94-876, 1997 WL 382101 at *1 (S.D. Ohio March 31, 1997)(attached to Questionnaire Responses); See also, *Dartron Corporation v. Uniroyal Chemical Company, Inc.*, 917 F.Supp. 1173, 1182 (N.D. Ohio 1996)("Actions for full cost recovery under § 9607(a) may only be brought by (1) federal or state governments; or (2) 'innocent' private parties.)

B. No "Arranger" Liability for Contracting with BFI.

By contracting with BFI, a party alleged to have used the Skinner Landfill, for the pick-up, transport and disposal of residential and commercial waste, the City of Blue Ash has not incurred "arranger" liability under 42 U.S.C. § 9607. Although "arranger" liability can attach to parties that do not have active involvement regarding timing, manner or location of disposal, there must be some nexus between the potentially responsible party and the disposal of hazardous substances. *G.E. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2nd Cir. 1992). A sufficient nexus may be established between a potentially responsible party (PRP) and the complained of hazardous substance, for purposes of holding a PRP liable as an "arranger" for CERCLA response costs, either by showing a PRP's actual involvement in the disposal of the hazardous substances or by showing a

PRP's obligation to control hazardous substances. *Pierson Sand & Gravel, Inc. v. Pierson Tp.*, 851 F.Supp. 850 (W.D. Mich. 1994). In the present situation, other than negotiating the waste disposal contract, the City of Blue Ash had absolutely no involvement whatsoever in the actual physical disposal of the waste materials. Furthermore, the City of Blue Ash had no obligation to control the alleged hazardous substances. These responsibilities belonged to B.F.I. Consequently, no "nexus" exists between the City of Blue Ash and the complained of hazardous substances, and no "arranger" liability attaches to the City of Blue Ash.

C. Orphan Share Allocation

Because plaintiffs are limited to a contribution action under 42 U.S.C. § 9613 as described above, they cannot seek to impose joint and several liability upon the Potentially Responsible Parties. Rather Plaintiffs can only seek "contribution" or "several" liability. *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, No. 2:94-876, 1996 U.S. Dist LEXIS (S.D. Ohio March 18, 1996). "Since liability under a § 113 action is several, not joint and several, each party is only responsible for their proportionate share of the harm caused at the [site]." *Gould Inc. v. A&M Battery and Tire Service,* 901 F.Supp. 906, 913 (M.D. Pa. 1995). Applying these principles, the *Gould* court concluded that the third party defendants could not be held responsible for any portion of the "orphan shares." Rather, the third party defendants could only be held liable for the amount which each defendant contributed to the harm. *Id.* (But see, *United States v. Kramer*, 953 F.Supp. 592 (D. N.J. 1997)(CERCLA contribution permits allocation of portions of orphan share to liable third party defendants).

Although not directly addressed by the Sixth Circuit, the principles adopted by the *Gould* court should be applied to the present action. Any allocation of "orphan shares" related to the Skinner Landfill should be directed to the § 113 plaintiffs who are seeking contribution, not to the third party defendants who are simply liable for the amount which each defendant contributed to the harm.

D. Importance of Toxicity

The degree of toxicity of the particular waste attributed to each responsible party is a primary consideration among the "Gore Factors" or other equitable factors considered under 42 U.S.C. § 9613(f)(1), CERCLA § 113(f)(1) for allocating contribution costs among responsible parties. As such, the degree of toxicity should be given significantly more weight than the volume of waste attributable to the responsible parties. *See, e.g., Control Data Corp. v. S.C.S.C Corp.*, 53 F.3d

930 (8th Cir. 1995), stating in pertinent part:

> A primary focus of these factors is the harm that each party causes the environment. Those parties who can show that their contribution to the harm is relatively small in terms of amount of waste, toxicity of the waste, involvement with the waste, and care, stand in a better position to be allocated a smaller portion of response costs.

Id. at 935 (citations omitted).

CERCLA, in the allocation stage, places the costs of response on those responsible for creating the hazardous condition. Allocating responsibility with a focus toward toxicity does just that because those who disposed of more toxic substances are more responsible for the hazardous condition. *Id.* at 938. *See also, Catellus Dev. Corp. v. L.D. McFarland Co.*, 910 F.Supp. 1509, 1514 (D. Oregon 1995)(following the *Control Data Corp.* Court's reasoning in heavily weighing toxicity as an equitable allocation factor).

To the extent that municipal solid waste is found to contain hazardous substances, thereby potentially subjecting municipalities to liability under 42 U.S.C. § 9613(f), such waste has an extremely low degree of toxicity. Therefore, in such cases, the low level of toxicity is a primary consideration under the "Gore Factors" or other equitable factors pursuant to 42 U.S.C. § 9613(f)(1), and require a significantly lower allocation in relation to industrial waste contributors.

The fact that municipal solid waste is of extremely low toxicity is reflected in and is the basis of the U.S. EPA's Interim Municipal Settlement Policy issued nearly nine years ago on December 12, 1989. 54 Fed. Reg. 51071 (1989). In this regard, the interim policy states:

> Although the actual composition of such waste varies considerably at individual site, MSW is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents) as well as small quantity generator wastes.

Id. at 51074.

The EPA's recently released Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (attached as Exhibit 4) also recognizes the fundamental difference in toxicity between MSW and non-MSW industrial waste.

> EPA recognizes the difference 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 dispose 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. . .

Id. at 1. Recognizing these fundamental differences in toxicity between MSW and industrial wastes, the EPA has adopted a cost per unit for remediating MSW at $5.30 per ton. Thus, although all credible evidence leads to the conclusion that the City of Blue Ash did not dispose of any waste at the Skinner Landfill, if a contrary finding is made, any liability assigned should be dealt with in accordance with the EPA's MSW policy.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

The Dow Chemical Company, et al.,	)	Case No. C-1-97-307
	)	
Plaintiffs,	)	Judge Herman J. Weber
	)	
v.	)	
	)	
Acme Wrecking Co., Inc., et al.	)	
	)	
Defendants.	)	

Second Affidavit of Michael T. Melampy

I, Michael T. Melampy, who resides at 1466 Gibson Road, Goshen, Ohio 45122, after having been first duly cautioned and sworn, do hereby state as follows:

1. I reaffirm everything contained in my previous affidavit dated October 8, 1997.

2. When I first began working for the City of Blue Ash in 1973, the City's dump trucks were painted yellow.

3. From 1973 until the present, the City's dump trucks have been painted yellow.

4. When I first began working for the City of Blue Ash in 1973, the writing on the City's dump trucks was blue.

5. From 1973 until the present, the writing on the City's dump trucks has always been blue, although sometime in the 1980s a black outline was added.

6. As an employee of the City's Service Department for the past 25 years I am familiar with the daily operations of the Department, and I have experienced first hand the tremendous growth the City of Blue Ash experienced from the mid-1970s through 1990.

7. Based upon my historical understanding of this growth as well as the City's 206 ton

average monthly generate rate of residential waste during 1978 (see City of Blue Ash Questionnaire Response 13(d)), I estimate that the City of Blue Ash collected approximately 150 tons of residential waste each month during the early 1960s.

8. When I started working for the City of Blue Ash in 1973, the City was collecting residential waste only and disposed of this material at the .

9. From 1973 until 1975, the City only collected residential waste and disposed of this material at the .

10. From 1975 until 1978, the City collected both residential and non-hazardous commercial waste and disposed of this material at the .

11. From 1978 to the early 1980s, the City collected and disposed of roll-off commercial material at the .

12. From 1978 to 1984, residential and commercial material collected in front loaders was disposed at the . which was operating as a transfer station at that time.

13. From the early 1980s until 1984, the City collected and disposed of roll-off commercial material at the .

14. From 1984 to1986, residential and commercial material collected by the City was disposed at .

15. In 1986, the City of Blue Ash exited the trash collection business and contracted with B.F.I. for the collection of waste. This contracted extended through 1990.

16. It is my understanding based upon personal knowledge of the City's operations, that the City of Blue Ash never operated a water treatment facility.

17. Finally, the Department of Transportation for the State of Ohio owned, operated and maintained a salt dome storage facility in the City of Blue Ash located near the area where a replica of Crosley Field baseball stadium was built. While it is true that this storage facility was located in the City of Blue Ash, the salt storage facility was owned and operated by State of Ohio, Department of Transportation and the City of Blue Ash played absolutely no role in the disposal of any material generated by this storage facility. Further affiant sayeth naught.

Michael T. Melampy

Sworn to a subscribed in my presence this 19th day of May, 1998.

Judith A. Ward
Notary Public

JUDITH A. WARD, Notary Public
In and for the State of Ohio
My Commission Expires May 1, 2001

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

The Dow Chemical Company, et al.,	)	Case No. C-1-97-307
	)	
Plaintiffs,	)	Judge Herman J. Weber
	)	
v.	)	
	)	
Acme Wrecking Co., Inc., et al.	)	
	)	
Defendants.	)	

Second Affidavit of Wilbur E. Brewer, Sr.

I, Wilbur E. Brewer, who resides at 4314 Woodlawn Avenue, having been first duly cautioned and sworn, do hereby state as follows:

1. I reaffirm everything contained in my previous affidavit dated October 9, 1997.
2. When I first began working for the City of Blue Ash in October of 1960, the City transported its residential material to .
3. It was apparent from conversations with my co-employees in the early 1960s that the City of Blue Ash had been using the landfill for several years prior to my arrival in October of 1960.
4. As an employee of the City of Blue Ash's Service Department, I operated one of the City's residential garbage packers from 1960 until 1975.
5. From 1960 until 1975, the only landfill in which I disposed of the City's residential material was located in .
6. I never received cash from the City of Blue Ash which was to be paid directly to any landfill owner or operator for the use of their landfill.

Further affiant sayeth naught.

Wilbur E. Brewer SR
Wilbur E. Brewer, Sr.

Sworn to a subscribed in my presence this 19th day of May, 1998.

Judith A Ward
Notary Public

JUDITH A. WARD, Notary Public
In and for the State of Ohio
My Commission Expires May 1, 2001

NOTARIAL SEAL STATE OF OHIO

EXHIBIT 3

CITY OF BLUE ASH

SPECIFICATIONS FOR

COLLECTION AND DISPOSAL OF
RESIDENTIAL, COMMERCIAL AND INDUSTRIAL WASTE

BID DOCUMENT

City of Blue Ash
Municipal & Safety Center
4343 Cooper Road
Blue Ash, OH 45242
(513) 745-8500

NOTICE TO BIDDERS

The City of Blue Ash is soliciting sealed bids until 11:00 a.m., Tuesday, February 4, 1986 for Waste Collection and Disposal Services.

INSTRUCTIONS TO BIDDERS

1. Proposals must be typewritten or clearly printed or written in ink and signed by a duly authorized representative of the firm submitting the bid.

2. Proposals must be submitted in a sealed envelope (by mail or in person) clearly marked on the outside "Bid for Waste Collection and Disposal Services".

3. All proposals must be accompanied by a bid bond in the amount of $5,000.00, a certified check for that amount, or a bank letter of credit drawn on a solvent bank in the amount of $5,000.00. This requirement provides assurance that the bidder will provide the services described in the specifications and listed on the bid form. The attached bid bond form may be used or you can secure a bid bond for $5,000.00 from your agent. All bonds or checks will be returned upon execution of contract.

4. Proposal amounts shall cover (see specifications).

5. Proposals must be submitted on the bid form supplied by the City.

6. Proposals must be received at the City of Blue Ash offices, 4343 Cooper Road, Blue Ash, Ohio 45242, by 11:00 a.m., Tuesday, February 4, 1986.

CONDITIONS APPLICABLE TO BIDS

1. Applicable laws: the Revised Code of the State of Ohio, the Charter of the City of Blue Ash and all City Ordinances insofar as they apply to the laws of competitive bidding, contracts and purchases are made a part hereof.

2. Bids may not be withdrawn after 11:00 a.m., Tuesday, February 4, 1986 and shall remain valid for a period of thirty (30) days thereafter. Negligence upon the part of the bidder in the preparation of the proposal confers no right for the withdrawal of the bid after it has been opened.

CONDITIONS APPLICABLE TO BIDS
(Continued)

3. The City reserves the right to reject any and all bids for any and all items covered in the proposal form; to waive informalities or defects in bids; to reject the proposal of a bidder, who in the City's opinion, is not qualified to perform the contract; or to accept any proposal including multiple awards, that it deems to be in the best interest of the City of Blue Ash.

4. Please be aware that all successful bidders shall return the attached Personal Property Tax Affidavit to the City.

ORDINANCE NO. 86-12

AUTHORIZING THE CITY MANAGER TO ENTER INTO CONTRACTS FOR: (1) WASTE COLLECTION AND DISPOSAL 1986-1990; (2) ASPHALT PAVER ($27,717.00); (3) MULTI-PURPOSE TRAILER ($6,033.00); AND DECLARING AN EMERGENCY

WHEREAS, Section 9.12 of Article IX of the Charter of the City of Blue Ash, Ohio provides the method under which the City Manager shall make purchases and enter into contracts on behalf of said City; and

WHEREAS, Ohio Revised Code Section 735.05 provides for certain additional methods for purchase of property and contract for services; and

WHEREAS, the City Manager has complied with the requirements of the Charter of the City of Blue Ash, Ohio, and the statutes of the State of Ohio, causing bid requests to be sent out to various contractors and publishing notices of said bid requests in the Sycamore Messenger/News on January 16, 1986 for waste collection and disposal, and on January 30, 1986 for an asphalt paver and a multi-purpose trailer; and

WHEREAS, the bid submitted by Browning-Ferris Industries of Ohio, Inc. (BFI) for the unit prices as shown on the attached bid summary for the years 1986 through 1990 appears to be the best bid; and

WHEREAS, the bid submitted by The McLean Company for acquisition of an asphalt paver for the City's Service Department appears to be the lowest and best bid; and

WHEREAS, the bid submitted by Smith Custom Services Inc. appears to be the lowest and best bid for a multi-purpose trailer.

Be it ordained by the Council of the City of Blue Ash, Ohio, not less than five (5) members thereof concurring,

SECTION I.

The City Manager is hereby authorized to enter into a contract for waste collection and disposal with Browning-Ferris Industries of Ohio, Inc. for the years 1986 through 1990 for the unit prices as shown on the attached bid summary.

SECTION II.

The City Manager is hereby authorized to enter into a contract with The McLean Company for acquisition of an asphalt paver for a total cost of $27,717.00.

SECTION III.

The City Manager is hereby authorized to enter into a contract with Smith Custom Services Inc. for acquisition of a multi-purpose trailer for a total cost of $6,033.00.

BFI Waste Systems
BROWNING-FERRIS INDUSTRIES
Cincinnati District

City of Blue Ash, Ohio

Suggested Language Clarification Changes

Section 7

The miscellaneous ~~materials shall~~ be standard non-hazzardous, solid waste materials limited to 100 cubic yards per month.

Section 11

The disposal site used by the contractor shall and shall continue to comply with all applicable federal, state, local, and EPA regulations.

Section 12

.....shall remain in full compliance of all applicable federal, state, and local EPA requirements.

Section 11E

.....city of Blue Ash, but the naming of the city as an additional insured shall only be with respect to the contractors preformance under this contract.

Approved change
Preston M. Combs
2-26-86

Bryan B. Slade
2-26-86
Vice President & District Manager of BFI of Ohio, Inc.

11563 MOSTELLER ROAD • CINCINNATI, OHIO 45241 • (513) 771-4200

CITY OF BLUE ASH
BLUE ASH, OHIO

GENERAL SPECIFICATIONS AND INFORMATION

Section 1

It is the intent of this proposal that bids be submitted for the collection and disposal of solid wastes for residential, commercial and industrial users within the corporate limits of the City of Blue Ash being more specifically defined within this proposal.

It is the City's desire to maintain the same pickup schedule and routes as currently being used. If for any reason the contractor requires a change in the schedule, it will be the contractor's responsibility to notify the residents or businesses affected after first receiving the written approval of the City of Blue Ash.

Section 2

All waste materials collected by the contractor shall be legally disposed of outside the corporate limits of the City of Blue Ash, Ohio.

Section 3

No improper or abusive language or unacceptable or improper conduct should at any time be exhibited to the public by contractor's employees or such offender will be removed from City's route by the contractor or upon request by the City of Blue Ash.

Section 4

Contractor agrees to handle all containers without abuse and to return all emptied containers to the location where it was set by the owner.

Section 5

All receptacles and equipment used by the contractor for the collection and removal of waste material shall be kept neat, clean and sanitary.

Section 6

Contractor's personnel while engaged in waste removal in the City of Blue Ash shall have a neat and professional appearance.

Section 7

Contractor shall agree to allow the City to dump miscellaneous materials picked up by City vehicles in the contractor's landfill at no fee to the City of Blue Ash.

Section 8

Contractor shall indemnify and hold harmless the City of Blue Ash or any of its officers and agents against and from all actions or claims brought against said City from actions based upon, connected with or related to the operations, equipment and/or conduct of the contractor and/or his employees.

Section 9

Contractor will be held liable for any damage, injury (including death) or destruction based upon, connected with or related to contractor's waste removal personnel or equipment while performing services for the City of Blue Ash. .

Section 10

Should the City feel compelled to mobilize its own workers to correct problems created by non-compliance with specifications, the contractor will be required to reimburse the City of Blue Ash for such funds necessary to complete the work as guaranteed by contract. Such reimbursement shall be determined by the City of Blue Ash based on personnel and equipment costs

necessary to rectify the problem and shall be paid by contractor within 30 days of the City of Blue Ash's request for reimbursement.

Section 11

The City of Blue Ash is not to be responsible for any problems arising at the disposal site as a result of solid waste collected in the City of Blue Ash. The disposal site used by the contractor shall be and shall continue to be EPA approved.

Section 12

The contractor shall upon award of bid provide the City of Blue Ash with a copy of an approved E.P.A. permit for the disposal site which shall be used for the term of the contract and shall remain in full compliance with all State and Federal E.P.A. requirements.

Section 13

Contractor shall agree that before any notifications, flyers or mailings pertaining to toter service and/or other services not covered by these specifications or contract, the contractor must have written approval of the City of Blue Ash prior to any contact with residents or businesses.

Section 14

Limits as to what is to be collected and not collected shall be consistent with if not identical to those already in effect in the City of Blue Ash.

Section 15

The contractor shall agree that if any of the premises or collections are missed, the contractor shall return to make pickup on that regular scheduled day.

Section 16

Upon completion of the day's route, the foreman of the particular route (residential, front-end, roll-off) will check with the assigned City representative and will redress complaints of the day's route.

Section 17

The contractor will work closely and cooperatively with City employees to ensure the smooth transition from City collection to contractor collection. In addition, the City representative will be given the name and number of an appropriate person within the contractor's employment with whom complaints can be aired and remedied.

Section 18

If it is felt by the City Manager that the work is not being performed in a satisfactory manner, then the City Manager or his assignee will so notify the contractor, who will then immediately rectify the problem area. Excessive complaints or failure to rectify the source of such complaints will be grounds for revocation of contract.

Section 19

The contractor shall agree that any City worker layed off as a result of privatization will be interviewed by the successful bidder and a real and purposeful effort should be made to hire such workers in the company receiving the bid.

Section 20

Contractor shall adhere to all laws, ordinances, and other policies that pertain to actions performed for and in the City of Blue Ash.

SPECIFICATIONS
RESIDENTIAL

Section 1

The term "waste material" shall include all solid refuse or putrescible wastes originating from the use of property situated only within the corporate limits of the City of Blue Ash, Ohio, and more specifically being identified in the following categories:

A. All solid waste material that size will allow is to be placed in a standard rear load or side load hopper.

B. All appliances and furniture including but not limited to refrigerators, dishwashers, washers, dryers, sofas and chairs.

C. Garbage as defined as organic waste of animal, fish, fruit or vegetable matter arising from or attendant to the storage, dealing in, preparation or cooking of food for human consumption.

D. All brush tied in small bundles not to exceed five (5) feet in length; large limbs and trees not being acceptable.

E. All wooden boxes and cardboard boxes either whole or broken down and/or tied in small bundles.

F. Newspapers and magazines, not placed in cans, tied in small bundles or placed in boxes.

G. Grass and leaf clippings and rakings when properly bagged or boxed.

H. Cold ashes placed in a separate container.

I. Household debris--small miscellaneous when properly bagged or boxed.

J. In general, the contractor shall collect everything set out at the curb side and properly contained by the residents for collection, except bricks, concrete and building materials, with no limit as to the amount to be set out.

Section 2:

All residents of the City of Blue Ash will be charged with the responsibility that all garbage will be drained and placed in metal or plastic water tight containers with lids or wired ends, not to exceed 30 gallon capacity and not more than 70 pounds in weight and to be placed at the curb or edge of street right-of-way.

Section 3

Collections for residential units shall be made at least once a week and between the hours of 7:00 a.m. and 6:00 p.m. Monday through Friday. Collections shall be made on all holidays with the exception of New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving and Christmas of which those collections shall be made the following day, with a one day schedule delay for the remainder of the week on which a said holiday falls. Collection hours shall remain as above.

Section 4

Weekly pickup shall be made of all City waste receptacles in the downtown area consisting of approximately 34, 32-gallon containers placed in various areas along the City right-of-way and the Towne Square Plaza.

Section 5

All spillage from various containers on all routes will be gathered and placed in the particular vehicle before proceeding to the next collection.

Section 6

Special carry-out services for the handicapped, elderly, or heretofore provided shall be acknowledged and acted upon by the contractor as directed by the City Manager or his designee.

SPECIFICATIONS
COMMERCIAL/INDUSTRIAL
FRONT LOADERS

Section 1

Contractor shall agree to a starting time of no earlier than 6:00 a.m. and a finishing time of no later than 7:00 p.m. for front loader service.

Section 2

Contractor shall agree that collections shall be made as per the City's route schedule (see route schedule attachment) with the same limitations as to pickups per day and week. Any changes to schedule must first be approved by the City of Blue Ash.

Section 3

New pickups shall only be added with the prior written approval of the City of Blue Ash and at the same base rate as agreed in the contract. All new units must be at least six cubic yards with a limit of no more than three pickups per week.

Section 4

Commercial containers now in use have been purchased or leased by the businesses. If the contractor desires to use a different type of container, the contractor is permitted to negotiate with the owner to change the type of container but only with the prior written approval of the City of Blue Ash.

Section 5

All purchases, lease or rental of commercial containers shall be the sole responsibility of the commercial or industrial business.

SPECIFICATIONS
COMMERCIAL/INDUSTRIAL
ROLL-OFF

Section 1

The contractor shall agree to a starting time of no earlier than 6:00 a.m. and no later than 7:00 p.m. for the pickup and return of roll-off units.

Section 2

Contractor shall agree that no roll-off unit shall be picked up and emptied unless it is filled to at least 90 percent (90%) of its full capacity.

Section 3

Contractor shall agree to the City's limit of no more than three pickups per-week per-business on roll-off units.

Section 4

All roll-off pickups shall be on a call-in basis whereas the business shall notify the contractor directly.

Section 5

New roll-off units shall only be added with the prior written approval of the City of Blue Ash and at the same base rate per unit as agreed in the contract.

BID SPECIFICATIONS

Section 1

Residential collection as of January 1, 1986 has been estimated to consist of 3,260 residential units.

Section 2

The contract to be awarded shall cover:

A. A period of three years, with the City reserving the right to rebid a new contract or revert back to City collection after the first six months. The City shall also have the right to extend the contract for two option years.

B. The bid shall also include the maximum increase the contractor may request for the two option years.

C. A bid price per residential unit with the contractor agreeing to add all new or additional units at same bid price per unit.

D. A bid price per roll-off unit for commercial/industrial.

E. A bid price per loose cubic yard for commercial/industrial front-loader service.

Section 3

Each bidder must satisfy himself by his own observations as to the quantity of proposed work to be performed and with the proposed requirements and limitations listed. The submission of a bid shall be considered evidence that the bidder has made such observations and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the specifications and information retained therein.

Section 4

The City reserves the right to require the bidder to present satisfactory evidence that he has been regularly engaged in the business of solid

waste removal previous to the bidding of this contract. The City also reserves the right to require the bidder to present satisfactory evidence that he is fully prepared with the necessary capital, material, insurance, machinery, and equipment to conduct the work to be contracted to the satisfaction of the City of Blue Ash and to begin promptly when so ordered after contract is awarded. The contractor awarded the bid shall be prepared for a projected start date of March 1, 1986.

Section 5

A bid bond in the amount of $5,000 shall accompany all bids. Bid bond shall be returned upon execution of contract.

Section 6

The contractor agrees to comply with all Federal and State statutes relating to liability insurance, workman's compensation, working hours, minimum wages, and provisions against discrimination throughout the life of the contract.

Section 7 - Contractor's Insurance

The contractor upon award of contract shall furnish to the City, certificates from the contractor's insurance company, including the Ohio Industrial Commission, acceptable to the owner, that insurance has been issued to the contractor providing insurance as listed below. Such certificates shall state that the insurance companies will give the owner "contractor" not less than 30 days notice prior to any cancellation or material change in such policies which the owner (contractor) shall also notify the City of Blue Ash 30 days prior to same.

A. The contractor shall furnish two unaltered copies of the official certificate of the Ohio Industrial Commission indicating that he has paid the premiums required under the Ohio Workers' Compensation Act. He may elect to keep one copy permanently on file with the City in which event it will be necessary to furnish two copies with his first contract and one copy each and every time further premiums are paid. If the contractor is legally permitted and qualified to be a self-insurer, such self-insurer shall furnish proof of such status to the City.

B. The contractor shall furnish two copies of a comprehensive general liability policy covering against bodily injury liability and property damage liability for not less than a combined single limit of $500,000 per occurrence.

C. Umbrella excess liability insurance shall be carried for not less than $1,000,000 limit for bodily injury and property damage.

D. The contractor shall furnish proof of a vehicle liability policy covering against bodily injury liability and property damage liability for not less than a combined single limit of $500,000 per accident covering the exposures of owned vehicles, non-owned vehicles and hired vehicles with City to be listed as an additional insured.

E. The contractor shall cause the City of Blue Ash to be named as an additional insured on their general liability and umbrella policy, and shall provide a certificate of insurance to that effect prior to the start of services for the City of Blue Ash.

Section 8

A. Payment to contractor shall be made within 15 days of receipt of proper billing from the contractor. Billing shall be 30 days from the start of service, and every 30 days thereafter during the life of the contract.

B. The contractor shall be required to furnish an accurate record of the number of pickups (residential), units (roll-off), and loose cubic yards (front loader) collected each month.

C. The City of Blue Ash shall request the successful bidder before commencement of this contract to submit a plan for a method of monitoring of collections which is acceptable to the City of Blue

Ash. The purpose of this monitoring shall be for verification of billing for all collections, additions and deletions of services.

Section 9

"All parts of these specifications are intended to be explanatory of each other, but in case of misunderstanding or doubt, the interpretation of the City of Blue Ash will be final."

Section 10

The City of Blue Ash reserves the right to reject any and all bids.

CITY OF BLUE ASH
WASTE COLLECTION AND DISPOSAL SERVICES
BID PROPOSAL

Residential collection of approximately 3,260 units:

Years 1986 through 1988: $ 2.44 /Month PER UNIT (with all additional units to be added at same unit price)

$ 95,452.80 PER YEAR (for 3,260 units)

Option Year 1989 $ 2.68/Month PER UNIT

Option Year 1990 $ 2.95/Month PER UNIT

Commercial/Industrial Collection of 25 roll-off units:

Years 1986 through 1988: $ 108.42 PER UNIT (with all additional units to be added at same unit price)

$ 140,946.00 PER YEAR (for 25 units at once-a-week pickup)

Option Year 1989 $ 119.26 PER UNIT

Option Year 1990 $ 131.19 PER UNIT

Commercial/Industrial collection front loader service -- 7,000 loose cubic yards per week:

Years 1986 through 1988: $ 0.88 PER LOOSE CUBIC YARD (with all additional units to be added at same unit price)

$ 320,320.00 PER YEAR at 7,000 loose cubic yards per week

Option Year 1989 $ 0.97 PER LOOSE CUBIC YARD

Option Year 1990 $ 1.07 PER LOOSE CUBIC YARD

$ 556,718.80 TOTAL PRICE PER YEAR FOR THE YEARS 1986 THROUGH 1988 FOR THE COMBINATION OF RESIDENTIAL, COMMERCIAL/INDUSTRIAL ROLL-OFF AND COMMERCIAL/INDUSTRIAL FRONT LOADER SERVICE.

NOTE: "Per Year" as written above shall be interpretted to mean a 12 month period starting from the directed contract starting date (anticipated to be March 1, 1986) to that same date of the following year and not from January 1 of one year to January 1 of the next.

Likewise, the years mentioned (1986 through 1988, 1989 and 1990) shall also be interpretted to mean a 12 month period starting from the directed contract starting date of the year stated to that same date of the following year and not from January 1 to January 1.

SIGNED Bryan B. Slade

PLEASE PRINT NAME Bryan B. Slade

TITLE District Manager

REPRESENTING Browning-Ferris Industries of Ohio, Inc.

MAILING ADDRESS 11563 Mosteller Road.

CITY, STATE & ZIP CODE Cincinnati, Ohio 45241

TELEPHONE NUMBER 513 771-4200

DATE February 3, 1986

CONTRACT

THIS AGREEMENT, made this 27th day of February, 1986 by and between the City of Blue Ash, hereinafter called "OWNER", and Browning-Ferris Industries of Ohio, Inc. doing business as a corporation, in the City of Sharonville County of Hamilton, State of Ohio hereinafter called "CONTRACTOR".

"WITNESSETH: That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the Owner, the Contractor hereby agrees to commence and provide the services for:

WASTE COLLECTION AND DISPOSAL SERVICES

hereinafter called "Work" for the sum stated in the Proposal, and for all extra work in connection therewith, under the terms as stated in the General Conditions of the Contract Document, and at his (its or their) own proper cost and expense to furnish all the materials, supplies, machinery, equipment, tools, superintendence, labor, insurance and other accessories and services necessary to complete the said Work in accordance with the conditions and price stated in the Bid Proposal, Information and Instructions to Bidders, the General Conditions, Specifications, and Addendum therefor as approved by the Owner, and all of which are a part hereof and collectively evidence and constitute the Contract.

The Contractor hereby agrees to commence work under this Contract as directed by the City of Blue Ash or be subject to liquidated damages of $200 per calendar day.

The Owner agrees to pay the Contractor in current funds for the performance of the Contract, subject to additions and deductions, and to make payments on account thereof, as provided in the General Conditions.

In accordance with Section 2A, Page 9, of the Bid Specifications, the City of Blue Ash (does/~~does not~~) choose to extend the contract period from the three (3) year base bid period to include (~~one~~/two) option (~~year~~/years). Thus the contract will become effective March 1, 1986 and extend through February 28, 19 91.

IN WITNESS WHEREOF, the parties to these presents have executed this Contract in two (2) counterparts, each of which shall be deemed as original, in the year and day first above mentioned.

ATTEST:

Debra A. Wallace

James S. Pfeffer
Witness

APPROVED AS TO FORM:

Robert T McConaughy
Robert T. McConaughy, Solicitor

ATTEST:

Thomas E. Dicke

Assistant District Manager
Witness

SEAL

OWNER: CITY OF BLUE ASH, OHIO

By Marvin D Thompson

City Manager
Title

SEAL

CONTRACTOR: Browning-Ferris Industries of Ohio, Inc.

By Bryan B. Slade

Title Vice President & District Manager

By _____

Title _____

CHUBB GROUP of Insurance Companies

CHUBB

FEDERAL INSURANCE COMPANY

BID BOND

Bond No. Amount $ **5,000.00**

Know All Men By These Presents,

That we,

Browning-Ferris Industries of Ohio, Inc.

(hereinafter called the Principal),

as Principal, and the FEDERAL INSURANCE COMPANY, Warren, New Jersey, a corporation duly organized under the laws of the State of New Jersey, (hereinafter called the Surety), as Surety, are held and firmly bound unto

City of Blue Ash, Ohio

(hereinafter called the Obligee),

in the sum of ----------Five Thousand and No/100---------- Dollars ($**5,000.00**), for the payment of which we, the said Principal and the said Surety, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of January , A. D. nineteen hundred and eighty six

WHEREAS, the Principal has submitted a bid, dated February 4 , 19 86 , for Collection and Disposal of Residential, Commercial and Industrial Waste.

NOW, THEREFORE, if the Obligee shall accept the bid of the Principal and the Principal shall enter into a contract with the Obligee in accordance with such bid and give bond with good and sufficient surety for the faithful performance of such contract, or in the event of the failure of the Principal to enter into such contract and give such bond, if the Principal shall pay to the Obligee the difference, not to exceed the penalty hereof, between the amount specified in said bid and the amount for which the Obligee may legally contract with another party to perform the work covered by said bid, if the latter amount be in excess of the former, then this obligation shall be null and void, otherwise to remain in full force and effect.

Browning-Ferris Industries of Ohio, Inc.
Principal

By: Stephen L. Thomas
Stephen L. Thomas, President

FEDERAL INSURANCE COMPANY

Patricia A. Parcher
Patricia A. Parcher, Resident Agent

By: Anne W. Marchetti
Anne W. Marchetti, Attorney-In-Fact

Form 15-02-0002 (Rev. 7-83)

PRINTED IN

POWER OF ATTORNEY

Know all Men by these Presents, That the FEDERAL INSURANCE COMPANY, 15 Mountain View Road, Warren, New Jersey, a New Jersey Corpora-
, has constituted and appointed, and does hereby constitute and appoint John A. Lindquist, Anne W. Marchetti, D. J. St. Jacques,
Jr. and G. Van Beek of Houston, Texas----------

each its true and lawful Attorney-in-Fact to execute under such designation in its name and to affix its corporate seal to and deliver for and on its behalf as surety thereon or otherwise, bonds of any of the following classes, to-wit:

1. Bonds and Undertakings filed in any suit, matter or proceeding in any Court, or filed with any Sheriff or Magistrate, for the doing or not doing of anything specified in such Bond or Undertaking.
2. Surety bonds to the United States of America or any agency thereof, including those required or permitted under the laws or regulations relating to Customs or Internal Revenue; License and Permit Bonds or other indemnity bonds under the laws, ordinances or regulations of any State, City, Town, Village, Board or other body or organization, public or private; bonds to Transportation Companies, Lost Instrument bonds; Lease bonds, Workers' Compensation bonds, Miscellaneous Surety bonds and bonds on behalf of Notaries Public, Sheriffs, Deputy Sheriffs and similar public officials.
3. Bonds on behalf of contractors in connection with bids, proposals or contracts.

In Witness Whereof, the said FEDERAL INSURANCE COMPANY has, pursuant to its By-Laws, caused these presents to be signed by its Assistant Vice-President and Assistant Secretary and its corporate seal to be hereto affixed this 1st day of January 19 85

Corporate Seal

Richard D O'Connor
Assistant Secretary

FEDERAL INSURANCE COMPANY
By
George McClellan
Assistant Vice-President

STATE OF NEW JERSEY
County of Somerset } ss.

On this 1st day of January 19 85, before me personally came Richard D. O'Connor to me known and by me known to be Assistant Secretary of the FEDERAL INSURANCE COMPANY, the corporation described in and which executed the foregoing Power of Attorney, and the said Richard D. O'Connor being by me duly sworn, did depose and say that he is Assistant Secretary of the FEDERAL INSURANCE COMPANY and knows the corporate seal thereof; that the seal affixed to the foregoing Power of Attorney is such corporate seal and was thereto affixed by authority of the By-Laws of said Company, and that he signed said Power of Attorney as Assistant Secretary of said Company by like authority; and that he is acquainted with George McClellan and knows him to be the Assistant Vice-President of said Company, and that the signature of said George McClellan subscribed to said Power of Attorney is in the genuine handwriting of said George McClellan and was thereto subscribed by authority of said By-Laws and in deponent's presence.

Notarial Seal

Acknowledged and Sworn to before me
on the date above written.
Notary Public

CERTIFICATION

PATRICIA A. HOLT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 14, 1990

STATE OF NEW JERSEY
County of Somerset } ss.

I, the undersigned, Assistant Secretary of the FEDERAL INSURANCE COMPANY, do hereby certify that the following is a true excerpt from the By-Laws of the said Company as adopted by its Board of Directors on March 11, 1953 and most recently amended March 11, 1983 and that this By-Law is in full force and effect.

"ARTICLE XVIII.

Section 2. All bonds, undertakings, contracts and other instruments other than as above for and on behalf of the Company which it is authorized by law or its charter to execute, may and shall be executed in the name and on behalf of the Company either by the Chairman or the Vice-Chairman or the President or a Vice-President, jointly with the Secretary or an Assistant Secretary, under their respective designations, except that any one or more officers or attorneys-in-fact designated in any resolution of the Board of Directors or the Executive Committee, or in any power of attorney executed as provided for in Section 3 below, may execute any such bond, undertaking or other obligation as provided in such resolution or power of attorney.

Section 3. All powers of attorney for and on behalf of the Company may and shall be executed in the name and on behalf of the Company, either by the Chairman or the Vice-Chairman or the President or a Vice-President or an Assistant Vice-President, jointly with the Secretary or an Assistant Secretary, under their respective designations. The signature of such officers may be engraved, printed or lithographed."

I further certify that said FEDERAL INSURANCE COMPANY is duly licensed to transact fidelity and surety business in each of the States of the United States of America, District of Columbia, Puerto Rico, and each of the Provinces of Canada with the exception of Prince Edward Island; and is also duly licensed to become sole surety on bonds, undertakings, etc., permitted or required by law.

I, the undersigned Assistant Secretary of FEDERAL INSURANCE COMPANY, do hereby certify that the foregoing Power of Attorney is in full force and effect.

Given under my hand and the seal of said Company at Warren, N.J., this 20th day of January 19 86.

Corporate Seal

J. Tomaso
Assistant Secretary

BID BOND

Know all men by these presents, that we, the undersigned _____ _____ as principal and _____ as sureties, are hereby held and firmly bound unto the City of Blue Ash, Ohio in the penal sum of _____ ($) dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed this _____ day of _____, 19___.

The condition of the above obligation is such, that whereas the above named principal did on the _____ day of _____, 19___, enter into a contract with the City of Blue Ash, which said contract is made a part of this bond the same as though set forth herein;

Now, if the said _____ shall well and faithfully do and perform the things agreed by the City of Blue Ash to be done and performed according to the terms of said contract; and shall pay all lawful claims of subcontractors, materialmen, and laborers, for labor performed and materials furnished in the carrying forward, performing, or completing of said contract; we agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modification, ommissions, or additions, in or to the terms of the said contract or in or to the plans or specifications therefor shall in any wise affect the obligations of said surety on its bond.

PRINCIPAL:

SIGNED _____

TITLE _____

REPRESENTING _____

ADDRESS _____

TELEPHONE _____

DATE _____

SURETY:

SIGNED _____

TITLE _____

REPRESENTING _____

ADDRESS _____

TELEPHONE _____

DATE _____

Each bidder should be aware that Sec. 5719.042 of the Ohio Revised Code requires that the successful bidder submit to the City a "Personal Property Tax Affidavit" prior to starting work. A blank affidavit is enclosed for your use.

"Sec. 5719.042. After the award by a taxing district of any contract let by competitive bid and prior to the time the contract is entered into, the person making a bid shall submit to the district's fiscal officer a statement affirmed under oath that the person with whom the contract is to be made was not charged at the time the bid was submitted with any delinquent personal property taxes on the general tax list of personal property of any county in which the taxing district has territory or that such person was charged with delinquent personal property taxes on any such tax list, in which case the statement shall also set forth the amount of such due and unpaid delinquent taxes and any due and unpaid penalties and interest thereon. If the statement indicates that the taxpayer was charged with any such taxes, a copy of the statement shall be transmitted by the fiscal officer to the county treasurer within thirty days of the date it is submitted.

"A copy of the statement shall also be incorporated into the contract, and no payment shall be made with respect to any contract to which this section applies unless such statement has been so incorporated as a part thereof."

Personal Property Tax Affidavit

STATE OF OHIO :
SS
COUNTY OF HAMILTON :

_____ _____ _____
Name Position Company

Being first duly sworn says that _____ was the successful bidder on the _____ project and that at the time the bid was submitted said Company was/was not (mark out one) charged with owing delinquent property taxes on the General Tax List of personal property, and that the following amount of unpaid delinquent personal property taxes, penalties, and interest thereon is due as follows:

Delinquent personal property tax $_____

Penalties $_____

Interest $_____

_____
Affiant

Sworn to before me and subscribed in my presence this _____ day of _____, 19___.

_____
Notary Public

hio Bureau of Workers' Compensation
. he Industrial Commission of Ohio

Certificate of Employer's Right to Pay Compensation Direct

To be posted in the employer's place or places of employment in compliance with Sec. 4123.83 Ohio Revised Code. Any Employer requiring more than one copy of this certificate, may reproduce as many copies of the certificate (without any alterations or changes) as required.

Risk No. and Employer	Period Specified Below
SI-3297 Browning-Ferris Industries of Ohio, Inc. 33 North Wickliffe Circle Youngstown, Ohio 44515	From 1st Day of July, 1985 To 1st Day of July, 1986

THIS IS TO CERTIFY that on date hereof the above named employer having met the requirements provided in Section 4123.35 of the Ohio Revised Code has been granted authority by this Commission to pay compensation direct to its injured or dependents of killed employees as provided in said Section, for the period above set forth.

Signed: as Members of the Industrial Commission of Ohio

Leonard J. Lancaster — Chairman

Emory Steigerwalt — Vice-Chairman

Member

Member

Member

Signed, Ohio Bureau of Workers' Compensation.

Administrator

BWC-7201 (Rev. 7/83)
SI-1

No. 3-86

OhioEPA

1986

SOLID WASTE DISPOSAL LICENSE

STATE OF OHIO

WARREN COUNTY COMBINED

HEALTH DISTRICT

NAME

ADDRESS

CITY

This license has been issued in accordance with the requirements of state law and is subject to revocation or suspension for cause and is not transferable without consent of the licensor and the Director of the Ohio Environmental Protection Agency.

EXPIRES DECEMBER 31 OF THIS YEAR

December 17, 1985

Date Issued

Ray Shumaker, MD

Health Commissioner

CONDITIONS OF LICENSURE ON REVERSE SIDE

EPA 6001

© GOES 414

EXHIBIT 4

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).

Addressees:

Linda Murphy, Director, Office of Site Remediation and Restoration, Region I
Harley F. Laing, Director, Office of Environmental Stewardship, Region I
Richard L. Caspe, Director, Emergency and Remedial Response Division, Region II
Conrad S. Simon, Director, Division of Enforcement and Compliance Assurance, Region II
Thomas C. Voltaggio, Director, Hazardous Waste Management Division, Region III
Richard D. Green, Director Waste Management Division, Region IV
Norman Niedergang, Director, Waste, Pesticides, and Toxics Division, Region V
William Muno, Director, Superfund Division, Region V
Myron O. Knudsen, Director, Superfund Division, Region VI
Samuel Coleman, Director, Compliance Assurance and Enforcement Division, Region VI
William A.J. Spratlin, Director, Air, RCRA, and Toxics Division, Region VII
Michael J. Sanderson, Director, Superfund Division, Region VII
Max H. Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Carol Rushin, Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region VIII
Julie Anderson, Director, Waste Division, Region IX
Randall F. Smith, Director, Environmental Cleanup Office, Region X
Pamela Hill (Acting), Office of Regional Counsel, Region I
Walter Mugdan, Office of Regional Counsel, Region II
William Early, Office of Regional Counsel, Region III
Phyllis Harris, Office of Regional Counsel, Region IV
Gail C. Ginsburg, Office of Regional Counsel, Region V
Larry Starfield, Office of Regional Counsel, Region VI
Martha R. Steincamp, Office of Regional Counsel, Region VII
Thomas A. Speicher, Office of Regional Counsel, VIII
Nancy J. Marvel, Office of Regional Counsel, Region IX
Jackson L. Fox, Office of Regional Counsel, Region X

cc:

Timothy Fields, OSWER
Lois Schiffer, DOJ
Cliff Rothenstein, OSWER
Eric Schaeffer, ORE
Barry Breen, OSRE
Craig Hooks, FFEO
Lisa Freidman, OGC
Mike Shapiro, OSWER
Liz Cotsworth, OSW
Jim Woolford, FFRRO
Joel Gross, DOJ
Bruce Gelber, DOJ
Steve Luftig, OERR
Linda Boornazian, OSRE
Paul Connor, OSRE
Sandra Connors, OSRE
Ken Patterson, OSRE
Lori Boughton, OSRE
Randy Dietz, OCLA
Kevin Matthews, OCLA
Dan Winograd, Region I
Deborah Mellott, Region II
Charlie Howland, Region III
Chris Corbett, Region III
David Engle, Region IV
Mike Bellott, Region V
Cheryle Micinski, Region VII
Baerbel Schiller, Region VII
Jessie Goldfarb, Region VIII
Harrison Karr, Region IX
Roy Herzig, Region IX
Seth Bruckner, OERR
Dan Beckhard, DOJ
Alex Schmandt, OGC
Allen Geswein, OSW
Paul Balserak, OSW
Doug Dixon, OSRE/RSD
Leslie Jones, OSRE/RSD

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.

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

City of Blue Ash ADR Questionnaire Responses

12. Based upon its "full and thorough investigation," the City of Blue Ash does not know nor does it have any reason to believe that it transported or arranged for the transport or disposal of any material from within its boundaries to the Site.

13. N/A

14. a. BFI 1986 through December 31, 1990

Clarke Incinerator, Inc. 1978 through 1984

b. 13.a. Solid material. For the above time periods, chemical constituents unknown; however, the materials collected were municipal and commercial solid waste which included the following:

- office waste
- plastic bottles
- cardboard
- glass
- scrap wood

13.b. For the above time period, the process which generated this material was residential and commercial solid waste generation.

13.c. Residential material was collected once per week. Residential collection trucks operated five days per week. Commercial materials were generally collected anywhere from once to five times per week depending upon the individual needs of the commercial entity. Commercial entities using "roll off" containers would receive service on an as needed basis.

13.d. This calculation is based upon information collected by Michael Melampy, Service Coordinator II, City of Blue Ash

Residential Material (Clarke Incinerator, Inc.)

(1978 through 1984: Clarke Incinerator, Inc.)

Average Monthly Generation Rate	*Yearly Generation Rate*
1978: 206 tons	2,472 tons
1979: 217 tons	2,604 tons

1980:	228 tons	2,736 tons
1981:	240 tons	2,880 tons
1982:	253 tons	3,036 tons
1983:	266 tons	3,192 tons
1984:	280 tons	3,360 tons

Total Residential Tonnage 1978 - 1984: 20,280 tons

Residential Material (BFI)

(1986 through December 31, 1990: BFI)

Average Monthly Generation Rate	*Yearly Generation Rate*
1986: 372 tons	4,460 tons
1987: 391 tons	4,687 tons
1988: 411 tons	4,927 tons
1989: 432 tons	5,179 tons
1990: 454 tons	5,443 tons

Total Residential Tonnage 1986 - 1990: 24,696 tons

Commercial Material (Clarke Incinerator, Inc.)

(1978 through 1984:Clarke Incinerator, Inc.)

Average Monthly Generation Rate	*Yearly Generation Rate*
1978: 1,204 tons (not including roll-offs)	14,448 tons
1979: 1,229 tons (not including roll-offs)	14,748 tons
1980: 1,254 tons (not including roll-offs)	15,048 tons

1981:	1,280 tons (not including roll-offs)	15,360 tons
1982:	1,306 tons (not including roll-offs)	15,672 tons
1983:	1,333 tons (not including roll-offs)	15,996 tons
1984:	1,360 tons (not including roll-offs)	16,320 tons

Total Commercial Tonnage 1978 - 1984: 107,592 tons

(Roll-offs not included in this calculation because they were not transported to Clarke's Incinerator, Inc. Roll-offs were transported to landfills other than Skinner.) (Based upon conversation with Michael Melampy.)

Commercial Material (BFI)

(1986 through 1990 - BFI)

Average Monthly Generation Rate		*Yearly Generation Rate*
1986:	2,329 tons (includes roll-offs)	27,948 tons
1987:	2,399 tons (includes roll-offs)	28,788 tons
1988:	2,471 tons (includes roll-offs)	29,652 tons
1989:	2,545 tons (includes roll-offs)	30,540 tons
1990:	2,621 tons (includes roll-offs)	31,452 tons

Total Commercial Tonnage 1986 - 1990: 148,380 tons

13.e. Residential material was usually picked up from garbage cans, boxes, plastic bags or other containers. Commercial material was usually picked up in either dumpsters, roll-off containers, or garbage cans. No drums, sludges or other containerized wastes were accepted.

13.f. **Residential Material**: A "good faith estimate or approximation" based upon conversations with Michael Melampy would be two 25 - 34 cubic yard load packers per day.

Commercial Material: A "good faith estimate or approximation" based upon interviews with Michael Melampy would be the following:

Roll-offs: Unknown. Picked up on an as needed basis; and

Front end loaders: Three 25 - 34 cubic yard load packers per day.

13.g. **Residential Collection**

1986: $2.44/month per residential unit

1987: same

1988: same

1989: $2.68/month per residential unit

1990: $2.95/month per residential unit

Commercial Collection (25 Roll off units)

1986: $108.42/week per roll off unit

1987: same

1988: same

1989: $119.26/week per roll off unit

1990: $131.19/week per roll off unit

Commercial Collection (Front loader service)

1986: $0.88/cu. yd.

1987: same

1988: same

1989: $0.97/cu. yd.

1990: $1.07/cu. yd.

13.h. Michael Melampy, Service Coordinator II.

15. From 1978 through 1984 and from 1986 through December 31, 1990, the City of Blue Ash arranged for the collection and transport of materials from commercial establishments occupying over 20,000 square feet and from industrial establishments. The following list identifies each such establishment, the dates material was collected, a brief description of the type of material collected (e.g., solid, liquid, sludge), and the approximate amount:

Name	Dates	Description	Amount
Cincinnati Fan*	~ 78 - 90	solid	~ 577 tons/yr
Container Corp.*	~ 78 - 90	solid	~ 542 tons/yr
Daylite Screen*	~ 78 - 90	solid	~ 46 tons/yr
Dorman Products*	~ 78 - 90	solid	~ 1,190 tons/yr
Exhibit*	~ 78 - 90	solid	~ 226 tons/yr
G.E.*	~ 78 - 90	solid	~ 300 tons/yr
Gentek*	~ 78 - 90	solid	~ 104 tons/yr
Glenny Glass*	~ 78 - 90	solid	~ 10 tons/yr
Harland Co.*	~ 78 - 90	solid	~ 231 tons/yr
Kmart*	~ 78 - 90	solid	~ 300 tons/yr
McSwain*	~ 78 - 90	solid	~ 212 tons/yr
Miami Systems*	~ 78 - 90	solid	~ 1,051 tons/yr
Parkview Markets*	~ 78 - 90	solid	~ 751 tons/yr

(* indicates that this entity used a roll-off unit)

Portion Pac*	~ 78 - 90	solid	~ 1,114 tons/yr
Rosenthal*	~ 78 - 90	solid	~ 1,051 tons/yr
Schauer*	~ 78 - 90	solid	~ 78 tons/yr
Schmidt*	~ 78 - 90	solid	~ 520 tons/yr
Sears*	~ 78 - 90	solid	~ 81 tons/yr
Superior Labels*	~ 78 - 90	solid	~ 959 tons/yr
Throop Martin*	~ 78 - 90	solid	~ 63 tons/yr
United Air*	~ 78 - 90	solid	~ 762 tons/yr
Whiting Mfg.*	~ 78 - 90	solid	~ 1,051 tons/yr
Xomox*	~ 78 - 90	solid	~ 474 tons/yr
Blue Ash (shop)*	~ 78 - 90	solid	~ 50 tons/yr
Directel, Inc.	~ 78 - 90	solid	~ 0.6 tons/wk
Ramada Inn	~ 78 - 90	solid	~ 2.7 tons/wk
Red Roof Inn	~ 78 - 90	solid	~ 0.9 tons/wk
Garcias	~ 78 - 90	solid	~ 1.8 tons/wk
Merrill Chemical	~ 78 - 90	solid	~ 1.2 tons/wk
Westlake Center	~ 78 - 90	solid	~ 2.4 tons/wk
Steelcraft	~ 78 - 90	solid	~ 4.8 tons/wk
Deluxe Check	~ 78 - 90	solid	~ 2.4 tons/wk
Gary Safe	~ 78 - 90	solid	~ 1.35 tons/wk
Northmark Building	~ 78 - 90	solid	~ 1.2 tons/wk

(* indicates that this entity used a roll-off)

G.E. (Creek)	~ 78 - 90	solid	~ 1.6 tons/wk
Fisher Scientific	~ 78 - 90	solid	~ 1.35 tons/wk
Metal Improvement	~ 78 - 90	solid	~ 0.2 tons/wk
Wynn Oil	~ 78 - 90	solid	~ 2.25 tons/wk
Sears (Creek)	~ 78 - 90	solid	~ 1.8 tons/wk
Loroco	~ 78 - 90	solid	~ 0.9 tons/wk
Reed Hartman Corp. Ctr.	~ 78 - 90	solid	~ 3.6 tons/wk
Cintas	~ 78 - 90	solid	~ 2.4 tons/wk
Great American Ins.	~ 78 - 90	solid	~ 2.4 tons/wk
Seaflay	~ 78 - 90	solid	~ 2.4 tons/wk
Da-Lite Screen	~ 78 - 90	solid	~ 0.4 tons/wk
Wynn Packaging	~ 78 - 90	solid	~ 1.35 tons/wk
Glenny Glass	~ 78 - 90	solid	~ 0.4 tons/wk
General Foods	~ 78 - 90	solid	~ 1.6 tons/wk
Distribution Center	~ 78 - 90	solid	~ 7 tons/wk
Kraft Foods	~ 78 - 90	solid	~ 1.2 tons/wk
Van Dyne Crotty	~ 78 - 90	solid	~ 0.8 tons/wk
Buehler Paper	~ 78 - 90	solid	~ 0.6 tons/wk
Precision Lens Crafters	~ 78 - 90	solid	~ 0.6 tons/wk
Armco Steel	~ 78 - 90	solid	~ 0.3 tons/wk
National Guard	~ 78 - 90	solid	~ 0.8 tons/wk
Parker Hannikan	~ 78 - 90	solid	~ 0.8 tons/wk

Corporex Properties	~ 78 - 90	solid	~ 0.8 tons/wk
Cincinnati Thermal Spray	~ 78 - 90	solid	~ 0.75 tons/wk
Airtron	~ 78 - 90	solid	~ 0.6 tons/wk
Cincinnati Safe	~ 78 - 90	solid	~ 0.2 tons/wk
Interstate Machine	~ 78 - 90	solid	~ 0.6 tons/wk
Blue Ash Too & Die	~ 78 - 90	solid	~ 0.8 tons/wk
Gold Crown Machinery	~ 78 - 90	solid	~ 0.1 tons/wk
Central Business Systems	~ 78 - 90	solid	~ 0.4 tons/wk
Buckeye Industrial Supply	~ 78 - 90	solid	~ 0.2 tons/wk
Ruff Paper Co.	~ 78 - 90	solid	~ 0.1 tons/wk
Sylvania (GTE)	~ 78 - 90	solid	~ 0.8 tons/wk
McGraw Edison	~ 78 - 90	solid	~ 0.2 tons/wk
Amana	~ 78 - 90	solid	~ 0.6 tons/wk
Ackerman Chacco	~ 78 - 90	solid	~ 0.5 tons/wk
Perspectives Park	~ 78 - 90	solid	~ 0.6 tons/wk
Re-Machine & Retro-fit	~ 78 - 90	solid	~ 0.8 tons/wk
Drooks Auto Parts	~ 78 - 90	solid	~ 0.4 tons/wk
Vantage Properties	~ 78 - 90	solid	~ 1.2 tons/wk
Cantwell Machinery	~ 78 - 90	solid	~ 0.3 tons/wk
Sharonville Day Care Ctr.	~ 78 - 90	solid	~ 0.8 tons/wk
Bonnie Lynn Bakery	~ 78 - 90	solid	~ 0.6 tons/wk
Reed Hartman Corp, Ctr.	~ 78 - 90	solid	~ 1.2 tons/wk

Prudential (Reed Hartman Bus. Ctr)	~ 78 - 90	solid	~ 3.2 tons/wk
Schmidt Aviation	~ 78 - 90	solid	~ 0.1 tons/wk
Bob Summerel Tire	~ 78 - 90	solid	~ 0.2 tons/wk
Blue Ash Nursing Home	~ 78 - 90	solid	~ 1.2 tons/wk
YMCA	~ 78 - 90	solid	~ 1.2 tons/wk
Schauer Manufacturing	~ 78 - 90	solid	~ 0.9 tons/wk
National Label	~ 78 - 90	solid	~ 2.2 tons/wk
Kenwood Prof. Bldg	~ 78 - 90	solid	~ 1.2 tons/wk
Sycamore Meadows	~ 78 - 90	solid	~ 0.9 tons/wk
John Q's	~ 78 - 90	solid	~ 2.4 tons/wk
Blue Ash's Offices	~ 78 - 90	solid	~ 0.9 tons/wk
Crossgate Lanes	~ 78 - 90	solid	~ 0.9 tons/wk
Walnut Creek Apts.	~ 78 - 90	solid	~ 2.4 tons/wk
K-Mart	~ 78 - 90	solid	~ 0.8 tons/wk
Michel Chemical	~ 78 - 90	solid	~ 2.4 tons/wk
Welco Industries	~ 78 - 90	solid	~ 0.9 tons/wk
Steelcraft	~ 78 - 90	solid	~ 23 tons/wk
Raymond Walters	~ 78 - 90	solid	~ 2.25 tons/wk
Vortec	~ 78 - 90	solid	~ 0.8 tons/wk
Belcan	~ 78 - 90	solid	~ 2.4 tons/wk
Krogers	~ 78 - 90	solid	~ 0.8 tons/ wk

Lighting Systems Inc.	~ 78 - 90	solid	~ 3tons/wk
Planet	~ 78 - 90	solid	~ 1.2 tons/wk
Carver Woods	~ 78 - 90	solid	~ 1.8 tons/wk
Orchard Offices	~ 78 - 90	solid	~ 1.6 tons/wk
Lannis Fences	~ 78 - 90	solid	~ 0.1 tons/wk
Ringo Lanes	~ 78 - 90	solid	~ 0.4 tons/wk
Crossgate Square	~ 78 - 90	solid	~ 0.8 tons/wk
Lyons Corporate Ctr.	~ 78 - 90	solid	~ 2.6 tons/wk
Electronic Engineering	~ 78 - 90	solid	~ 0.4 tons/wk
P&G	~ 78 - 90	solid	~ 12 tons/wk
P&G Warehouse	~ 78 - 90	solid	~ 0.2 tons/wk
Basco	~ 78 - 90	solid	~ 0.9 tons/wk
Schulte Corp.	~ 78 - 90	solid	~ 0.8 tons/wk
Dosimeter	~ 78 - 90	solid	~ 0.9 tons/wk
Sheffer Corp.	~ 78 - 90	solid	~ 2.4 tons/wk
Stolle Research and Dev.	~ 78 - 90	solid	~ 0.3 tons/wk
United Sales Assoc.	~ 78 - 90	solid	~ 0.3 tons/wk
Lehr Tool	~ 78 - 90	solid	~ 2.1 tons/wk
Akko Fasteners	~ 78 - 90	solid	~ 1.8 tons/wk
Magnet Corp.	~ 78 - 90	solid	~ 4.8 tons/wk
J.W. Harris	~ 78 - 90	solid	~ 2.1 tons/wk
United Tape & Label	~ 78 - 90	solid	~ 2.4 tons/wk

Fred J. Murphy	~ 78 - 90	solid	~ 1.2 tons/wk
Davey Compressor	~ 78 - 90	solid	~ 2.4 tons/wk
P.O.B.	~ 78 - 90	solid	~ 0.6 tons/wk
Metalex	~ 78 - 90	solid	~ 3.6 tons/wk
Federal Stampings	~ 78 - 90	solid	~ 0.4 tons/wk
Keystone General	~ 78 - 90	solid	~ 1.2 tons/wk
Brown Campbell	~ 78 - 90	solid	~ 0.2 tons/wk
Orr Safety	~ 78 - 90	solid	~ 0.4 tons/wk
McJunkin	~ 78 - 90	solid	~ 0.6 tons/wk
Warner Cable	~ 78 - 90	solid	~ 3.0 tons/wk
S&L Data Corp.	~ 78 - 90	solid	~ 0.8 tons/wk
Cornell Center	~ 78 - 90	solid	~ 0.8 tons/wk
Heekin Can	~ 78 - 90	solid	~ 0.8 tons/wk
American Feintool	~ 78 - 90	solid	~ 0.8 tons/wk
B & B Manufacturing	~ 78 - 90	solid	~ 0.2 tons/wk
Janell, Inc.	~ 78 - 90	solid	~ 0.7 tons/wk
Roofers Supply, Inc.	~ 78 - 90	solid	~ 0.4 tons/wk
Ryberg Corp.	~ 78 - 90	solid	~ 0.2 tons/wk
H. Gallenstein Construction	~ 78 - 90	solid	~ 0.8 tons/wk
Pagels Moving & Storage	~ 78 - 90	solid	~ 1.6 tons/wk
United Moving & Storage	~ 78 - 90	solid	~ 0.6 tons/wk
Fiberglass Evercoat	~ 78 - 90	solid	~ 7.2 tons/wk

Cincinnati Sprinkler	~ 78 - 90	solid	~ 0.1 tons/wk
Douglas Machine Tool	~ 78 - 90	solid	~ 0.1 tons/wk
Phil Bell Co.	~ 78 - 90	solid	~ 0.4 tons/wk
Pella Windows & Doors	~ 78 - 90	solid	~ 0.3 tons/wk
RA Mueller	~ 78 - 90	solid	~ 0.4 tons/wk
Haines Hasco	~ 78 - 90	solid	~ 0.3 tons/wk
JN Fauver	~ 78 - 90	solid	~ 0.4 tons/wk
Sanger Moving & Storage	~ 78 - 90	solid	~ 0.2 tons/wk
Allen Bradley	~ 78 - 90	solid	~ 0.1 tons/wk
Pat Matson's	~ 78 - 90	solid	~ 0.4 tons/wk

16. a. Minutes from numerous Blue Ash City Council meetings, conversations with several employees in Blue Ash's Service Department (employed since 1960), and interviews with Marvin Thompson (City Manager since 1973) indicate that the City of Blue Ash transported and/or arranged for the transport of material from within its boundaries to several locations other than the Site. Taken as a whole, this evidence indicates that the City of Blue Ash used locations other than the Site from 1955 through December 31, 1990. After conducting a "full and thorough investigation," there is absolutely no evidence indicating that the City of Blue Ash transported and/or arranged for the transport of any material to the Site. (See documents contained in Confidential folder.)

b. The City of Blue Ash was not incorporated until 1955.

1955 - December 31, 1990: Municipal trash dumped at other locations (see documents contained in Confidential folder for references to landfills other than the Site)

c. 1955 - 1985: The City of Blue Ash, Ohio

1986 - December 31, 1990: BFI

17. There were no sewage or wastewater treatment plants in the City of Blue Ash during the relevant time period.

18. Responsive documents provided in enclosed Redwell folder.

19. Responsive documents provided in enclosed Redwell folder.

20. See attached list provided in Exh. 1.

27. a. Persons interviewed who have relevant information who were consulted in the preparation of these answers include:

Dennis Albrinck, Service Director

Marvin Thompson, City Manager

Mike Melampy, Service Coordinator II

Julie Prickett

Wilbur Brewer, Sr., Serviceworker II

John L. Viox, Service Supervisor

Steven R. Gillespie, Serviceworker II

Terry Chapman, Service Coordinator I

William G. Stabler, Service Coordinator I

b. The following individuals may have relevant information but were not interviewed:

Robert I. Richardson	Deceased
James A. Sawyer	Deceased

c. The following may be relevant but were not reviewed:

Copies of all checks which were issued and/or paid invoices, and check registers

The City of Blue Ash has a schedule for records retention. Most likely, these documents were destroyed in accordance with that schedule.

28. **Factual Defenses**

After conducting a "full and thorough investigation," there are no records linking the City of Blue Ash to the Site. Furthermore, all Service Department employees recollect that the City's waste materials went to landfills other than the Site. Nevertheless, if this investigation were to uncover evidence sufficiently linking the City of Blue Ash to the Site, the relative toxicity of any of these materials would be extremely low especially in light of the fact that the City of Blue Ash specifically prohibited commercial and industrial entities from disposing of sludge or liquid materials into the containers which the City of Blue Ash transported on their behalf.

Legal Defenses:

No Joint and Several Liability

Pursuant to *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, No. 2:94-876, 1996 U.S. Dist. LEXIS (S.D. Ohio March 18, 1996)(attached as Exh. 2), potentially Responsible Parties ("PRPs") under the Comprehensive Environmental Response Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 ("SARA"), may not bring a claim upon which relief can be granted under 42 U.S.C. § 9607(a), CERCLA § 107(a). *AT&T Global Info. Solutions Co.*, which is the controlling authority for this action pending before the United States District Court for the Southern District of Ohio, after fully expounding upon the distinctions between the joint and several liability among responsible parties falling within 42 U.S.C. § 9607(a), CERCLA § 107(a) and that of 42 U.S.C. § 9613(f), CERCLA § 113(f), which would limit a responsible plaintiff's claim solely to that of a contribution recovery, held:

> [T]he Court concludes that plaintiffs, as potentially responsible parties, are not entitled to seek full cost recovery for all for all expenses incurred in the cleanup, but are limited to contribution recovery.

Id. at *38 (citations omitted)(Exh. 2).

Ensuring that its holding would remain clear and unambiguous, over a year later the *AT&T Global Info. Solutions Co.* Court reiterated its March 18, 1996 holding in a March 31, 1997 Memorandum and Order:

> Plaintiffs initially sought joint and several liability against defendants pursuant to CERCLA § 107(a). Defendants subsequently moved to dismiss the complaint on the basis that plaintiffs, as potentially responsible parties [PRPs], are not entitled to pursue a joint and several liability claim to recover all costs plaintiffs incurred in complying with the Consent Order. In the alternative, defendants argued that plaintiffs should be limited to contribution recovery for those expenses that plaintiffs incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to CERCLA § 113(f)(1). Defendants also moved to dismiss plaintiffs' claims for attorney's fees and for reimbursement of governmental oversight costs. In a related motion, plaintiffs moved to dismiss defendants' counterclaims for contribution.
>
> By Memorandum and Order dated March 18, 1996 [Record No. 192] the Court granted defendants' alternative motion to limit plaintiffs' claims to contribution recovery of plaintiffs' excess costs. ***The Court held that plaintiffs, as potentially responsible parties, were not entitled to seek full cost recovery for all the expenses that plaintiffs incurred in the cleanup.***

AT&T Global Info. Solutions Co. v. Union Tank Car Co., No. 2:94-876, 1997 WL 382101 at *1 (S.D. Ohio March 31, 1997)(attached as Exh. 3).

Importance of Toxicity

The degree of toxicity of the particular waste attributed to each responsible party is a primary consideration among the"Gore Factors" or other equitable factors considered under 42 U.S.C. § 9613(f)(1), CERCLA § 113(f)(1) for allocating contribution costs among responsible parties. As such, the degree of toxicity should be an allocation factor which apportions liability to a greater degree beyond an apportionment based upon the volume of waste attributable to the responsible parties. *See, e.g., Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995), stating in pertinent part:

> A primary focus of these factors is the harm that each party causes the environment. Those parties who can show that their contribution to the harm is relatively small in terms of amount of waste, toxicity of the waste, involvement with the waste, and care, stand in a better position to be allocated a smaller portion of response costs.

Id. at 935 (citations omitted).

CERCLA, in the allocation stage, places the costs of response on those responsible for creating the hazardous condition. Allocating responsibility based partially on toxicity does just that because those who release substances that are more toxic are more responsible for the hazardous condition. *Id.* at 938. *See also, Catellus Dev. Corp. v. L. D. Mcfarland Co.*, 910 F. Supp. 1509, 1514 (D. Oregon 1995)(following the *Control Data Corp.* Court's reasoning in heavily weighing toxicity as an equitable allocation factor); *BancAmerica Comm'l Corp. v. Trinity Indus., Inc.*, 900 F. Supp 1427, 1474 (D. Kansas 1995)(following *Control Data Corp.* and noting that "[t]his court agrees with the reasoning in *Control Data* and finds it equitable to adopt the approach taken in that case. which allocated one-third of response costs to a party that had contributed only 10% of the total volume of pollution").

In cases where particular municipal solid waste is found to contain hazardous substances, thereby subjecting the municipality to potential liability under 42 U.S.C. § 9613(f), CERCLA § 113(f) as a potential responsible party, such waste has an extremely low degree of toxicity. Therefore, in such cases, the low level of toxicity is a primary consideration under the "Gore Factors" or other equitable factors pursuant to 42 U.S.C. § 9613(f)(1), CERCLA § 113(f)(1), and must weigh heavily in favor of a significantly lower allocation in relation to the other non-municipal responsible parties.

The fact that municipal solid waste is of extremely low toxicity is reflected in and is the basis of the U.S. EPA's Interim Municipal Settlement Policy issued nearly eight years ago on December 12, 1989. 54 Fed. Reg. 51071(1989). In this regard the interim policy states:

> Although the actual composition of such wastes varies considerably at individual sites, MSW is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and ***may contain small quantities of household hazardous wastes (e.g., pesticides and solvents) as well as small quantity generator wastes.***

Id. at 51074.

29. With respect to municipalities such as the City of Blue Ash, an equitable and fair allocation of liability, if any, should be based upon the U.S. EPA's Municipal Solid Waste Settlement Proposal (hereafter "Proposal") (see Exh. 4 for the "Announcement of and Request for Comment on Municipal Solid Waste Settlement Proposal.") The public comment period for this Proposal ended August 25, 1997, and it appears that the Proposal will be promulgated in substantially the same form as a final policy in the near future. This Proposal describes a rational methodology for calculating "appropriate settlement contributions for . . . generators/transporters (G/Ts) of . . . municipal solid waste. . . The purpose of this proposal is to provide a fair, consistent, and efficient settlement methodology for resolving potential liability of . . . [municipal solid waste generators and transporters] at co-disposal Superfund sites." (Exh. 4 at 1). This Proposal is specifically targeted to assist municipalities such as the City of Blue Ash, as the U.S. EPA recognizes that "PRPs that contributed large quantities of hazardous substances at co-disposal landfills have sometimes sought to spread the cost of their CERCLA liability among large numbers of other parties, including those whose only contribution was [municipal solid waste]." Id. at 2. More specifically, "[a]t sites for which prior settlements have been reached but where MSW parties are subject to third party litigation, EPA will recommend that the principles set forth in the final policy be followed by the private litigants to reach a settlement involving the MSW parties." Id. at 4.

The Proposal is based upon a unit cost methodology for the closure/post-closure activities at a RCRA Subtitle D landfill. Id. at 5. "EPA's estimate of the cost per unit of remediating [municipal solid waste] at a representative MSW-only landfill is $3.05 per ton." Id. The $3.05 per ton figure may rise to $3.25 if certain geologic factors exist (i.e., shallow aquifer beneath the landfill, unusually high rainfall in the area). Id.

Since there is no evidence whatsoever that any material from the City of Blue Ash was disposed at the Site, the City of Blue Ash should be assigned a zero liability share. Nevertheless, if some additional evidence is discovered during this ADR procedure sufficiently linking Blue Ash to the Site, then the above Proposal should be used to allocate liability to the City of Blue Ash ($3.05/ton).

30. No response

31. In compliance with the ADR Questionnaire requirements, a full and thorough investigation was conducted. Interviews were completed with individuals familiar with the City of Blue Ash's disposal practices from 1955 through 1990. Of all the individuals interviewed, no one recalled any waste being shipped to the Site. A comprehensive record review also failed to turn up any references to the Site. (See also affidavits of Michael Melampy and Wilbur Brewer, Sr. attached as Exh. 5).

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Name	Position Title	Last Known Address	Phone Number	Approximate Dates of Service*	Deceased (X)
Dennis E. Albrinck	Service Director	1194 Oldwick Drive, Reading, OH 45215	554-1599	February 1996 - Present	
Herman W. Cauble	Service Director	9904 Sherwood Drive, Cincinnati, OH 45231	~~851-9230~~ 521 2242	June 1989 - November 1995	
Preston M. Combs	Service Director	920 Hayes, Hamilton, OH 45015 City of Middletown	N/A ~~541-8896~~	August 1984 - 1989	
Robert I. Richardson	Service Director	6619 Elm Street, Cincinnati, OH 45227	N/A	January 1974 - August 1984	X
Gary Kammer	Service Director	N/A	N/A	1972/1973? - December 1974?	
Dennis J. Cunningham	Service Supervisor	747 Barg Salt Run Road, Cincinnati, OH 45244	528-7797	August 1975 - Present	
John L. Viox	Service Supervisor	9760 Monroe Avenue, Cincinnati, OH 45242	N/A	August 1978 - January 1994	
James A. Sawyer	Service Supervisor/Foreman	16 Yorktowne Drive, Cincinnati, OH 45241	N/A	April 1969 - December 1990	X
Terry Chapman	Service Coordinator I	7602 Blue Ash Road, Cincinnati, OH 45236	791-2974	April 1981 - Present	
Michael T. Melampy	Service Coordinator II	1466 Gibson Road, Goshen, OH 45122	575-3220	July 1973- Present	
William G. Stabler	Service Coordinator I	9383 Raven Lane, Cincinnati, OH 45242	984-1832	January 1979 - Present	
Harrie C. Coulter	Serviceworker II	4831 Teal Lane, Milford, OH 45150	752-0673	December 1969 - June 1997	
Steven R. Gillespie	Serviceworker II	5097 Meyers Lane, Blue Ash, OH 45242	984-2037	October 1981 - Present	
Robert R. Kirschner	Serviceworker II	10538 Plainfield Road, Blue Ash, OH 45241	563-7951	August 1981 - Present	
Joseph A. Long	Serviceworker II	4621 Cooper Road, Cincinnati, OH 45242	793-1774	September 1976 - Present	
Wilbur E. Brewer	Serviceworker II	4314 Woodlawn Avenue, Cincinnati, OH 45236	984-2136	April 1985 - September 1988**	
Charles Frick	Serviceworker II	40 S. Terrace Dr. #5, Reading, OH 45215	N/A 563-4408	March 1977 - July 1993	

* Date of service indicates entire time period the individual is (was) employed by the City of Blue Ash. The individual may not have held position title listed during the entire time period (e.g. Dennis Cunningham was hired at entry level position and has been promoted over time to current position of Service Supervisor.)

** Wilbur Brewer is still an employee of the City of Blue Ash; however, he only served in the Serviceworker II capacity during this time period.

COUNCIL MEMBERS
Village / City of Blue Ash

Village of Blue Ash

Year	Members/Comments
12/55 - 12/57	Frank F. Ferris, II (Mayor) James E. Turner Cecil B. Daniels E. Craig Kennedy Clyde B. Proctor Cletus F. Hoenemier Herbert Ness Paul D. McKinney (Clerk) George E. Strawser (Treasurer)
12/57 - 12/59	Herbert Ness (Mayor George W. Strawser (Died 12/59) William Barker Melvin L. McNess (Died 6/21/90) John T. Koetz Ardorous J. Tidd Richard M. Miller James E. McMahon (Clerk; resigned 3/18/58) James Carter (Apptd. Clerk 3/18/59) Richard W. Remke (Treas.)
12/59 - 7/61* - 12/61	Frank F. Ferris, II (Mayor) James E. Turner Fred B. Richardson Charles E. Zimmer Walter C. Reuszer Robert G. Proctor Stephen Ranz (Apptd. 3/22/60) Paul D. McKinney (Clerk) A. T. Carrelli (Apptd. Treas. 3/31/60; died 11/22/91)

*Council members elected in 12/59 were reappointed in July 1961 when the Village of Blue Ash became a City and the Charter form of government took effect. Council members thereafter took office the first Council Meeting in December following their election. Terms are for 2 years.

Via Ordinance No. 61-57 passed at the 12/5/61 Council Meeting, the separate positions of Clerk of Council and Treasurer were combined into one Clerk/Treasurer position.

City of Blue Ash

Year	Members/Comments
12/61 - 12/63	Frank F. Ferris, II (Mayor James E. Turner (Vice Mayor) James Carter Fred B. Richardson Charles E. Zimmer

Council Members/By Year
Page 2

Year	Members/Comments
12/61 - 12/63 (contd.)	Walter C. Reuszer Stephen Ranz Robert G. Proctor (Resigned 11/20/62) Robert Emery (Apptd. 11/20/62) Paul D. McKinney (Clerk/Treas)
12/63 - 12/65	Frank F. Ferris, II (Mayor) James E. Turner (Vice Mayor) Walter C. Reuszer Fred B. Richardson Carl Hall Robert Emery Robert A. Stevens Paul D. McKinney (Resigned C/T 9/24/64--Acting City Manager 6/12/64 - 4/22/65) Garnett D. Savage (Apptd. Clerk/Treas. 9/24/64)
12/65 - 12/67	Walter C. Reuszer (Mayor) Robert Emery (Vice Mayor) James E. Turner Charles E. Zimmer Carl Hall (Died 4/66) Robert A. Stevens Harlan E. Houser Louis Strottman (Apptd. 5/26/66; resigned 8/24/67; died 12/25/93) Garnett D. Savage (Clerk/Treas; resigned 2/28/66) Richard Myers (Apptd. C/T 2/28/66; apptd. to Council 9/5/67 to fill Strottman's unexp. term and held dual positions of Council member and Clerk/Treas. until 12/67.)
12/67 - 12/69	Harlan E. Houser (Mayor) Mel Schulz (Vice Mayor) James E. Turner Walter C. Reuszer (Died 11/84) Freeman Stock J. E. Smith Richard Myers (Resigned C/T 4/25/68) James P.Klatte (Apptd. Clerk/Treas. 5/9/68; resigned 7/10/69)
12/69 - 12/71	Charles W. Proctor (Mayor) Robert Emery (Vice Mayor) Paul D. McKinney Leonard Ingram Daniel Steidle (Died 10/88) Jack Redwine Harold G. Korbee Chandler Eason (Apptd. Clerk/Treas. 7/10/69)

Year	Members/Comments
12/71 - 12/73	Charles W. Proctor (Mayor) Harold G. Korbee (Vice Mayor) Paul D. McKinney Harlan E. Houser Leonard Ingram Jack Redwine (Resigned 6/22/72) Richard D. Huddleston Raymond MacNab (Apptd. 6/22/72; filled unexp. term of Redwine) Chandler Eason (Resigned Clerk/Treas. position 8/24/72) Marion Jett (Apptd. Clerk/Treas. 9/12/72)
12/73 - 12/75	Raymond MacNab (Mayor) Paul D. McKinney (Vice Mayor) Chandler Eason Stephanie Stoller Robert F. Schueler Don R. Biedermann Curtis Battle Marion Jett (Clerk/Treas.)
12/75 - 12/77	Raymond MacNab (Mayor) Paul D. McKinney (Vice Mayor) Charles W. Proctor Stephanie Stoller Robert F. Schueler Don R. Biedermann Curtis Battle Marion Jett (Resigned C/T 11/18/76; reapptd. C/T 3/17/77) Alice Geier (Apptd. Acting C/T 12/17/76; resigned 3/17/77)
12/77 - 12/79	Paul D. McKinney (Mayor) Don R. Biedermann (Vice Mayor) Charles W. Proctor Stephanie Stoller Robert F. Schueler Curtis Battle Raymond L. MacNab Marion Jett (Resigned Clerk/Treas. 9/1/79) Mary E. Malone (Apptd. Clerk/Treas. 9/1/79)

*Ord. 79-179, terminating the separate offices of Clerk of Council and Treasurer to be known as one office of Clerk/Treasurer, was passed at the 9/13/79 Council Meeting.

12/79 - 12/81	Don R. Biedermann (Mayor) Stephanie Stoller (Vice Mayor) Charles W. Proctor Robert F. Schueler Curtis Battle

Council Members/By Year
Page 4

Year	Members/Comments
12/79 - 12/81 (cont'd)	Paul D. McKinney (passed away July 1994) Raymond L. MacNab Mary E. Malone (Clerk/Treas.)
12/81 - 12/83	Don R. Biedermann (Mayor) Stephanie Stoller (Vice Mayor) Charles W. Proctor Robert F. Schueler Curtis Battle James R. Cobb Raymond L. MacNab Mary E. Malone (Clerk/Treas.)
12/83 - 12/85	Stephanie Stoller (Mayor) James R. Cobb (Vice Mayor) Charles W. Proctor Robert F. Schueler Curtis Battle Raymond L. MacNab Don R. Biedermann Mary E. Malone (Clerk/Treas.)
12/85 - 12/87	Stephanie Stoller (Mayor) Robert F. Schueler (Vice Mayor) James R. Cobb Raymond L. MacNab Charles W. Proctor Curtis Battle Don R. Biedermann Mary E. Malone (Clerk/Treas.)
12/87 - 12/89	Robert F. Schueler (Mayor) James R. Cobb (Vice Mayor; resigned Council position 2/24/89) Stephanie Stoller (Apptd. Vice Mayor 2/23/89) Walter L. Reuszer (Apptd. 2/23/89; fillex unexp. term of Cobb) Raymond L. MacNab Charles W. Proctor Curtis R. Battle Don R. Biedermann Mary E. Malone (Clerk/Treas.)
12/89 - 12/91	Robert F. Schueler (Mayor-resigned 10/91) Stephanie Stoller (Vice Mayor; served as temp. Mayor 12/91-12/91) Walter L. Reuszer Raymond L. MacNab Charles W. Proctor Walter R. Minning Don R. Biedermann Mary E. Malone (Clerk of Council)

12/91 - 12/93	Walter L. Reuszer (Mayor) Raymond L. MacNab (Vice-Mayor) Walter R. Minning Don R. Biedermann James Sumner Robert F. Schueler Stephanie Stoller Mary E. Malone (Clerk of Council
12/93 - 12/95	Walter L. Reuszer (Mayor) Raymond L. MacNab (Vice-Mayor) Walter R. Minning Don R. Biedermann James Sumner Robert F. Schueler Stephanie Stoller Mary E. Malone (Clerk of Council)
12/95 - 12/97	Raymond L. MacNab (Mayor) Walter L. Reuszer (Vice-Mayor;Resigned Vice Mayor 4/30/97) Rick Bryan Don R. Biedermann (Apptd Vice-Mayor 4/30/97 to fill Reuszer term) James Sumner Robert F. Schueler Stephanie Stoller Mary E. Malone (Clerk of Council)
12/97 - 12/99	

2ND CASE of Level 1 printed in FULL format.

AT & T Global Information Solutions Company, et al., Plaintiffs, vs. Union Tank Car Company, et al., Defendants.

Civil Action No. 2:94-876

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

1996 U.S. Dist. LEXIS 8167

March 18, 1996, FILED; March 19, 1996, Docketed

COUNSEL: [*1] For AT&T GLOBAL INFORMATION SOLUTIONS COMPANY, AMERICAN TELEPHONE & TELEGRAPH, GOODYEAR TIRE AND RUBBER COMPANY, STEEL CEILINGS INC, plaintiffs: John Thomas James Sunderland, Thompson, Hine & Flory - 2, Columbus, OH.

For ARMCO INC, defendant: John Anthony Kington, Eugene Baldwin Lewis, Chester Willcox & Saxbe - 2, Columbus, OH. John P Krill, Jr, James S Wrona, Craig P Wilson, Kirkpatrick & Lockhart, Harrisburg, PA.

JUDGES: John D. Holschuh, Chief Judge, United States District Court, Mag. Judge Mark R. Abel

OPINIONBY: John D. Holschuh

OPINION: MEMORANDUM AND ORDER

This matter is before the Court upon the parties' cross motions to dismiss [Record Nos. 64, 65 and 113]. The motions have been fully briefed and are ripe for decision.

INTRODUCTION

This is an environmental action in which plaintiffs seek to recover from defendants all costs plaintiffs have expended or will expend in a cleanup action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, *42 U.S.C. § 9601*, et seq. [CERCLA], as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 [SARA]. Defendants have moved to dismiss plaintiffs' claims [*2] for joint and several liability or in the alternative to limit plaintiffs' recovery to contribution expenses. Defendants also seek dismissal of plaintiffs' claims for recovery of governmental oversight costs and attorneys' fees. Plaintiffs have moved to dismiss defendants' counterclaim for contribution expenses.

FACTUAL BACKGROUND

Defendant Granville Solvents, Inc., [GSI] owns real property located on Palmer Lane in Granville, Ohio [GSI Site]. From approximately 1958 until 1980, GSI operated a storage, distribution and recycling business at the GSI site. In 1986, GSI was ordered by the Ohio Environmental Protection Agency [Ohio EPA] and the Licking County Court of Common Pleas to cease operations. On June 18, 1990, the Ohio EPA commenced removal of the drums and tanks of waste chemical solvents and residues located at the GSI site. By October 11, 1991, the Ohio EPA completed its removal activities. However, it is alleged that some of the drums and tanks were in a rusted and deteriorated condition and had leaked their contents into the environment.

On September 7, 1994, plaintiffs entered into an Administrative Order of Consent [Consent Order] with the United States [*3] Environmental Protection Agency [EPA] pursuant to CERCLA. The Consent Order requires plaintiffs to engage in certain response actions at the GSI Site, including development and implementation of a site security plan, air monitoring program, comprehensive sampling and analysis plan, and groundwater monitoring and testing plan; installation of a groundwater extraction and treatment system; implementation of action to insure that any contaminated groundwater originating from the GSI Site meets all risk-based and applicable state and federal drinking standards; and other remedial measures, including reimbursing the government for the cost of overseeing the private party cleanup.

On September 9, 1994, plaintiffs filed the instant action, seeking joint and several liability against defendants for the response costs Plaintiffs have incurred, and will incur, as a result of actual or threatened release of hazardous substances at the GSI Site." The complaint also seeks a declaration of rights as to defendants' liability for future response costs. Plaintiffs also seek

recovery of interest, costs and attorneys' fees incurred in connection with this litigation.

Defendants have moved to dismiss [*4] plaintiffs' complaint, arguing that plaintiffs are not entitled to recover all monies plaintiffs incurred in complying with the Consent Order under *42 U.S.C. § 9607* [CERCLA section 107], but are limited to contribution for expenses that plaintiff incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to *42 U.S.C. § 9613*(f)(1) [CERCLA section 113(f)(1)]. Defendants have also moved to dismiss plaintiffs' claims for attorneys' fees and for reimbursement of government oversight costs. [Record Nos. 64 and 113]. n1 In a related motion, plaintiffs have moved to dismiss defendants' counterclaims for contribution. [Record No. 65].

n1 The Court notes that subsequent to defendants' motion to dismiss, plaintiffs filed an amended complaint [Record No. 98]. The parties have stipulated that all pleadings related to dismissal of the complaint and counterclaims shall be deemed refiled and submitted to this Court for consideration with regard to the First Amended Complaint. [Record No. 113].

[*5]

DISCUSSION

The purpose of a motion under Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the complaint. When considering a motion to dismiss pursuant to Rule 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515. 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983); Dunn v. Tennessee, 697 F.2d 121, 125 (6th Cir. 1982),* cert. denied, *460 U.S. 1086; Smart v. Ellis Trucking Co., 580 F.2d 215, 218 n.3 (6th Cir. 1978),* cert. denied, *440 U.S. 958, 59 L. Ed. 2d 770, 99 S. Ct. 1497 (1979); Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976).* Although the Court must liberally construe the complaint in favor of the party opposing the motion to dismiss, *Kugler v. Helfant, 421 U.S. 117, 125-26 n.5, 44 L. Ed. 2d 15, 95 S. Ct. 1524 (1975); Smart, 580 F.2d at 218 n.3; Davis H. Elliot Co. v. Caribbean Utils. Co., 513 [*6] F.2d 1176, 1182 (6th Cir. 1975); Ott v. Midland-Ross Corp., 523 F.2d 1367, 1369 (6th Cir. 1975),* it will not accept conclusions of law or unwarranted inferences cast in the form of factual allegations. *Blackburn v. Fisk Univ., 443 F.2d 121, 124 (6th Cir. 1971); Sexton v. Barry, 233 F.2d 220, 223* (6th Cir.), cert. denied, *352 U.S. 870, 1 L. Ed. 2d 76, 77 S. Ct. 94 (1956).* The Court will, however, indulge all reasonable inferences that might be drawn from the pleading. *Fitzke v. Shappell, 468 F.2d 1072, 1076-77 n.6 (6th Cir. 1972).*

When determining the sufficiency of a complaint in the face of a motion to dismiss, a court will apply the principle that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* See also *McLain v. Real Estate Bd., 444 U.S. 232, 246, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983),* cert. denied, *469 U.S. 826, 83 L. Ed. 2d 50, 105 S. Ct. 105 (1984).* Because [*7] a motion under Rule 12(b)(6) is directed solely to the complaint itself, *Roth Steel Prods., 705 F.2d at 155; Sims v. Mercy Hosp., 451 F.2d 171, 173 (6th Cir. 1971),* the focus is on whether the plaintiff is entitled to offer evidence to support the claims, rather than on whether the plaintiff will ultimately prevail. *Scheuer, 416 U.S. at 236; McDaniel v. Rhodes, 512 F. Supp. 117, 120 (S.D. Ohio 1981).* Extrinsic evidence cannot be considered in determining whether a complaint states a claim upon which relief can be granted. *Roth Steel Prods., 705 F.2d at 155; Sims, 451 F.2d at 173.*

A complaint need not set down in detail all the particularities of a plaintiff's claim against a defendant. *United States v. School District, 577 F.2d 1339, 1345 (6th Cir. 1978); Dunn, 697 F.2d at 125; Westlake, 537 F.2d at 858.* Rule 8(a)(2) Federal Rules of Civil procedure, requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." The function of the complaint is to afford the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See *Dunn, 697 F.2d at 125; Westlake, 537 F.2d at 858.* [*8] The Court will grant a motion for dismissal under Rule 12(b)(6) only if there is an absence of law to support a claim of the type made or of facts sufficient to make a valid claim or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. See generally *Rauch v. Day & Night Mfg., 576 F.2d 697, 702 (6th Cir. 1978); Ott, 523 F.2d at 1369; Brennan v. Rhodes, 423 F.2d 706 (6th Cir. 1970).*

A. COST RECOVERY VS. CONTRIBUTION.

The Comprehensive Environmental Response Compensation and Liability Act of 1980 [CERCLA],

42 U.S.C. § 9601, et seq., was enacted "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." *United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1500 (6th Cir. 1989)* (quoting H.R.Rep. No. 1016(I), 96th Cong., 2d Sess. 22, reprinted in 1980 U.S.C.C.A.N. 6119, 6125). In *Walls v. Waste Resource Corp., 823 F.2d 977 (6th Cir. 1987)*, the Sixth Circuit Court of Appeals recognized that CERCLA was intended "primarily to facilitate the prompt cleanup [*9] of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes." *Id. at 981.* (emphasis added).

In 1986, Congress reauthorized and amended CERCLA by the Superfund Amendments and Reauthorization Act [SARA], *42 U.S.C. § 9601*, et seq., Pub. L. 99-499, 100 Stat. 1613 (1986). Among other things, SARA established the Hazardous Substance Superfund [Superfund], *26 U.S.C. § 9507*, to finance the government's response to actual or threatened releases of hazardous materials. The Superfund is financed through general revenue appropriations, certain environmental taxes, monies recovered under CERCLA on behalf of the Superfund, and CERCLA authorized penalties and punitive damages. *R.W. Meyer, 889 F.2d at 1500* (describing in detail CERCLA and the SARA amendments).

CERCLA authorizes the government to respond to any threatened or actual release of any hazardous substance that may pose an imminent and substantial public health threat by taking "remedial" or other "removal" action. *42 U.S.C. § 9604* (a) [CERCLA section 104(a)]. n2 In responding to these environmental threats, the EPA uses Superfund money to take [*10] direct response actions that are consistent with the National Contingency Plan [NCP]. n3 If the government performs the cleanup, it may recover all its response costs from all persons responsible for the release of a hazardous substance pursuant to *42 U.S.C. § 9607*(a) [CERCLA section 107(a)].

n2 CERCLA section 104(a), *42 U.S.C. § 9604*(a), provides in part that:

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility . . . or any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. . . . [*11]

n3 The National Contingency Plan [NCP] is described at *42 U.S.C. § 9605* and is set forth at 40 C.F.R. Part 300, et seq. The NCP sets forth "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants . . . ." *42 U.S.C. § 9605*.

CERCLA section 107(a) provides in part that:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity at any facility or incineration vessel owned or operated by any other party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted [*12] any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which caused the incurrence of response costs,

of a hazardous substance, shall be liable for

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Liability under CERCLA section 107(a) among responsible parties is joint and several.

As an alternative to cleaning up the hazardous waste site, the government is authorized under *42 U.S.C. § 9606*(A) [CERCLA section 4106(a)] n4 to order and oversee a private party cleanup in which responsible parties [*13] carry out necessary removal and remedial actions. See *United States v. Rohm & Haas, 2 F.3d 1265, 1270 (3rd Cir. 1995)* (explaining the two mechanisms provided by CERCLA for cleaning up waste sites). Prior to the enactment of the SARA amendments, courts permitted responsible parties who conducted removal actions to seek contribution recovery against other potentially responsible parties [PRPs] under CERCLA section 107(a). Although section 107(a) does not expressly provide for a right of contribution among PRPs, courts have implied this right to alleviate the harsh results of holding one party jointly and severally liable for all response costs when other parties were also responsible for damages at the cleanup site. *Key Tronic Corp. v. United States, 128 L. Ed. 2d 797, 114 S. Ct. 1960, 1965, n. 7 (1994)* (quoting *Walls v. Waste Resources, 761 F.2d at 318)* (holding that district courts "'have been virtually unanimous'" in holding that § 107(a)(4)(B) creates a private right of action for the recovery of necessary response costs").

n4 CERCLA section 106, *42 U.S.C. § 9606*, provides in part that:

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA section 106(a).

[*14]

When the SARA amendments were enacted, Congress expressly provided for the right of contribution among PRPs in *42 U.S.C. § 9613*(f) [CERCLA section 113(f)]. CERCLA section 113(f)(1) provides that:

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

CERCLA section 113(f)(1).

The right of contribution is limited, however, when PRPs do not enter into settlement agreements. Under CERCLA section 113(f)(2), a non-settling PRP is precluded from seeking contribution recovery against a settling PRP to the extent the [*15] expenses are matters addressed in the settlement agreement:

(2) Settlement

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

of the settlement.

CERCLA section 113(f)(2).

A settling party's right to seek contribution from a non-settling party is not limited, however. *42 U.S.C. § 9613*(f)(3) [CERCLA section 113(f)(3)]. CERCLA section 113(f)(3) provides, in relevant part, that:

(3) Persons not party to settlement

. . .

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

CERCLA section 113(f)(3).

In the case sub judice, the EPA and plaintiffs entered [*16] into a judicially approved settlement agreement [Consent Order] pursuant to CERCLA section 106. The Consent Order requires plaintiffs to perform removal actions and to reimburse the United States in connection with the GSI Site. n5 Defendants were not signatories to the Consent Order.

n5 See In the matter of Granville Solvents Site, Docket No. V-W-94-C-248, Administrative Order Pursuant to Section 106 of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, *42 U.S.C. § 9606*(a).

This Order provides for performance of removal actions and reimbursement of response costs incurred by the United States in connection with property located at the Granville Solvents Site, Palmer Lance, Granville, Licking County, Ohio ("the Granville Site" or "the Site"). This Order requires the Respondents to conduct removal actions described herein to abate an imminent and substantial endangerment to the public health, welfare or the environment that may be presented by the actual or threatened release of hazardous substances at or from the Site.

[*17]

Plaintiffs filed the instant action seeking to hold defendants jointly and severally liable for all costs that plaintiffs have incurred and will incur in the future in complying with the Consent Order. Plaintiffs do not seek contribution recovery under CERCLA section 113(f), but want to recover all response costs, even those for which they are rightfully responsible. If plaintiffs obtain a judgment for joint and several liability against defendants, then defendants will be required to pay plaintiffs' share of the response costs in complying with the Consent Order, because defendants, as non-settling PRPs, are precluded from seeking contribution recovery against plaintiffs under CERCLA section 113(f)(2). n6 Defendants have moved to dismiss plaintiffs' joint and several liability claim for full cost recovery or in the alternative to limit plaintiffs' claims to contribution recovery. Therefore, this Court must determine whether plaintiffs are entitled to pursue a full cost recovery action for joint and several liability against defendants pursuant to CERCLA section 107(a) or whether plaintiffs are limited to contribution recovery.

n6 Defendants could, however, seek reimbursement under section 113(f)(3) from other non-settling parties; but, plaintiffs would nevertheless escape liability.

[*18]

Plaintiffs cite the Supreme Court's recent decision in *Key Tronic Corporation v. United States, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994)*, in support of their argument that they are entitled to pursue a full cost recovery action for joint and several liability under CERCLA section 107(a). Key Tronic does not stand for this proposition, however. In Key Tronic, the plaintiff - a potentially responsible party - entered into a settlement agreement with the EPA and then brought a section 107 full cost recovery action against other PRPs to recover a share of its cleanup costs. Id. at 1963. The plaintiff, Key Tronic, also sought recovery of attorneys' fees. The sole issue before the Supreme Court was whether attorneys' fees were recoverable as "necessary costs of response" under CERCLA section 107. The Court concluded that section 107 does not provide for the award of private litigants' attorneys' fees associated with bringing a cost recovery action. n7 The Court did not find that the plaintiff PRP could obtain full cost recovery pursuant to CERCLA section 107(a).

n7 See section C, infra, for a discussion of *Key Tronic Corporation v. United States, 114 S. Ct. 1060 (1994)*, and recovery of attorneys' fees under CERCLA.

[*19]

Plaintiffs argue that since Key Tronic pursued its cost

recovery action under section 107, then plaintiffs are entitled to do the same. Plaintiffs also maintain that the Key Tronic Court recognized the right of a PRP to pursue a section 107 cost recovery action when the Court stated that "the statute [CERCLA] now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in section 107." Id. at 1966.

Plaintiffs want this Court to find that because the Supreme Court allowed the plaintiff in Key Tronic to pursue a section 107(a) cost recovery action for a share of its cleanup costs (i.e., a contribution action under section 107(a)) then plaintiffs are entitled to pursue a full cost recovery action for joint and several liability against defendants under section 107(a). Plaintiffs argue that if Key Tronic had improperly pursued its cause of action under section 107(a), then the Supreme Court would not have granted certiorari or would have stated that the section 107(a) claim was improper. Plaintiffs' logic is flawed for several reasons.

First, the issue of whether Key Tronic's section [*20] 107 claim was properly pursued was never addressed by the Court and may not have been presented on appeal. Further, Key Tronic only sought contribution recovery under section 107 (a) to recover a share of its cleanup expenses. Thus, Key Tronic provides no guidance as to whether PRPs are entitled to pursue full cost recovery under section 107(a). See *United Technologies Corporation v. Browning-Ferris Industries, 33 F.3d 96 (1st Cir. 1994)*, cert. denied, *130 L. Ed. 2d 1128, 115 S. Ct. 1176 (1995)*, (holding that the Supreme Court's statement on which plaintiffs herein rely does not give PRPs carte blanch authority to choose whether-they wish to pursue their claims under CERCLA section 107 or section 113).

Plaintiffs have made similar comparisons to Sixth Circuit decisions in which PRPs pursued cost recovery actions under section 107(a) against other PRPs: *Velsicol Chemical Corp. v. Enenco, Inc., 9 F.3d 524 (6th Cir. 1993); Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993)*, vacated and remanded, *114 S. Ct. 2668 (1994)* n8; and, *Anspec Co., Inc. v. Johnson Controls, Inc. 922 F.2d 1240 (6th Cir. 1991)*. Plaintiffs' reliance on these decisions is also misplaced.

n8 The judgment in *Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993)*, was vacated and remanded to the Sixth Circuit Court of Appeals for further proceedings with respect to the award of attorneys' fees in light of the Supreme Court's decision in *Key Tronic v. United States, 126 L. Ed. 2d 609, 114 S. Ct. 652 (1994)*.

[*21]

The plaintiff in Velsicol, a PRP, alleged that the defendant was a potentially responsible party under CERCLA and sought both cost recovery pursuant to section 107(a) and contribution recovery pursuant to section 113(f). *Velsicol, 9 F.3d at 527*. The issue before the Court was whether the statute of limitations for a cost recovery claim under CERCLA should be applied retroactively to an accrued -but-not-yet- filed claim and whether the equitable defense of laches was available for a section 107 claim. The court of appeals held that the district court wrongfully concluded that the PRPs' cost recovery action was time barred. The court of appeals also held that the plaintiffs' cost recovery action under section 107(a) was not barred by the doctrine of laches. Accordingly, the court of appeals reversed the district court's dismissal of the section 107(a) claim and reinstated the section 113(f) contribution claim.

Contrary to plaintiffs' contention otherwise, Velsicol does not stand for the proposition that a PRP may pursue a full cost recovery action for joint and several liability under section 107(a) without being limited to the right of contribution under section [*22] 113(f). Although the court permitted the plaintiff PRP to proceed with a cost recovery action under section 107, the court contemplated that a contribution claim would be pursued. *Id. at 531*. ("Having concluded that the dismissal of the cost recovery claim was in error, we therefore reinstate the contribution claim."). Therefore, Velsicol is not persuasive.

Plaintiffs also cite Donahey v. Bogle for the proposition that they are entitled to recover all costs they incurred in the cleanup action. In Donahey, the plaintiffs purchased land that was contaminated with waste products. The plaintiffs and former owner agreed that the former owner would restore the land to an environmentally satisfactory condition and reimburse the plaintiffs for costs resulting from contamination of the land. The plaintiffs employed an environmental consultant to clean up some of the land, but the property was later abandoned after the plaintiffs realized that the cleanup effort was too costly. The plaintiffs later filed suit against the former owner to recover, among other things, costs incurred in attempting to cleanup the property.

The Sixth Circuit Court of Appeals held that the plaintiff [*23] and former owners were responsible parties under CERCLA section 107(a). The court of appeals affirmed the trial court's finding that the response costs the plaintiff incurred were not consistent with the National Contingency Plan and therefore not recoverable under CERCLA. Neither the district court nor the court of ap-

peals made any determination with respect to whether the plaintiff, as a PRP, could obtain full cost recovery for the expenses it incurred. This question was never raised, because the plaintiffs were not entitled to recover any costs they incurred. Hence, plaintiffs' reliance on Donahey in support of its full cost recovery claim is erroneous.

Plaintiffs' reliance on Anspec is similarly misguided. In Anspec the plaintiff PRP filed a section 107(a) action against a successor corporation that had been the owner of land that was subject to a cleanup order. The successor corporation was the owner when the pollution allegedly occurred. The opinion does not state whether the plaintiff sought full cost recovery for joint and several liability against the successor corporation or whether the plaintiff only sought reimbursement expenses. The sole issue before [*24] the court of appeals, however, was "whether a successor corporation resulting from a merger with a corporation that had released hazardous waste material on a previously owned site can be held liable for cleanup costs incurred by the present owner of the polluted property under [CERCLA] . . . ."

Plaintiffs argue that the Sixth Circuit's conclusion that Congress intended to include successor corporations within the description of entities that are potentially liable for CERCLA cleanup costs and the court's remand to the district court for further proceedings provides authority to allow PRPs to seek full cost recovery for joint and several liability under section 107(a). The Court does not accept plaintiffs' logic. First, there is no indication whether the plaintiff in Anspec sought joint and several liability or contribution recovery. That the court considered whether the successor corporation fell within the definition of a responsible party under section 107(a) does not mean that plaintiffs are entitled to pursue joint and several liability under section 107(a) for full cost recovery. Whether a party seeks full cost recovery under section 107(a) or contribution recovery [*25] under section 113(f), a court must determine whether the defendant is a liable party under section 107(a). *42 U.S.C. § 9613(f)(1)* ("Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) of this title"). The issue of whether a PRP can seek full cost recovery under section 107(a) was not before the Anspec court and this Court declines to find an implied holding therein.

Finally, plaintiffs cite several district court decisions within the Sixth Circuit in which the courts allegedly "allowed the PRP to brings its cost recovery action for joint and several liability under § 107." These decisions are not persuasive.

In Gen Corp., Inc. v. Olin Corporation, Civil Action No. 5:93cv2269 (N.D. Ohio April 19, 1995), Magistrate Judge David Perelman held that a section 107 cost recovery action is not limited to claims by innocent parties, but potentially responsible parties could pursue both cost recovery actions under section 107 and contribution actions under section 113(f). Although the opinion does not set forth the factual background of the case, it appears that the PRP only sought to recover a share of its cleanup costs. [*26] Id. at p. 2, P 3. (PRP arguing that Gen Corp. was "partially responsible for the costs of cleaning up the waste sites . . . ."). Thus, the issue before the Donahey court was not whether the PRP could pursue a full cost recovery action for joint and several liability and escape all liability under section 107. Magistrate Judge Perelman found that a PRP could choose whether to pursue a contribution action under CERCLA section 107(a) or CERCLA section 113(f). Plaintiffs herein want to pursue full cost recovery under CERCLA section 107(a); hence, Gen Corp. is not helpful.

Plaintiff's reliance on Judge Kinneary's decision in Mead Corp. v. United States, No. 2:92-326, *1994 U.S. Dist. LEXIS 14261* (S.D. Ohio Jan. 14, 1994), is also misplaced. The Meade court held that a potentially responsible party could bring a joint and several liability cost recovery action under section 107(a). The court contemplated, however, that the defendant PRP would counterclaim for contribution recovery. Hence, the court did not envision the plaintiff PRP escaping all liability as plaintiffs herein desire. The court held that "a person found to be jointly and severally liable under [*27] section 107 may limit his damages by seeking contribution under section 113 from any other responsible person, including the plaintiff who brought the section 107 action." Id. at *26. Clearly, Judge Kinneary was not considering facts presented in the instant action where the defendant PRP is precluded under section 113(f)(2) from pursuing a counterclaim against the plaintiff because the defendant PRP did not enter into a settlement agreement with the EPA. See also *T H Agriculture Co., Inc. v. Aceto Chemical Co., Inc., 884 F. Supp. 357,* (E.D. Cal. 1995) (rejecting the Meade court's approach as duplicitous); *Oshtemo v. American Cyanamid Co., 1993 U.S. Dist. LEXIS 13176,* No. 92cv843, 1993 WL 561814 at *2 (W.D. Mich. Aug. 16, 1993) (holding that a PRP could choose whether to pursue a cost recovery action under section 107(a) or a contribution action under section 113(f), but contemplating that if the section 107 claim was filed, then a second suit for contribution would be pursued by the defendant PRP). *Kelley v. Thomas Solvent Co., 790 F. Supp. 710, 718 (W.D. Mich. 1990)* (same); *Bethlehem Iron Works v. Lewis Indus., No. 94-0752, 891 F. Supp. 221, 1995*

U.S. Dist. LEXIS 8477 *12-13 [*28] (E.D. Pa. June 21, 1995) (holding that the PRP could pursue either a cost recovery action under section 107 or contribution action under section 113, but concluding that "any unfairness that might result in imposing joint and several liability on Johnston will be remedied through the resolution of [the defendant PRP's] counterclaim for contribution . . ." and recognizing that the right to pursue a section 107(a) cost recovery action should be limited when the contribution protection of section 113(f)(2) is threatened); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269, 1277 (E.D. Va. 1992)* (allowing PRPs to maintain a section 107(a) cost recovery action, but retaining jurisdiction over the matter throughout the contribution phase such that liability could be equitably apportioned).

Although not binding on this Court, defendants have cited decisions from other circuits in which potentially responsible parties' rights were limited to contribution recovery; the Court finds these decisions persuasive. See *United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96, 101 (1st Cir. 1994)*, cert. denied, *130 L. Ed. 2d 1128, 115 S. Ct. 1176 (1995)*; [*29] *Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994); United States v. Colorado & Eastern R. Co., 50 F.3d 1530,* 1995 WL 115720 at *3-5 (10th Cir. 1995). See also *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc., 904 F. Supp. 644,* 1995 WL 764134 (N.D. Ohio 1995); *T H Agriculture & Nutrition Co. v. Aceto Chemical Co., 884 F. Supp. 357,* (E.D. Cal. 1995); *Kaufman and Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1214 (N.D. Cal. 1994);* Ciba-Geiga Corp. v. Sandoz Ltd., No. 92-4491, 1993 WL 668325 (D.N.J. June 17, 1993). These decisions illustrate and explain the problems encountered when potentially responsible parties are permitted to pursue full cost recovery actions under section 107(a). First, the plaintiffs' proposed plan ignores the Congressional intent underlying CERCLA to hold potentially responsible parties accountable for their actions. Second, if potentially responsible parties are permitted to seek full recovery under section 107(a), then the contribution protection of section 113(f)(2) will be eliminated. Finally, other [*30] difficulties arise when a potentially responsible party seeks to escape all liability for its actions by holding a non-settling defendant PRP liable for all costs incurred in a cleanup action.

1. Legislative Intent

In *Anspec Co. Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991)*, the Sixth Circuit Court of Appeals identified two essential purposes of CERCLA: (1) "to provide the federal government with the tools immediately necessary for a swift and effective response to hazardous waste sites[,]" and (2) to hold "those responsible for disposal of chemical poisons [accountable for] the cost and responsibility of remedying the harmful conditions they created." Id. (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)* and H.R. No. 96-1016(II), 96th Cong., 2d Sess. 17 (1980), reprinted in, 1980 U.S.Code Cong. & Admin. News 6119, 6119-120). See also *Velsicol Chemical Corp. v. Enenco, Inc., 9 F.3d 524, 529 (6th Cir. 1993)* (holding that "absent a specific congressional intent to the contrary, we will broadly interpret the CERCLA provisions in accordance with CERCLA's statutory goals of facilitating [*31] expeditious cleanups of inactive and abandoned hazardous waste sites and holding the responsible parties liable for the cleanups"); *Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995)* ("CERCLA's dual goals are to encourage quick response and to place the cost of that response on those responsible for the hazardous conditions.").

Awarding plaintiffs, as potentially responsible parties, a judgment for joint and several liability against defendants for full cost recovery, when defendants are precluded from seeking contribution expenses against plaintiffs under section 113(f)(2), would permit plaintiffs to escape all liability for their part in creating the environmental hazard at the GSI site. This scheme opposes Congress' intent to hold responsible parties accountable when they create harmful environmental conditions. Although section 113(f)(2) was intended to protect settling parties, it was not designed to shield them from all responsibility. See *United States v. Pretty Products, 780 F. Supp. 1488, 1494 (S.D. Ohio 1991)* (explaining the "carrot and stick" approach of section 113(f)). n9 Thus, this Court declines to accept plaintiffs' argument that they [*32] are entitled to pursue a full cost recovery action under section 107(a) against defendants.

n9 The Court rejects plaintiffs' characterization of the "carrot and stick approach" as immunizing settling PRPs from all liability. The court in *United States v. Pretty Products, 780 F. Supp. 1488, 1494 (S.D. Ohio 1991)*, explained the effect of section 113(f):

Congress's goal of achieving expeditious settlements was furthered through Section 9613(f)(2), which places non-settling Defendants who have paid more than their proportionate share of liability at a disadvantage in two ways. First, it leaves them open to contribution claims from settling Defendants who

have paid more than their proportionate share of liability. Second, if the settling Defendants have paid less than their proportionate share of liability, Section 113(f)(2) apparently compels the non-settlers to absorb the short fall.

Id. (quoting *Central Illinois Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1504 (W.D. Mo. 1990)).*

[*33]

2. Eliminates Contribution Protection.

The second problem with plaintiffs' full cost recovery proposal is that the plan frustrates the CERCLA contribution scheme by eliminating the contribution protection of section 113(f)(2). There is no dispute that "CERCLA was intended primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility on those responsible for hazardous wastes." *Hardage, 733 F. Supp. 1424 at 1431* (citing *Walls, 823 F.2d 977 at 981).* In order to encourage prompt settlement, the SARA amendments provided a contribution scheme that protects settling PRPs from contribution suits by non-settling PRPs. *42 U.S.C. § 113(f)(2).* See *Control Data Corp., 53 F.3d at 936* (explaining section 113(f)(2) contribution protection). CERCLA section 113(f)(2) provides that a party who settles with the government "shall not be liable for claims for contribution regarding matters addressed in the settlement." Under this plan, the settling party is assured that once it enters into a settlement agreement with the government, a non-settling party cannot make a claim for contribution against the settling party. This section "was [*34] designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." *United Technologies, 33 F.3d at 103* (quoting *United States v. Cannons Engineering Corp., 899 F.2d 79, 92 (1st Cir. 1990)).*

If the Court were to accept plaintiffs' argument that PRPs can bring cost recovery actions against other PRPs for full cost recovery under section 107(a), then a non-settling PRP could circumvent the contribution limitation of section 113(f)(2) by filing a joint and several liability cost recovery action against a settling PRP pursuant to section 107(a). Section 113(f)(2) only precludes contribution actions, not cost recovery actions under section 107(a).

The First Circuit recognized this problem in United Technologies when it held that "the mechanism for encouraging settlement would be gutted were courts to share [this] view of the contribution universe, for section [113(f)(2)] then would afford very little protection." *33 F.3d at 103,* Further, there would be no incentive to make a prompt settlement if the settling PRP could be pursued by a non-settling PRP for joint and several liability under section 107(a). See also [*35] *Colorado & Eastern R. Company, 50 F.3d at 1536* (holding that to allow PRPs to recover expenditures incurred in cleanup and remediation from other PRPs under section 107's strict liability scheme would render section 113(f) meaningless); The Ekotek Site PRP Comm. v. SELF, No. 94-C-277K, *881 F. Supp. 1516, 1995 U.S. Dist. LEXIS 4707* at *10-11 (D. Utah Mar. 24, 1995) (adopting Colorado & Eastern R. Company).

3. Ignores Contribution Scheme.

Plaintiffs fail to recognize that if CERCLA section 107(a), prior to the enactment of the SARA amendments, authorized PRPs to obtain full cost recovery, then enacting the contribution scheme of section 113(f) was superfluous. Under plaintiffs' proposed scheme, apportioning liability among PRPs would require separate full cost recovery actions by each PRP. The district court in Ciba-Geigy Corp. v. Sandoz, No. 92-4491, 1993 WL 668325 (D.N.J. June 17, 1993), recognized the advantage of apportioning liability in one contribution action. In Ciba-Geigy, the plaintiff PRP sought to recoup all its cleanup costs from the defendant PRPs under section 107(a). The court, however, limited the plaintiff's claim to contribution recovery [*36] under section 113(f). The court held:

It is clear that Congress reacted to the uncertainly [sic] regarding a PRP's right to seek contribution by enacting § 113(f) for if a PRP could have already recovered its full response costs under § 107(a), there would have been no need to authorize a PRP to recover a portion its [sic] expenses in contribution. Section 113(f)'s legislative history thus indicates that Congress was enacting a provision to benefit non-governmental PRPs, one not needed by the United States. [footnote omitted]. "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979).*

Id. at *6. Adopting plaintiffs' proposed plan would ignore Congress' intent to limit PRPs to contribution recovery. Thus, plaintiffs' claim must be limited to contribution recovery.

4. Other Problems.

Courts have also recognized other problems with allowing PRPs to seek full cost recovery actions under section 107(a). See *United Technologies, 33 F.3d at*

101 (holding that permitting a potentially [*37] responsible party to pursue a joint and several liability action under section 107 (a) against another PRP, rather than require that the action be maintained under section 113(f), would "completely swallow section [113(g)(3)'s] n10 three-year statute of limitations associated with actions for contribution" and would ignore the requirement that courts "give effect to each subsection contained in a statute. . . ."); *Kaufman and Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1215 (N.D. Cal. 1994)* (case in point n11 finding the United Technologies rationale regarding statutory language persuasive and holding that "any and all responsible parties, even those who have expended response costs voluntarily, are confined to bringing contribution actions under § 9613(f).").

n10 CERCLA section 113(g), *42 U.S.C.* § *9613*(g), provides in part that:

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced-

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this paragraph.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after-

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

[*38]

n11 The issue involved in *Kaufman and Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1215 (N.D. Cal. 1994)*, was "whether a potentially responsible party ("PRP") under CERCLA is restricted to bringing a contribution claim under § 9613(f) or whether it may also pursue a cost recovery action under 9607(a).") [footnote omitted].

Having considered the authority submitted by the parties, the Court concludes that plaintiffs, as potentially responsible parties, are not entitled to seek full cost recovery for all expenses incurred in the cleanup, but are limited to contribution recovery. See also Plaskon Electronic Materials, Inc. v. Allied Signal, Inc., No. 92cv7572 (N.D. Ohio Aug. 4, 1995) (holding that the plaintiff PRP could not seek joint and several liability against a defendant PRP, but was limited to seeking contribution recovery under section 113(f)); *Control Data Corp., 53 F.3d at 934-935* (holding that "recovery of response costs by a private party under CERCLA is a two-step process. [footnote omitted]. Initially a plaintiff must prove that the defendant is liable [*39] under CERCLA. Once that is accomplished, the defendant's share of liability is apportioned in an equitable manner. . . . Once liability is established, the focus shifts to allocation. Hence the question is what portion of the plaintiff's response costs will the defendant be responsible for? Allocation is a contribution claim controlled by § 9613(f) . . . ."); *Akzo Coatings, Inc., 30 F.3d at 764* (rejecting PRP's attempt to characterize its contribution claim as a cost recovery action under section 107(a) and holding that "whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f)"); T H Agriculture & Nutrition Co., Inc., No. CV-F-93-5404 at pp. 9-12 (holding that PRPs are limited to seeking contribution recovery from other PRPs).

Based on the foregoing, defendants' alternative motion to limit plaintiffs' recovery to contribution expenses is granted.

B. Governmental Oversight Costs.

The Administrative Consent Order [Consent Order] requires plaintiffs to reimburse the government [*40] for "all past response costs and oversight costs of the United States related to the [GSI Site] that are not inconsistent with the NCP [National Contingency Plan]." Administrative Consent Order, § VII. The Consent Order defines "oversight costs" as "all costs, including but not limited to direct and indirect costs, that

the United States incurs in the review or development plans, reports and other items pursuant to this AOC." Id. Plaintiffs seek to recover these costs from defendants as necessary response costs. Defendants argue that these costs are not recoverable.

The Third Circuit Court of Appeals addressed this identical issue in *United States v. Rohm & Haas Company, 2 F.3d 1265 (3rd Cir. 1993)*, and concluded that the governmental oversight costs of private party cleanups are not recoverable as necessary response costs. The Sixth Circuit Court of Appeals has never addressed this issue; but, in *United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989)*, the court held that when the government conducts a cleanup action under CERCLA, it may recover both direct and indirect costs attributable to the cleanup site under CERCLA section 107(a). In light of [*41] R.W. Meyer, the Court finds that the Sixth Circuit would permit the government to recover from plaintiffs the government's cost of overseeing the private party cleanup.

CERCLA provides two separate mechanisms for cleaning up waste sites: a government conducted cleanup under CERCLA section 104 followed by a cost recovery action under section 107, or a private party cleanup, ordered by the EPA, pursuant to CERCLA section 106. n12 *Rohm & Haas, 2 F.3d at 1270*. CERCLA section 106 authorizes the EPA to sue private parties, or to issue administrative orders, in order to compel such parties to cleanup hazardous waste sites at their own expense. *Id. at 1270*. The Administrative Order of Consent in the instant action was entered into pursuant to CERCLA section 106.

n12 See, infra, fn. 4.

CERCLA section 107(a) provides for the recovery of response costs from all persons responsible for the release of hazardous substances. The term "respond" or "response" means remove, removal, remedy and remedial action [*42] and the enforcement activities related thereto. *United States v. Witco Corp., 853 F. Supp. 139, 142, n. 6 (E.D. Pa. 1994)* (citing *42 U.S.C. § 9601* (25)). "Removal" is defined under CERCLA as:

[1] the cleanup or removal of released hazardous substances from the environment, [2] such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment. [3] such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances, [4] the disposal of removal material, or [5] the taking of such other actions as may be necessary to prevent, minimize, or mitigate damages to the public health or welfare or the environment, which may otherwise result from a release or threat of release.

CERCLA section 101(23), *42 U.S.C. § 9601*(23). Categories three and five of section 101 (23) provide the government with authority to recover from plaintiffs the costs the government incurs in ensuring that plaintiffs comply with the Consent Agreement. Hence, plaintiffs are entitled to recover contribution from defendants for such costs, provided the costs are otherwise recoverable. [*43]

Interpreting the definition of removal to include recovery of governmental oversight costs of monitoring private party cleanups is also consistent with the funding of the Superfund, which provides the resources for governmental enforcement of CERCLA and derives its funds from general revenues, environmental taxes, monies recovered under CERCLA, and CERCLA authorized penalties and punitive damages. *United States v. Lowe, 864 F. Supp. 628, 630 (S.D. Tex. 1994)* (rejecting the reasoning of Rohm and Haas as unpersuasive). In Lowe, the district court agreed with this interpretation of the statute:

This Court respectfully finds the reasoning in Rohm & Haas to be unpersuasive. EPA's oversight of cleanups conducted by liable parties fits squarely within the terms of CERCLA § 107(a) and § 101(23). Oversight necessarily encompasses the evaluation of all stages of the cleanup process, from the preliminary investigation throughout the final treatment, destruction, disposal or removal of hazardous substances on the site. Oversite is "necessary to prevent, minimize or mitigate" damages to the public welfare, and necessary to "monitor, assess, and evaluate" the release or threatened [*44] release of hazardous substances into the environment. The statute makes no distinction between the EPA's direct monitoring of a release and its monitoring of a private party cleanup response. Moreover, were this Court to embrace the Third Circuit's reasoning in Rohm & Haas, it would lead to the incongruous result that the EPA could recover the costs of overseeing its own contractors, but not the costs of overseeing those hired by the potentially responsible parties.

Id. at 631-32. See also *California Dept. of Toxic Substances Control v. Snydergeneral Corp., 876 F. Supp. 222, 224 (E.D. Cal. 1994)* (rejecting Rohm & Kaas and holding that "a proper construction of CERCLA allows administrative recovery of costs incurred in overseeing cleanup activities by either private parties or agencies.").

Accordingly, defendants' motion to dismiss plaintiffs' claim for recovery of contribution for expenses incurred in reimbursing the government for its oversight costs is denied.

C. Attorneys' Fees.

Defendants have also moved to dismiss plaintiffs' claim for attorneys' fees pursuant to the Supreme Court's recent decision in *Key Tronic Corporation v. United [*45] States, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994)*. Defendants admit that the Supreme Court did not foreclose recovery of attorneys' fees under any circumstances, but claim that plaintiffs have failed to allege any facts in their complaint that would allow recovery of attorneys' fees in the limited circumstances enunciated by the Key Tronic Court.

In Key Tronic, the Supreme Court considered whether attorneys' fees are "necessary costs of response" within the meaning of CERCLA. At issue were recovery of attorneys' fees for (1) litigation-related expenses; (2) legal services performed in connection with negotiations between the PRP and the EPA that culminated in the consent decree; and (3) fees pertaining to the corporation's activities performed in identifying other potentially responsible parties. The Court held that the attorneys' fees related to the first two types of expenses were not recoverable, but the third type of expenses, which were closely tied to the actual cleanup, were recoverable if they constituted a necessary response cost under section 107(a)(4)(B). The Court held:

The conclusion that we reach with respect to litigation-related fees does not signify [*46] that all payments that happen to be made to a lawyer are unrecoverable expenses under CERCLA. On the contrary, some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(4)(B). The component of Key Tronic's claim that covers the work performed in identifying other potentially responsible parties falls in this category. . . . Tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for. Key Tronic is therefore quite right to claim that such efforts significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs.

Id. at 1967.

In the First Amended Complaint, plaintiffs' seek "interest, costs and attorneys' fees incurred by Plaintiffs in connection with this action . . . ." To the extent plaintiffs seek recovery of attorneys' fees "that [are] closely tied to the actual cleanup [and] may constitute a necessary cost of response in and of itself under the terms of § 107(4)(B)[,]" defendants' motion to dismiss is denied. To the extent that plaintiffs seek to recover [*47] attorneys' fees for litigation related fees or fees for legal services involved in the negotiation process which culminated in the consent decree, plaintiffs' claim must be dismissed. See *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (holding that a motion to dismiss should be granted where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

D. MOTION TO DISMISS COUNTERCLAIM FOR CONTRIBUTION.

Finally, plaintiffs have moved to dismiss defendants' counterclaim for contribution under CERCLA section 113(f)(2). As discussed above, CERCLA section 113(f)(2) provides contribution protection to potentially responsible parties who enter into settlement agreements with the EPA from contribution actions by non-settling PRPs to the extent the expenses are related to the settlement agreement. Accordingly, plaintiffs contend that defendants, as non-settling PRPs, are precluded from seeking contribution expenses against plaintiffs who entered into a settlement agreement with the EPA.

Defendants Dean & Barry Company assert the same arguments as presented in their motion to [*48] dismiss and maintain that if plaintiffs are permitted to seek full cost recovery under section 107(a) for joint and several liability, then defendants should be permitted to counterclaim so that defendants are not required to bear the costs for which plaintiffs are rightfully responsible. To the extent the Court held above that plaintiffs' claims are limited to a claim of contribution, plaintiffs' motion to dismiss defendants' counterclaim is granted.

Defendants Bradley Paint Company, Westinghouse Electric Corporation and IRD Mechanalysis, Incorporated, on the other hand, contend that plaintiffs' motion to dismiss should be denied because plaintiffs are only entitled to recover, if at all, for matters considered in the Consent Order between plaintiffs and the EPA. Defendants argue that the Consent Order by its express terms is limited to the performance of removal actions; therefore, plaintiffs are only entitled to contribution protection for removal activities. Defendants contend that it is too early in the litigation process to determine whether plaintiffs' expenditures were for removal costs.

There is no dispute that under section 113(f)(2) plaintiffs are protected from claims [*49] for contribution re-

garding matters addressed in the settlement agreement. Because discovery has not been completed, however, the Court cannot determine whether the costs plaintiffs seek were incurred pursuant to the Consent Order. Accordingly, to the extent plaintiffs' claims are for expenses addressed in the Consent Order, plaintiffs' motion to dismiss defendants' counterclaim for contribution is granted. Otherwise, the motion is denied.

CONCLUSION

In accordance with the foregoing, defendants' alternative motion to limit plaintiffs' claims to contribution recovery is GRANTED; defendants' motion to dismiss plaintiffs' claim for attorneys' fees is GRANTED IN PART and DENIED IN PART; defendants' motion to dismiss plaintiffs' claim for governmental oversight costs is DENIED; plaintiffs' motion to dismiss defendants' counterclaim is GRANTED to the extent defendants seek contribution for matters addressed in the settlement agreement, but DENIED to the extent plaintiffs have presented a claim for other expenses.

John D. Holschuh, Chief Judge

United States District Court

Not Reported in F.Supp.
65 USLW 2695
(Cite as: 1997 WL 382101 (S.D.Ohio))

AT & T GLOBAL INFORMATION SOLUTIONS COMPANY, et al., Plaintiffs,
v.
UNION TANK CAR COMPANY, et al., Defendants.

No. C2-94-876.

United States District Court, S.D. Ohio.

March 31, 1997.

MEMORANDUM AND ORDER

HOLSCHUH

*1 Plaintiffs, AT & T Global Information Systems, et al. [AT & T], have moved to strike certain affirmative defenses raised by the defendants. [Record No. 122]. The motion has been fully briefed and is ready for decision. [FN1]

Plaintiffs have moved pursuant to Fed.R.Civ.P. 12(f) to strike certain defenses of defendants as insufficient. Plaintiffs contend that defendants are limited to raising the defenses specifically enumerated in 42 U.S.C. § 9607(b), CERCLA § 107(b). Defendants argue that their defenses are valid and that plaintiffs' motion is moot in light of the Court's March 18, 1996 Memorandum and Order. [Record No. 192].

Plaintiffs initially sought joint and several liability against defendants pursuant to CERCLA § 107(a). Defendants subsequently moved to dismiss the complaint on the basis that plaintiffs, as potentially responsible parties [PRPs], are not entitled to pursue a joint and several liability claim to recover all costs plaintiffs incurred in complying with the Consent Order. In the alternative, defendants argued that plaintiffs should be limited to contribution recovery for those expenses that plaintiffs incurred in excess of plaintiffs' fair share of the cleanup costs pursuant to CERCLA § 113(f)(1). Defendants also moved to dismiss plaintiffs' claims for attorney's fees and for reimbursement of governmental oversight costs. In a related motion, plaintiffs moved to dismiss defendants' counterclaims for contribution.

By Memorandum and Order dated March 18, 1996 [Record No. 192] the Court granted defendants' alternative motion to limit plaintiffs' claims to contribution recovery of plaintiffs' excess costs. The Court held that plaintiffs, as potentially responsible parties, were not entitled to seek full cost recovery for all the expenses that plaintiffs incurred in the cleanup. The Court also denied defendants' motion to dismiss plaintiffs' claim for recovery of expenses incurred by plaintiffs in reimbursing the government for its

oversight costs. In addition, the Court denied defendants' motion to dismiss plaintiffs' claims for attorney's fees. Thus, to the extent plaintiffs have moved to strike as insufficient those defenses raised in defendants' motion to dismiss, the motion to strike is overruled as MOOT.

Plaintiffs maintain that the defenses raised by defendants are insufficient because the available defenses in a CERCLA § 107 cost recovery action are limited to the defenses specifically enumerated at 42 U.S.C. § 9607(b), CERCLA § 107(b). Thus plaintiffs seek to have stricken any defenses not enumerated in the statute. Rule 12(f), Fed.R.Civ.P., provides in part that "[u]pon motion made by a party ... the Court may order stricken from the pleading any insufficient defense." Because striking a portion of a pleading is a drastic remedy, such motions are generally viewed with disfavor and are rarely granted. Brown and Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir.1953). Despite the cautious approach courts have taken in granting motions to strike, such motions have been granted in CERCLA actions because the defenses are, for the most part, governed and limited by statute.

*2 This is an action for reimbursement of response costs under CERCLA. As stated above, the Court determined in its March 18, 1996 Memorandum and Order that plaintiffs are limited to seeking contribution recovery under CERCLA § 113(f). Section 113(f) provides that: "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title [CERCLA section 107(a)]." Liability under section 107(a) is imposed where the government establishes the following four elements:

(1) The defendant falls within one of the four categories of responsible parties;
(2) The hazardous substances are disposed of at a facility;
(3) There is a release or threatened release of hazardous substances from the facility into the environment;
(4) The release causes the incurrence of response costs.

United States v. Alcan Aluminum Corp., 964 F.2d 252, 258-59 (3rd Cir.1992) (citing section 107(a)). Section 107(a) further provides that liability is imposed "subject only to the defenses set forth in subsection (b) of this section." 42 U.S.C. § 9607(a). These defenses are: (1) the release of waste caused by an act of God, (2) an act of war, (3) an act or omission of an unrelated third party, and (4) any combination thereof. Based on the language of the statue and the fact that CERCLA imposes strict liability "[a] strong majority of courts have held that liability under § 107(a) of CERCLA is subject to only the defenses set out in § 107(b)." United States v. Marisol, Inc., 725 F.Supp. 833, 838 (M.D.Pa.1989).

Given this background, the Court will address each defense challenged by plaintiffs.

1. Failure to State a Claim.

Each defendant asserts that the complaint fails "to state a claim upon which relief

can be granted." Although this defense is not one of the four enumerated in CERCLA Section 107(b), the defense is allowable pursuant to Fed.R.Civ.P. 12(b) and is often cited in CERCLA actions. United States v. Fidelcor Business Credit Corp., 1993 WL 276933 (E.D.Pa. Jul. 21, 1993). This type of challenge cannot succeed "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A review of the Second Amended Complaint shows that the complaint alleges all the requisite elements of CERCLA liability. Specifically, the complaint alleges that defendants are responsible parties; that hazardous substances were disposed of at a facility; that there was a release or threatened release of hazardous substances from the facility into the environment; and that said release or threatened release of hazardous substances has caused or will continue to cause plaintiffs to incur necessary costs of response [Second Amended Complaint, Record No. 208]. Accordingly, plaintiffs have sufficiently stated a claim for which relief may be granted. Therefore, the plaintiffs' motion to strike the defendants' defense of failure to state a claim upon which relief may be granted is GRANTED. See, e.g., Fidelcor, 1993 WL 276933 at * 3 (striking defense of failure to state a claim in a CERCLA action); Hatco Corp. v. W.R. Grace & Co., 801 F.Supp. 1309, 1327 (D.N.J.1992) (same); United States v. Kramer, 757 F. Supp 397, 418 (D.N.J.1991) (same); Marisol, 724 F.Supp. at 837 (same).

2. Attorney's Fees and Oversight Costs.

***3** Each defendant has also raised the defense of failure to state a claim upon which relief can be granted for attorney's fees and oversight costs.

a. Attorney's Fees.

Defendants also moved in a separately filed motion to dismiss plaintiffs' claim for attorney's fees. The Court, in its March 18, 1996 Memorandum and Order, denied defendants' motion to dismiss on this issue under the Supreme Court's decision in Key Tronic Corporation v. United States, 114 S.Ct. 1960 (1994), to the extent that plaintiffs sought recovery of attorney's fees "that [are] closely tied to the actual cleanup [and] may constitute a necessary cost of response in and of itself under the terms of § 107(4)(B)." The Court, however, granted defendants' motion to dismiss to the extent plaintiffs sought recovery of attorney's fees for litigation related fees or fees for legal services involved in the negotiation process which culminated in the consent decree.

Accordingly, in light of the Court's decision regarding plaintiffs' claim for attorney's fees, plaintiffs' motion to strike is MOOT.

b. Oversight Costs.

Defendants also argue that plaintiffs' attempt to recover the expenses plaintiffs incurred for reimbursing the government for its oversight costs of the cleanup fails to state a claim upon which relief can be

granted. Defendants filed a separate motion to dismiss plaintiffs' claim for reimbursement of governmental oversight costs. Defendants' motion to dismiss was denied by the Court's March 18, 1996 Memorandum and Order. Accordingly, plaintiffs' motion to strike is denied as MOOT.

3. Equitable Defenses.

Defendants have raised several equitable defenses to plaintiffs' cost recovery claims, including: (1) plaintiffs' recovery should be reduced by amounts already paid by the defendants, (2) defendants' liability should be proportionate to the defendants' contribution to the release, (3) defendants should not be liable for any portion of damages caused by others, (4) unclean hands, (5) estoppel, and (6) waiver.

Although the equitable defenses, if proven, will not relieve defendants from liability, the equitable defenses may be considered by the Court under CERCLA section 113(f) in resolving contribution claims. See 42 U.S.C. § 9613(f)(1) (providing that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). Therefore, inasmuch as the Court has determined that plaintiffs, as PRPs, are limited to seeking contribution recovery, plaintiffs' motion to strike defendants' equitable defenses is DENIED.

4. Causation.

Defendants have denied liability on the basis that they did not cause the release or threatened release and did not cause response costs at the response site. Plaintiffs maintain that the causation defense should be stricken, because CERCLA is a strict liability statute, which imposes liability without regard to causation.

***4** To establish a prima case in a CERCLA action, the plaintiff must prove that:

> (1) the defendant is within one of the four categories of responsible parties enumerated in § 9607(a); (2) the landfill site is a facility as defined in § 9601(9); (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or threatened release; and (5) the costs and response actions conform to the national contingency plan. 42 U.S.C. § 9607(a).

B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir.1996). There are only three defenses to imposition of liability on a generator: an act of God, an act or war, and an act or omission of a third party. 42 U.S.C. § 9607(b). See also U.S. v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir.1993). Courts have determined that "including a causation requirement makes superfluous the affirmative defenses provided in section 9607(b)." Id. Thus, "CERCLA does not require the plaintiff to prove that the defendant caused actual harm to the environment at the liability stage." Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir.1995) (citing United States v. Alcan-Aluminum, 964 F.2d 252, 264-66 (3rd Cir.1992)); See

also B.F. Goodrich, 99 F.3d at 514 (holding that "it is not required that the [plaintiff] show that a specific defendant's waste caused incurrence of clean-up costs"). The Court recognizes, however, that there must be a showing that the response costs were incurred as a result of a release. Control Data Corp., 53 F.3d at 935, fn. 8.

Accordingly, to the extent defendants contend that they are not liable because they did not cause actual harm to the environment, plaintiffs' motion to strike is GRANTED.

5. Divisibility.

Plaintiffs seek to strike the defense that damages are divisible and distinct, therefore, joint and several liability may not be imposed. This Court has determined that plaintiffs as PRPs are limited to seeking contribution recovery and that plaintiffs cannot seek to recover from the defendant PRPs the portion of response costs for which plaintiffs are responsible. The Court's conclusion comports with the rule applied by many courts in CERCLA cases that "[i]f the harm is divisible and if there is a reasonable basis for apportionment of damages, each defendant is liable only for the portion of harm he himself caused." United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D.Ohio 1983); United States v. Colorado & Eastern R. Co., 50 F.3d 1530, 1535 (10th Cir.1995); In re Bell Petroleum Servs., Inc., 3 F.3d 889, 895 (5th Cir.1993). Therefore, while divisibility is not a complete defense to liability, it is a factor to be considered in apportioning responsibility to liable parties. Accordingly, plaintiffs' motion to strike is DENIED.

6. Set-off.

The defendants contend that plaintiffs' recovery is subject to set-off for amounts actually paid by other PRPs. Set-off is an equitable defense and may be considered in determining each responsible parties' liability under CERCLA section 113(f). Thus, plaintiffs' motion to strike this defense is DENIED.

7. Judicial Review of Administrative Order.

***5** In the present case, plaintiffs are attempting to impose liability on the defendants, in part, pursuant to the Administrative Order of Consent [AOC] that plaintiffs entered into with the EPA. Defendants have raised the defense that the AOC is arbitrary, capricious or otherwise contrary to law and lacks an adequate basis in the Administrative Record. Plaintiffs maintain that this defense is not one enumerated in CERCLA section 107(b) and is therefore precluded.

A review of the statutory provisions in question clearly contemplate that defendants are entitled to challenge the validity of the AOC. For example, CERCLA section 113(h) provides that:

> No Federal Court shall have jurisdiction under Federal law ... to review any challenges to removal or remedial action

selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title in any action except one of the following:
(1) An action under section 9607 of this title to recover response costs or damages or for contribution....
42 U.S.C. § 9613(h).

In addition, a district court may exercise jurisdiction pursuant to CERCLA section 113(h) to review challenges of remedial actions after the initiation of a cost recovery action under CERCLA section 107(a). The defense asserted by Armco, made after the initiation of plaintiffs' cost recovery action, challenges the remedial actions taken by plaintiffs. Accordingly, plaintiffs' motion to strike this defense is DENIED.

8. Constitutional Defense.

Plaintiffs contend that defendants are precluded from raising a due process challenge to the AOC, because defendants are not a party to and are not bound by the AOC. Defendants argue that constitutional challenges may be made in CERCLA actions when the defendant is challenging the constitutionality of CERCLA as applied to a specific factual context.

It is clear that constitutional challenges have been made in CERCLA cases. See, e.g., United States v. Fidelcor Business Credit Corp., 1993 WL 276933 (E.D.Pa. Jul. 21, 1993); LaSalle National Bank v. Owens-Illinois, Inc., 1994 WL 249542 (N.D.Ill. Jun. 7, 1994). Based on the present record, the Court cannot determine the validity of defendants' due process argument. Accordingly, without a more developed record and further legal argument the Court is not willing to strike defendants' constitutional defense. Therefore, plaintiffs' motion to strike defendants' constitutional challenge is DENIED.

9. Consistency with the National Contingency Plan.

Plaintiffs seek recovery of costs for performance of necessary response actions pursuant to the AOC. Defendants argue that the costs plaintiffs incurred were not consistent with the National Contingency Plan [NCP]. Plaintiffs maintain that strict compliance with the NCP is not a prerequisite in a private party cost recovery action. The statutory language clearly provides that responsible parties shall be liable for response costs that are consistent with the National Contingency Plan. Thus, while strict compliance in every detail may not be required, the response costs must be consistent with the NCP's requirements, which is recognized by the authority submitted by the plaintiffs. General Elec. Co. v. Litton Indus. Automation Servs., 920 F.2d 1415, 1420 (8th Cir.1990), cert. denied, 499 U.S. 937 (1991). Therefore, plaintiffs' motion to strike defendants' defense that the response costs incurred were not consistent with the National Contingency Plan is DENIED.

10. Facility Subject to RCRA.

*6 Defendants maintain that recovery of

response costs under CERCLA are not recoverable because the facility in question is a facility regulated by the Resources Conservation and Recovery Act of 1986 [RCRA], and therefore the facility should have been subject to a RCRA correction action.

Defendants have failed to set forth any argument whatsoever as to why plaintiffs' claim would be barred under CERCLA. Accordingly, plaintiffs' motion to strike defendants' RCRA defense is GRANTED.

11. Joinder of Necessary Parties.

Defendants maintain that plaintiffs have failed to join necessary parties in that the harm in this case is divisible and therefore liability may be apportioned to responsible parties. Plaintiffs maintain that liability under CERCLA is joint and several for responsible parties, thus it is not necessary to join all responsible parties.

Defendants have not identified which parties it claims to be necessary. Therefore, the Court cannot make a determination at this time regarding the merits of defendants' argument. Accordingly, plaintiffs' motion to strike is DENIED. The motion is denied without prejudice, however, and plaintiffs may seek leave to file a second motion to strike after the asserted necessary parties have been identified.

CONCLUSION

Based on the foregoing, plaintiffs' motion to strike insufficient defenses is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

FN1. To the extent plaintiffs' motion seeks to strike insufficient defenses raised by Gammatronix, Inc., plaintiffs' motion is moot. Gammatronix was dismissed from this action per stipulation of dismissal on January 13, 1997. [Record No. 278].

END OF DOCUMENT

Announcement of and Request for Comment on
Municipal Solid Waste Settlement Proposal

SUMMARY: EPA is publishing the "Municipal Solid Waste Settlement Proposal" to inform the public about this proposal and to solicit public comment before developing a final policy. This proposal describes a methodology for calculating appropriate settlement contributions for municipal owner/operators (O/Os) and municipal and other generators/transporters (G/Ts) of municipal sewage sludge and municipal solid waste (collectively referred to as MSW) at co-disposal landfills under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §9601 et seq. The purpose of this proposal is to provide a fair, consistent, and efficient settlement methodology for resolving the potential liability of municipal O/Os and MSW G/Ts at co-disposal Superfund sites. Specifically, EPA is proposing settlements based upon a unit cost formula for contributions by MSW G/Ts and a settlement range, based on historical data, for municipal O/Os of co-disposal sites.

DATE: Comments must be submitted no later than 45 days after publication of this proposal.

ADDRESS: Comments should be addressed to Leslie Jones, U.S. Environmental Protection Agency, Office of Site Remediation Enforcement, Policy and Guidance Branch (2273A), 401 M Street, S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Leslie Jones, phone: (202) 564-5144; fax: (202) 564-0091.

EPA Proposal for Municipality and MSW Liability Relief at CERCLA Co-Disposal Sites

BACKGROUND

Currently, there are approximately 250 landfills on the National Priorities List (NPL) that accepted both municipal solid waste (MSW) and other wastes, such as industrial wastes, containing hazardous substances (commonly referred to as "co-disposal" landfills). Co-disposal landfills comprise approximately 23% of the sites on the NPL. Many of these landfills are or were owned or operated by municipalities in connection with their obligation to provide necessary sanitation and trash disposal services to residents and businesses. The number of co-disposal sites on the NPL, and the problems associated with co-disposal of MSW and industrial wastes, have prompted EPA to address issues facing municipal owner/operators (O/Os) and MSW generators/transporters (G/Ts) at Superfund sites.

For the purposes of this proposal, EPA defines municipal solid waste as solid waste that is generated primarily by households, but that may include some contribution of wastes from commercial, institutional and industrial sources as well. Although the actual composition of such wastes varies considerably at individual sites, municipal solid waste is generally composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents), as well as conditionally exempt small quantity generator wastes (i.e., a listed or characteristic

waste under RCRA that is exempt from permitting because it is accumulated in quantities of less than 100 kilograms (kg) month for hazardous waste and less than 1 kg month for acute hazardous waste. 40 C.F.R. § 261.5).

Sewage sludge is defined as any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sludge. For purposes of this proposal, municipal solid waste and municipal sewage sludge are collectively referred to as MSW; all other wastes and substances are referred to as non-MSW. 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.

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 MSW G/Ts and municipalities. The 1989 Policy assists EPA in determining whether to exercise its enforcement discretion to pursue MSW G/Ts as potentially responsible parties (PRPs) under Section 107(a) of CERCLA. The 1989 Policy provides that EPA generally will not identify an MSW G/T as a PRP for the disposal of MSW at a site unless there is site-specific evidence that the MSW contained hazardous substances derived from a commercial, institutional or industrial process or activity. The 1989 Policy recognizes that, like private parties, municipal O/Os may be PRPs at Superfund sites. The 1989 Policy identified several settlement provisions, however, that may be particularly suitable for settlements with municipal O/Os in light of their status as governmental entities.

Notwithstanding EPA's 1989 Policy, MSW G/Ts have sometimes been drawn into CERCLA contribution litigation. PRPs that contributed large quantities of hazardous substances at co-disposal landfills have sometimes sought to spread the cost of their CERCLA liability among large numbers of other parties, including those whose only contribution was MSW.

Numerous studies have demonstrated that hazardous substances are typically present in MSW in very low concentrations. The overwhelming majority of landfills at which MSW alone was disposed do not experience environmental problems of sufficient magnitude to merit designation as Superfund Sites. In the Agency's experience, with only the rarest of exceptions, MSW landfills do not become Superfund Sites unless other types of wastes containing hazardous substances, such as industrial wastes, are co-disposed at the facility.

In addition, the cost of remediating MSW is typically much lower than the cost of remediating industrial waste. In 1992, EPA performed a comparative analysis of the cost of remediating a representative MSW site versus the cost of remediating a representative industrial waste site. At that time, EPA found that on a per-acre basis, the estimated cost of remediating MSW was significantly lower than the cost of remediating industrial waste. Although costs have changed somewhat since 1992 and EPA continues to learn more about remediating different kinds of waste sites, the Agency does not believe that there has been a radical shift in the relative cost of remediating MSW versus industrial wastes.

INTRODUCTION AND APPLICATION

This proposal will provide revised national guidance on how to involve MSW G/Ts in the CERCLA settlement process and more detailed guidelines for Agency settlements with municipal O/Os. This proposal applies to municipal O/Os and to municipal and private MSW G/Ts. This proposal encourages settlements by setting forth a fair and efficient method for calculating an equitable and reasonable settlement contribution for such parties. Such settlements should encourage settlements with and reduce transactions costs for all parties at a site and should reduce third-party litigation. Specifically, this proposal contains a unit cost formula for contributions by MSW G/Ts and a presumptive settlement percentage and range, based on historical data, for municipal O/Os of co-disposal sites. In addition, a final policy will provide guidelines for evaluating a municipality's ability to pay.

This proposal builds on the 1989 Policy with respect to generators and transporters of MSW. The Agency will continue its policy of not identifying such parties as PRPs at Superfund Sites. As in the 1989 Policy, this proposal does not apply if there is site-specific evidence that the MSW contained hazardous substances derived from a commercial, institutional or industrial process or activity. In recognition of the strong public interest in reducing the burden of contribution litigation, however, EPA is proposing to supplement the 1989 policy by offering settlements to any such MSW G/Ts that wish to resolve their potential Superfund liability and to obtain contribution protection pursuant to Section 113(f) of CERCLA.

This proposal does not apply to MSW G/Ts who also generated or transported any non-MSW containing a hazardous substance, except to the extent that a party can demonstrate that the MSW was completely and continually segregated from the non-MSW prior to and during disposal at the site. Such a party would be required to demonstrate to EPA's satisfaction that segregation occurred. In considering claims of segregated waste, EPA will consider whether the MSW and non-MSW were delivered to the site in separate loads and/or separate packaging, disposed of in separate units of the landfill, handled, packaged and disposed of separately within the disposing facility, and other relevant information. Where such segregation of waste is demonstrated, this proposal applies only to the MSW component of that waste stream; the party's liability for non-MSW would continue to be addressed under applicable EPA CERCLA policies (e.g., EPA's de minimis policy).

To address concerns that this proposal may result in the indirect inclusion in contribution litigation of MSW parties who have contributed small amounts of MSW, and in an effort to prevent creation of transaction costs for parties that EPA has tried to protect from lawsuits through the de micromis policy, EPA intends to amend the existing de micromis policy to modify the volumetric cut-off for MSW G/Ts.

This proposal is designed for co-disposal sites on the NPL. Co-disposal sites contain both MSW and non-MSW. Although this proposal has its most direct application at co-disposal sites with multiple, viable non-de minimis G/Ts, EPA may elect to apply all or part of a final policy to other appropriate sites. Because this proposal is a draft and is subject to public comment before finalization, EPA will not apply it until the proposal is issued as a final policy.

EPA does not intend in any circumstances to reopen settlements already entered into or to reconsider Unilateral Administrative Orders (UAOs) issued prior to issuance of this policy. At sites for which prior settlements have been reached but where MSW parties are subject to third party litigation, EPA will recommend that the principles set forth in the final policy be followed by the private litigants to reach a settlement involving the MSW parties. To the extent that such a settlement is not reached, the U.S. may settle with MSW G/Ts based on the formulas established in this proposal and 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 G/Ts, 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 proposal. In no circumstances does EPA intend to bestow a benefit on recalcitrant parties.

This proposal is intended for settlement purposes only and, therefore, the formulas contained in this proposal are relevant only where settlement occurs. Except as specifically provided below, this proposal will not supersede any of EPA's existing policies (e.g., orphan share, residential homeowner, etc.), and is intended to be used in concert with those policies. For example, those parties eligible for orphan share compensation under EPA's orphan share policy will continue to be eligible for such compensation.

PROCEDURE

EPA believes that this proposal can promote global settlements at co-disposal sites. In some cases, site circumstances may warrant a series of settlement negotiations with different parties. Because this proposal is designed to achieve fair and equitable settlements, settlements with the U.S. will generally provide contribution protection for settling parties and require parties settling under this proposal to waive contribution claims against all other PRPs at the site. In addition, the U.S. will accept settlements from parties based on limited ability to pay, where appropriate. Where beneficial to settling parties, the U.S. will place the proceeds of settlements under this proposal into a special account to help fund cleanup at the site.

MSW Generator/Transporter Settlements:

One purpose of this proposal is to facilitate settlements with MSW G/Ts who seek settlements with the U.S. This proposal recognizes the differences between MSW and the types of wastes that typically give rise to the environmental problems at Superfund Sites. Consistent with the 1989 Policy, EPA will generally not actively pursue MSW G/Ts absent site-specific evidence that the MSW contained a hazardous substance derived from a commercial, institutional or industrial process or activity. However, in recognition of the fact that the potential for small amounts of hazardous substances in MSW may result in contribution claims against MSW G/Ts, EPA intends to use its enforcement discretion to offer settlements based on the process and formulas contained in this proposal to parties that have not been issued special notice letters but that wish to enter settlement negotiations with EPA. It will be incumbent upon such parties to notify EPA of their 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 these parties.

Proposed G.T Methodology:

EPA's proposed methodology for calculating settlement offers to MSW G.Ts requires multiplying the known or estimated quantity of MSW contributed by the G.T by an estimated unit cost of remediating MSW at a representative MSW-only landfill. This method provides a fair, reasonable and efficient means of completing settlements with MSW G/Ts that reflects a reasonable approximation of the cost of remediating MSW.

The unit cost methodology is based on the costs of closure post-closure activities at a "clean" MSW landfill (i.e., a RCRA Subtitle D landfill, not subject to RCRA corrective action or CERCLA response authorities) and increased slightly if certain site conditions exist. EPA's estimate of the cost per unit of remediating MSW at a representative MSW-only landfill is $3.05 per ton.[1] That unit cost is derived from the cost model in EPA's "Regulatory Impact Analysis for the Final Criteria for Municipal Solid Waste Landfills," (RIA) and then adjusted to reflect 1997 dollars. The Subtitle D landfill cost model was run to extract only the costs associated with closure/post-closure activities (thus excluding siting and operational costs). The closure criteria specified in the Solid Waste Disposal Facility Criteria (40 C.F.R. pt. 257 - 258) include a final cover system that minimizes erosion and infiltration with an erosion layer underlain by an infiltration layer. Post-closure requirements consist of cover maintenance, maintenance and operation of a leachate collection system, groundwater monitoring, and maintenance and operation of a gas monitoring system, all to be conducted for 30 years.

Of the Subtitle D landfill types addressed in the RIA, EPA selected the type most representative of the landfills encountered within the Superfund program: a closed, unlined, 55.53-acre landfill. Regions may increase the unit cost not to exceed $3.25/ton if the presence of one or more of the following factors exist:

- shallow aquifer beneath the landfill
- unusually high annual rainfall in the area
- cold ambient air temperature in the area
- affected groundwater beneath the site is classified as drinking water
- low-permeability cover material (e.g., clay) is unavailable onsite.

The presence of one or more of these factors may result in greater closure/post-closure costs at any MSW-only landfill due to the additional precautionary and monitoring technology generally utilized in those instances.

In the instance where a party's contribution is known in cubic yards rather than tons, the following density conversion scales should be used to convert the site-specific cubic yard data into tons:
(1) loose refuse ("curbside") - 100 lbs./cu. yd.;

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[1] This cost will be adjusted over time to reflect inflation.

(2) refuse in a compactor truck - 550 lbs./cu. yd; and
(3) refuse in a landfill (after degradation and settling) - 1200 lbs cu. yd.[2]
In the instance where a party's contribution is MSS, Regions should use a conversion formula of 8.33 pounds/gallon.[3]

In order to use such density conversions, Regions should first identify whether the MSW cubic yard "waste-in" data represents MSW at the time of collection from places of generation, or MSW at the time of transport in or disposal by a compactor truck. Next, Regions should convert the cubic yards to pounds (tons) by multiplying either 100 (for curbside MSW) or 550 (for compactor truck MSW) times the number of cubic yards that a G/T contributed. For cases where site-specific conversion information is already available, Regions may use those conversions rather than the presumptive conversion scales provided in this proposal.

Once the adjusted unit cost is established, the Region will multiply that cost/ton by an individual G/T's quantity contribution to produce a total settlement amount for that party. In order to be eligible for settlements under this proposal, an MSW G/T must provide all information requested by EPA to estimate the quantity of MSW contributed by such party. EPA may solicit information from other parties where appropriate to estimate the quantity of a particular G/T'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.

MSW G/Ts settling pursuant to the final policy will be required to waive their contribution claims against other parties at the site. In situations where there is more than one generator or transporter associated with the same MSW, the settling party will not be required to waive its contribution claims for that waste against any non-settling parties associated with the same waste.

Municipal Owner/Operator Settlements:

A second purpose of this proposal is to provide a consistent methodology for constructing proposals for municipalities that are potentially liable as past or present owners or operators of co-disposal landfills. Pursuant to this proposal, the U.S. will offer settlements to municipal O/Os of co-disposal facilities who wish to settle; those municipal O/Os who do not settle with EPA will remain subject to site claims by EPA and other parties.

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[2] "Estimates of the Volume of MSW and Selected Components in Trash Cans and Landfills," Franklin Assoc., the Garbage Project (1990); prepared for the Council for Solid Waste Solutions.

[3] "Final Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA," OSWER Directive 9835.16 (Feb. 22, 1991).

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 obligation to provide basic sanitation and trash disposal services to residents and businesses. In many cases municipalities opened the landfills initially solely to serve their own communities. EPA believes that those factors, along with the non-profit status of municipalities and the unique fiscal planning considerations that they face, warrant a national settlement policy that provides municipal O Os with reasonably consistent and equitable settlements.

Proposed O/O Methodology:

EPA proposes 20% of total response costs for a site as a baseline presumption to be considered as settlement amount for an individual municipal O/O to resolve its liability at the site. Regions will have the discretion to deviate from the presumption (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 O/O's liability as an O/O. EPA recognizes that, at some sites, there may be multiple liable municipal O/Os and the Region may determine that it is appropriate to settle for less than the presumption for an individual O/O. A group or coalition of two or more municipalities with the same nexus to a site, at the same time or during continuous operations under municipal control, should be considered a single O/O for purposes of developing a cost share (e.g., two cities operated together in joint operations or in cost sharing agreements). In cases where a municipal O/O is also liable as an MSW G/T, EPA would offer to resolve such liability for an additional payment amount developed pursuant to the MSW G/T settlement methodology.

EPA proposes the 20% baseline settlement contribution on the basis of several considerations. EPA examined the data from past settlements of CERCLA cost recovery and contribution cases with municipal O/Os at co-disposal sites where there were also PRPs who were potentially liable for the disposal of non-MSW, such as industrial waste. In examining that data, EPA considered that such historical settlements also typically reflected resolution of the municipality's liability not only as an owner/operator, but also as a generator or transporter of MSW. Under the final policy, such liability will be resolved through payment of an additional amount, calculated pursuant to the MSW G/T methodology. The 20% baseline does not reflect this separate basis for liability and the respective additional payment.

The 20% baseline figure also reflects the requirement that municipal O/Os that settle under the final policy will be required to waive all contribution rights against other parties as a condition of settlement. By contrast, in many historical settlements, municipal O/Os retained their contribution rights and hence were potentially able to seek recovery of part of the cost of their settlements from other parties.

In addition, the 20% baseline figure reflects EPA's evaluation of public interest considerations relating to municipalities. For example, Section 122(e)(3) of CERCLA authorizes the President to perform "nonbinding preliminary allocations of responsibility" for the purpose of promoting settlements and to include "public interest considerations" in developing such allocations. EPA believes it is in the public interest to consider collectively: the unique public

health obligation of municipalities to provide waste disposal services to their citizens; the municipalities' non-profit status; and the unique fiscal planning considerations for municipalities that require multi-year planning.

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

(1) whether the municipality performed specific activities that exacerbated environmental contamination or exposure (e.g., the municipality permitted the installation of drinking wells in known areas of contamination);

(2) whether the O/O received operating revenues net of waste system operating costs during ownership or operation of the site that are substantially higher than the O/O's presumptive settlement amount pursuant to this policy; and

(3) whether an officer or employee of the municipality has been convicted of performing a criminal activity relating to the specific site during the time in which the municipality owned or operated the site.

The Regions may adjust the presumptive percentage down based on whether the municipality, on its own volition, 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; whether the municipality discontinued accepting hazardous waste once groundwater contamination was discovered; etc.). The Regions may also consider other equitable factors at the site.

Financial Considerations in Settlement:

In all cases under this proposal, the U.S. will consider municipal claims of limited ability to pay. Municipalities making such claims are required to provide Regions all necessary documentation relating to the claim. Recognizing that municipal O/Os may be 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 O/O may offer as partial settlement of its cost share.

Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

The Dow Chemical Company, et al.,	)	Case No. C-1-97-307
	)	
Plaintiffs,	)	Judge Herman J. Weber
	)	(Magistrate Judge Jack
vs.	)	Sherman, Jr.)
	)	
	)	
Acme Wrecking Co., Inc., et al.	)	
	)	
Defendants.	)	

AFFIDAVIT OF MICHAEL T. MELAMPY

I, Michael T. Melampy, 1466 Gibson Road, Goshen, Ohio 45122, after having been first duly cautioned and sworn, do hereby state as follows:

1. I have been employed by the City of Blue Ash in the Service Department since July of 1973.
2. As an employee of the Service Department, I operated one of the residential garbage collection trucks on a temporary basis. I did this from 1973 until 1977 and became familiar with the City of Blue Ash's entire waste collection program.
3. During 1973 until 1977, the material which I collected was transported to a landfill other than Skinner Landfill.
4. To the best of my knowledge, all material collected by the City of Blue Ash from 1973 until 1977 also went to a landfill other than Skinner Landfill.
5. From 1977 through 1985, I operated a front load commercial hauler and a residential garbage packer for the City of Blue Ash.

6. To the best of my knowledge, all materials which I collected were transported to sites other than Skinner Landfill.

7. To the best of my knowledge, all material collected by the City of Blue Ash from 1977 through 1985 went to landfills other than Skinner Landfill.

8. In 1986, the City of Blue Ash contracted with Browning Ferris Industries to collect, transport and dispose of its residential and commercial waste.

9. I was personally involved in the contract negotiations and assisted in formulating the specifications of the contract.

10. This contract required Browning Ferris Industries to dispose of this material at an EPA approved landfill.

11. In response to this requirement, Browning Ferris Industries provided the City of Blue Ash with an EPA disposal permit for the Bigfoot Landfill located in Morrow, Ohio, thereby certifying that Browning Ferris Industries was disposing the City of Blue Ash's material at this location.

12. To further illustrate that the City of Blue Ash's waste material was being disposed at the Bigfoot Landfill from 1986 through 1990, Browning Ferris Industries took me on a tour of the Bigfoot Landfill.

13. During this tour, representatives from Browning Ferris Industries specifically told me that the City of Blue Ash's waste material was being disposed at the Bigfoot Landfill.

14. In summary, as an employee of the City of Blue Ash's Service Department, the waste material generated by the City of Blue Ash from 1973 through 1990 was disposed at locations other

than the Skinner Landfill.

15. I have no personal knowledge of any waste material collected from within the borders of the City of Blue Ash ever being disposed at the Skinner Landfill.

Further affiant sayeth naught.

Michael T. Melampy

Sworn and subscribed in my presence this 8 day of October, 1997.

Judith A. Ward
Notary Public

JUDITH A. WARD, Notary Public
In and for the State of Ohio
My Commission Expires May 1, 2001

NOTARIAL SEAL
STATE OF OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

The Dow Chemical Company, et al.,	)	Case No. C-1-97-307
	)	
Plaintiffs,	)	Judge Herman J. Weber
	)	(Magistrate Judge Jack
vs.	)	Sherman, Jr.)
	)	
	)	
Acme Wrecking Co., Inc., et al.	)	
	)	
Defendants.	)	

AFFIDAVIT OF WILBUR E. BREWER, Sr.

I, Wilbur E. Brewer, Sr., 4314 Woodlawn Avenue, after having been first duly cautioned and sworn, do hereby state as follows:

1. I have been employed by the City of Blue Ash in the Service Department since October of 1960.
2. As an employee of the Service Department, I operated one of the residential garbage collection trucks from 1960 until approximately 1975. In this position I became very familiar with the City of Blue Ash's waste disposal practices.
3. From 1960 through 1975, the material which I collected was transported to landfills other than Skinner Landfill.
4. To the best of my knowledge, all material collected by the City of Blue Ash from 1960 until 1975 was residential waste only.
5. Throughout my thirty-eight years as an employee of Blue Ash, I have no personal knowledge of any waste material collected from within the borders of the City of Blue Ash ever being disposed at the Skinner Landfill.

Further affiant sayeth naught.

Wilbur E. Brewer SR.
Wilbur E. Brewer, Sr.

Sworn and subscribed in my presence this 9th day of October, 1997.

Judith A. Ward
Notary Public

JUDITH A. WARD, Notary Public
In and for the State of Ohio
My Commission Expires May 1, 2001