NEWS & ANALYSIS

ARTICLES

Negotiating Superfund Mixed Funding Settlements

by Barry E. Hill

Editors' Summary: Often, the hardest part of getting Superfund cleanup underway is finding a workable compromise between the government's assertions of joint and several liability and defendants' willingness to pay only "their share." In 1986, seeking to break such impasses, Congress added specific authority for the government to pay for part of the cleanup. Such "mixed funding" settlements have always been conceptually attractive, but not so easy to implement without criticism. In this Article, the author outlines the underlying legal authorities and tracks the cases in which mixed funding has been used. Finally, he suggests ways to use mixed funding most appropriately.

A mixed funding settlement agreement should be a viable option to litigants at a Superfund site. However, as an alternative to protracted and costly litigation, few mixed funding agreements have been entered into. This Article discusses how private sector litigants can make better and more frequent use of mixed funding as a settlement tool. The Article first describes the legal authority underlying mixed funding. It then summarizes cases in which mixed funding has been used to date. Finally, the Article offers advice on how to use mixed funding most appropriately.

Underlying Legal Authority

In 1986, Congress endorsed the United States Environmental Protection Agency's (EPA's) flexible approach to settling Superfund cases by adding §122 to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund).[1] Specifically, §122(b)(1) provides:

> An agreement under this section may provide that the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance. In any case in which the President provides such reimbursement, the President shall make all reasonable efforts to recover the amount of such reimbursement under section 107 or under other relevant authorities.

Congress intended that mixed funding settlement agreements under §122(b)(1) should cover a myriad of circumstances when conferees stated that:

> The President, where appropriate and in the public interest, may reimburse parties for certain costs of actions under the agreement by using monies from the Fund on behalf of parties who are unknown, insolvent, similarly unavailable, or refuse to settle.[2]

CERCLA §122(b)(1) gives the President explicit statutory authority to enter into mixed funding settlement agreements, and he delegated this authority to EPA.[3]

The mixed funding authority of §122(b)(1) must be read in conjunction with §111(a)(2), which sets forth the general statutory authority for reimbursing claims for the necessary response costs incurred. CERCLA §111(a)(2) states that the fund may be used to pay:

> any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan ... Provided, however, that such costs must be approved under said plan and certified by the responsible Federal official.

Essentially, §111(a)(2) adds requirements that the response

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1. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA 001-075. The 1986 Amendments were added by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.
2. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 252 (1986).
3. Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), ELR ADMIN. MATERIALS 45031.

costs be "necessary" and "approved" under the national contingency plan.[4]

In 1987, EPA promulgated a guidance document on mixed funding, entitled "Evaluating Mixed Funding Settlements Under CERCLA."[5] EPA discussed three scenarios for a mixed funding settlement in which the Agency, at its discretion, agrees to conduct or pay for a portion of a response action, or both.

First, with *preauthorization*, EPA grants prior approval to a potentially responsible party (PRP) to conduct a response action, and the Agency agrees to allow the PRP to assert a claim against the fund for reimbursement of a portion of its response costs. EPA explained that:

> The term "preauthorization" refers to the approval that must be granted by the Agency prior to cleanup actions if a claim for response costs is to be considered against the Fund. If preauthorization is granted, it serves as an Agency commitment that, if response costs are conducted pursuant to the settlement agreement and the costs are reasonable and necessary, reimbursement will be available from the Fund as dictated by the agreement, subject to the availability of appropriated monies.[6]

Second, in a *cash-out* arrangement, or "settlement for cash," a PRP pays EPA for a portion of the response costs in lieu of the PRP conducting the response action. Thus, the Agency conducts the response action.

Third, a *mixed work* arrangement addresses the entire response action, but the PRP and the Agency agree to conduct discrete portions or segments of the response action. Thus, since cleanup of a site may be divided into "operable units," the Agency may perform the remedial investigation/feasibility study and the PRP may implement the remedial design/remedial action.

EPA Experience With Mixed Funding

Of the three mixed funding options, EPA generally prefers preauthorization, since it requires the PRPs, and not EPA, to conduct the response action.[7] Also, preauthorization as a settlement tool conserves Agency time and its limited manpower and litigation resources, and allows EPA to allocate fund monies to other high priority Superfund sites.

Over the years, EPA has demonstrated its preference for preauthorization. It has agreed to mixed work arrangements at only two sites: Ottati & Goss in New Hampshire (Region I), and Love Canal in New York (Region II). EPA agreed to a cash-out arrangement at another site—Prices Landfill in New York (Region II).

In general, consistent with congressional intent, EPA has granted preauthorization when some PRPs cannot be found or will not participate in a negotiated settlement or, because of financial constraints, cannot currently or in the foreseeable future contribute to the cleanup of the hazardous waste site. The Agency, therefore, must determine that preauthorization is the best available means of addressing the hazardous waste problems at the site. The Agency must decide: (1) whether it is appropriate to grant preauthorization to the proposed PRP settlors who are responsible for a significant portion of the liability for the site and are willing to accept an appropriate level of responsibility; (2) whether the proposed PRP settlors are technically and financially capable of implementing the remedial design/remedial action activities; and (3) whether the proposed preauthorization will facilitate meeting the schedules for initiating remedial investigations/feasibility studies and remedial actions mandated by §116 of CERCLA.

The following chart lists the nine Superfund sites where the Agency has preauthorized PRPs to conduct response actions. Consent decrees for eight sites have been entered by the indicated federal district courts. At the Peak Oil,

REGION	SITE NAME	SITE LOCATION	DATE OF PRE-AUTHORIZATION	DISTRICT COURT	DOCKET NO. or EPA ADMIN. ORDER NO.	TOTAL COST OF CLEANUP (IN MILLIONS)	FUND SHARE (IN MILLIONS)	PERCENTAGE OF GOVERNMENT'S CONTRIBUTION
Region I	Re-Solve, Inc.	North Dartmouth, Massachusetts	November 23, 1988	District Court of Massachusetts	90-104905	$22.9	$6.9	30%
Region III	McAdoo Associates, Inc.	McAdoo, Pennsylvania (Schuylkill County)	June 16, 1987	Eastern District of Pennsylvania	87-7352	0.4	0.1	25
	Harvey & Knott Drum, Inc.	Kirkwood, Delaware (New Castle County)	May 6, 1987	District Court of Delaware	87-464	9.3	3.1	33 1/3
	Tybouts Corner	Tybouts, Delaware	September 9, 1988	District Court of Delaware	80-489-JLL 88-703 89-561	20.0	4.2	21
Region IV	Peak Oil, Reeves Southeastern Corporation, Bay Drums	Tampa, Florida	February 9, 1989		90-42-C (EPA) 90-43-C (EPA) 90-44-C (EPA)	1.8	0.7	39
Region V	Marion/Bragg Landfill	Marion, Indiana (Grant County)	September 7, 1988	Northern District of Indiana	F-90-142	7.1	1.8	25
Region VI	Motco	Texas City, Texas	May 6, 1987	Southern District of Texas	G-86267	44.4	9.3	21
	Bailey Waste	Orange, Texas	November 16, 1989	Eastern District of Texas	B-89-0859-CA	15.2	3.0	20
Region X	Colbert	Colbert, Washington	September 30, 1988	Eastern District of Washington	C-89-033-RJM	12.2	1.4	11 1/2

4. 40 C.F.R pt. 300 (1990). *See generally* Starfield, *The 1990 National Contingency Plan—More Detail and More Structure, But Still a Balanced Act*, 20 ELR 10222 (June 1990).

5. ELR ADMIN. MATERIALS 35117. The guidance was later published in the *Federal Register* at 53 Fed. Reg. 8279 (Mar. 14, 1988).

6. ELR ADMIN. MATERIALS 35117, 53 Fed. Reg. at 8280 (Mar. 14, 1988).

7. *See* ELR ADMIN. MATERIALS 35118, 53 Fed. Reg. at 8282 (Mar. 14, 1988).

Reeves Southeastern Corporation, and Bay Drum sites in Tampa, Florida, however, EPA issued on June 4, 1990, three Administrative Orders on Consent for an area-wide remedial investigation/feasibility study. This legal agreement between EPA and the PRPs can be enforced in federal district court.

The mixed funding agreements listed provide for a fund share of $30.5 million out of $133.5 million in total cleanup costs. EPA agreed to pay between 11 1/2 percent and 39 percent of the response costs at the nine Superfund sites. On average, EPA has agreed to reimburse PRPs for approximately 25 percent of the response costs incurred. Thus, a mixed funding settlement, if negotiated effectively and supported by a high quality application for preauthorization, can save a PRP or a group of PRPs millions of dollars in transaction costs and litigation fees.

In approving mixed funding agreements, EPA is likely to use the four stages it has proposed as the response claims process:

> (1) *The Negotiation Process*—PRPs negotiate an "agreement in principle" with EPA for a mixed funding settlement;
> (2) *The Preauthorization Process*—PRPs submit an application for preauthorization to EPA for the PRPs to conduct the remedial design/remedial action and obtain EPA's prior approval to conduct the response action;
> (3) *The Response Action Process*—PRPs conduct the preauthorized response activities at the hazardous waste site; and
> (4) *The Claims Award Process*—PRPs submit a claim(s) against the fund for reimbursement of a portion of the response costs incurred.[8]

How to Use Mixed Funding Most Appropriately

Three principles will help Superfund lawyers make appropriate use of mixed funding as an effective settlement tool:

> (1) The earlier PRPs become involved in the EPA administrative/negotiation process, the better.
> (2) The earlier a PRP negotiation team is established, the better.
> (3) The earlier an experienced mediator and competent technical consultants are hired and made an integral part of the discussions among and between the PRPs and the negotiation process with EPA, the better.

Each of these principles is considered in more detail below.

It Helps to Have Early PRP Involvement in the EPA Administrative/Negotiation Process

Early involvement in the EPA administrative process by a PRP is, as a general rule, encouraged by experienced Superfund practitioners. It provides for greater input directly into the EPA administrative process and can be the only opportunity to comment on the proposed cleanup alternatives. Early involvement can mean an early assessment of the PRP's potential liability and its contribution to the hazardous waste problems at the site relative to other PRPs. In addition, early involvement is an opportunity to find out who the other PRPs are. Furthermore, early involvement provides the opportunity to evaluate the technical issues at the site based on the preliminary assessment, the site investigation, and the score of the site based on the hazard ranking system. Ideally it is advisable for the PRP to become involved in the EPA administrative process prior to the listing of the site on the national priorities list (NPL). This is the best situation for a PRP seeking to develop a negotiation strategy for assuming its fair share of the liabilities for cleanup of a site.

However, once a site has been listed on the NPL, EPA has determined that a response action is necessary, and the Agency has also issued notice letters (either general or special notice letters) to identified PRPs, a PRP should begin to assess its legal position. If a PRP has not had any involvement whatsoever at the site or has not disposed of any hazardous materials at the site, and the PRP can demonstrate this to EPA's satisfaction, a PRP is in an enviable position.

However, if the PRP is financially viable and realizes that the federal government has a strong case against the company, and if the company believes, based on internal information, that it is a substantial contributor to the hazardous waste problems at the site, the PRP should consider submitting a "good faith" mixed funding offer to the Agency. In a situation where more than one PRP may be liable, a single PRP may make an offer to finance or conduct less than 100 percent of the cleanup. This is especially true when other viable PRPs alleged to be responsible for a significant share of liability either refuse or lack the funds to participate in a settlement. This is the earliest point at which a PRP may decide to become involved in the EPA administrative/negotiation process for a mixed funding settlement agreement.

The Agency says that a "good faith" mixed funding offer can trigger the negotiation process since:

> EPA will not consider any application for preauthorization from PRPs outside of negotiations aimed at reaching a judicial or administrative settlement. That is, if EPA has not initiated negotiations with PRPs, an application for preauthorization will serve to notify EPA that a PRP wishes to initiate negotiations with EPA. The Agency will not consider preauthorization of response actions to be conducted by PRPs until negotiations are underway.[9]

Once a "good faith" mixed funding offer is made by the individual PRP or group of PRPs, the Agency will consider whether any type of mixed funding arrangement is appropriate. EPA's guidance provides that:

> The best candidates for mixed funding are cases in which the following features are present:
> The potential portion or operable unit to be covered by the Fund is small or the settling PRPs offer a substantial portion of the total cost or [sic] cleanup. In this context, substantial portion may be defined as a commitment by the PRPs to undertake or finance a predominant portion of the total remedial action.
> The Government has a strong case against financially

8. 54 Fed. Reg. 37892 (Sept. 13, 1989).

9. *Id.* at 37905.

viable nonsettling PRPs, from which the Fund portion may be recovered.[10]

The guidance goes on to provide that:

> Cases considered poor candidates for mixed funding have the following features:
>
> • The case against settling parties is strong, and thus the potential for successful litigation is high;
>
> • The potential Fund portion is large (e.g., the potentially [sic] settlors' offer is insufficient).[11]

In a nutshell, the factors of primary importance to EPA are: (1) the size of the offer; (2) the strength of the federal government's case against nonsettlors; and (3) the litigation risks involved in pursuing a cause of action against the settling parties.

If the EPA Regional Office determines that a mixed funding arrangement is appropriate for the site (based on the percentage of total costs offered and whether the PRPs are technically and financially capable of conducting the cleanup), the PRPs and EPA will reach an "agreement in principle." The PRPs will then submit a draft application for preauthorization to EPA Headquarters. The PRPs have now reached the second stage of the response claims process and there are additional opportunities for further negotiation or refinement of the "agreement in principle" on both the Agency's and the PRPs' parts. Eventually, the preauthorization process will culminate in a Preauthorization Decision Document (PDD) with the specific terms and conditions that must be met by the PRP applicants for response costs to be reimbursed by the fund. The PDD is attached to the consent decree that is subsequently filed with the federal district court.

In sum, PRPs are advised to begin the process of negotiation with EPA as early as possible and to seek the federal government's acceptance of a mixed funding offer at a very early stage. Such action could be of tremendous benefit to the PRPs and could result in reducing the PRPs' cleanup costs and litigation fees.

It Helps to Establish a PRP Negotiating Team Early

The PRP negotiating team is the primary vehicle for developing a successful mixed funding settlement with EPA. The PRP negotiating team should be comprised of a representative number of all classes of the contributors to the hazardous waste problems at a site (e.g., major, medium, small, and de minimis contributors), since the rights of all of the parties must be protected during the settlement discussions.

A PRP negotiating team should: (1) develop a comprehensive and coordinated strategy for negotiations with EPA; (2) develop and share with the PRP group draft settlement documents in advance of negotiations with EPA; (3) raise issues for the EPA enforcement staff to consider and resolve with management; (4) develop initial positions on major issues; (5) negotiate schedules with appropriate deadlines; (6) conduct the negotiations with EPA; (7) advise the PRP group on the resolved and unresolved issues; and (8) keep the PRP group informed in a timely manner. The PRP negotiating team may also use a mediator and technical consultants to ensure that they are directly involved in the negotiating process as valuable support personnel.

Examples

An aggressive proactive approach to negotiating with EPA is essential. This was true of the PRPs at the Harvey & Knott Drum, Inc., site in New Castle County, Delaware, whose proactive approach to negotiation resulted in the first request for preauthorization granted by the Agency.

The Harvey & Knott Drum, Inc., site was a two-acre site that was used as an open dump and burning ground. The site was placed on the national priorities list in 1982. On September 30, 1985, the EPA Region III Regional Administrator signed the record of decision (ROD) for the site which included: (1) on-site pond cleanup; (2) off-site drum, debris, and waste pile disposal; and (3) contaminated groundwater extraction, treatment, and reapplication of the treated water (soil flushing). The ROD deferred selection of remedial response measures for the wetlands and surface waters adjacent to the site and also deferred decisions regarding final closure of the site and the level of groundwater quality to be achieved.

In the PDD, the Agency sought to demonstrate the importance of proactive negotiations. It specifically pointed out that shortly after the ROD was signed and after EPA issued notice letters to five PRPs, General Motors initiated settlement discussions. The PDD stated that, as a result, General Motors participated in the remedial investigation/feasibility study conducted by EPA and also hired a consultant to prepare the Remedial Action Work Plan that EPA approved in April 1986. After several discussions of settlement between the company and Region III enforcement staff, General Motors submitted a draft consent decree to the Agency for review in January 1986. In early May 1986, EPA and General Motors arrived at an "agreement in principle," which provided that General Motors would conduct the remedy selected by EPA and that EPA would reimburse General Motors for a portion of the response costs incurred. In October 1986, General Motors submitted the formal application for preauthorization. The Assistant Administrator for the Office of Solid Waste and Emergency Response signed the PDD, issued on May 6, 1987, promising to reimburse General Motors "in an amount not to exceed the lesser of three million eighty-six thousand dollars ($3.086 million), or thirty-three and one third percent (33 1/3%) for reasonable and necessary eligible costs incurred in carrying out the remedy."[12] The consent decree between EPA, Delaware, and General Motors was executed by the parties and approved by the district court of Delaware in December 1987, and filed with the clerk's office in May 1988.[13]

By contrast, Chrysler Corporation did not join in the settlement discussions, though EPA attempted to reach a settlement with the company at the time that it reached an agreement with General Motors. Chrysler Corporation al-

10. ELR ADMIN. MATERIALS 35118, 53 Fed. Reg. at 8281 (Mar. 14, 1988).

11. *Id.*

12. Decision Document—Preauthorization of a CERCLA §111(a) Claim—Harvey & Knott Drum, Inc., New Castle, Delaware, 6 (May 6, 1987).

13. United States v. General Motors Corp., No. 87-464 (D. Del. May 4, 1988).

legedly sent paint sludge and thinner wastes containing toxic chemicals (e.g., benzene, ethylbenzene, methylene chloride, toluene, and xylenes) to the site. On June 23, 1988, approximately six months after the consent decree with General Motors was approved by the court, the government filed suit against Chrysler Corporation and Knotts, Inc., the owner of the hazardous waste site, seeking approximately $3.3 million for past costs and one-third of future costs for oversight of the remedial design/remedial action being conducted by General Motors. This cost-recovery lawsuit was a direct result of Chrysler Corporation's decision not to join the settlement discussions. Failure to settle with the federal government may, in the end, be more costly in terms of remedial costs and litigation fees for PRPs who refuse to enter into settlement discussions when the opportunity exists. The *Chrysler* case is still pending.[14]

Another example of the Agency's aggressive pursuit of recalcitrant PRPs in a subsequent cost-recovery action occurred at the McAdoo Associates, Inc., site in Schuylkill County, Pennsylvania. An investigation of the McAdoo site was conducted by EPA and the Pennsylvania Department of Environmental Resources. Toluene, trichloroethylene, trichloroethane, methyl ethyl ketone, and other hazardous wastes were found, and the site was added to the national priorities list in September 1983.

On June 28, 1985, the ROD was signed for the McAdoo Associates site. The remedy consisted of: (1) filling, grading, and constructing a cap; (2) diverting surface water; (3) removing and disposing of debris; (4) excavating wastes and contaminated soil; and (5) commissioning an engineering study to determine the risk and the magnitude of mine subsidence to assist in the design of the cap, and to determine the need, if any, for soil excavation. The ROD deferred selection of remedial response activities for the mine pool and surface water adjacent to the site.

Again, in the PDD, the Agency sought to demonstrate how important it considered proactive negotiations. It specifically stated that in 1985 a group of PRPs initiated settlement discussions with EPA after the Agency issued special notice letters to 77 PRPs for a remedial design/remedial action at the site. Pursuant to §122(e), EPA provided the PRPs with the following information: (1) the names and addresses of the other PRPs; (2) the volume and the nature of the hazardous wastes/substances each PRP allegedly contributed; and (3) a ranking of the substances by volume. The special notice letters invoked the statutory moratorium on certain EPA actions and initiated the process of formal negotiations.

After several months of mediation conducted by Clean Sites, Inc., that included the development of a cost-sharing arrangement among the PRPs, on May 29, 1986, EPA and the steering committee for 69 of the PRPs reached an "agreement in principle" for the PRPs to carry out the remedy selected by EPA. The PRPs, in turn, would be reimbursed for a portion of the response costs incurred in conducting the response action. On January 13, 1987, the PRPs submitted a formal application for preauthorization. The Assistant Administrator for the Office of Solid Waste and Emergency Response signed the PDD on June 16, 1987. The Agency said that it would reimburse settling PRPs "in an amount not to exceed the lesser of one hundred and nineteen thousand dollars ($119,000), or twenty-five percent (25%) of reasonable and necessary eligible costs incurred in carrying out the remedy."[15] The maximum amount for which the PRPs could submit claims against the fund was based on the estimated remedial design costs (including the mine subsidence engineering study and the soil sampling analyses) and surface cleanup costs. The maximum amount did not reflect the total costs of the remedy since neither the government nor the PRPs knew the extent of soil excavation that would be needed. EPA agreed in the PDD, however, that once the final remedy was determined, it would reimburse the PRPs for 25 percent of the eligible costs incurred for implementing the approved remedy. The consent decree between EPA, Pennsylvania, and the settling PRPs was executed by the parties and approved by the federal district court on June 2, 1988.[16]

However, eight companies (Alcan Aluminum, Inc.; Champion Auto Generator Service, Inc.; International Flavors and Fragrances, Inc.; Kalama Chemicals, Inc.; McAdoo Associates, Inc.; Payso, Inc.; Schultz Electroplating, Inc.; and S&W Waste, Inc.) and two individuals (Edward L. and Noreen Payer) did not enter into a settlement agreement when it was first offered. On June 23, 1988, less than a month after the consent decree with the other PRPs was approved by the court, the federal government filed suit against the nonsettling parties, seeking a judgment of $925,000 for the Agency's past costs and for 25 percent of the future response costs incurred at the site. This cost-recovery lawsuit, again, was a direct result of the recalcitrant PRPs' earlier decision not to join the settlement discussions with EPA and the federal government's indication that those PRPs who are not willing to assume any cleanup responsibilities will be vigorously pursued. In the end, it may prove to be more costly in transaction fees for the PRPs. The case is still pending.[17]

In short, the Agency has demonstrated that it will comply literally with §122(b)(1), requiring "all reasonable efforts to recover the amount of such reimbursement under section 107 or under other relevant authorities" against nonsettling parties. These case studies are clear indicators of the benefits to PRPs of proactive negotiations with EPA and, of course, the early establishment of an effective PRP negotiating team.

It Helps to Have Early Involvement of a Mediator and Technical Consultants

Often, it is advisable for the PRPs to secure the services of an experienced mediator (or a team of mediators) and competent technical consultants as early as possible. These professionals can contribute significantly to the discussions between the parties prior to and after reaching an "agreement in principle" with the Agency. An experienced mediator, such as a professional neutral factfinder, can assist PRPs in allocating the responsibilities for the hazardous waste problems at the site and, consequently, in allocating

14. United States v. Chrysler Corp., No. 88-341 (D. Del. June 23, 1988).

15. Decision Document—Preauthorization of a CERCLA §111(a) Claim—McAdoo Associates, Schuylkill County, Pennsylvania, 8 (June 16, 1987).

16. United States v. Air Products & Chemicals Corp., No. 87-7352 (E.D. Pa. June 2, 1988).

17. United States v. Alcan Aluminum, Inc., No. 88-4970 (E.D. Pa. June 23, 1988).

percentages among themselves of the total response costs for the cleanup. The factual basis for these percentages can later assist the federal government in settling on a mixed funding share. Competent technical consultants, due to their specialized expertise, can assist PRPs in understanding and responding to the highly technical issues at the site and can provide assistance in developing a comprehensive application for preauthorization.

Pursuant to §122(e)(3), to expedite settlements and remedial actions, EPA may provide PRPs with a nonbinding preliminary allocation of responsibility (NBAR) that allocates responsibility and percentages of the response costs among PRPs. The PRP steering committee, however, can hire an experienced mediator to provide the equivalent of an NBAR during the negotiation phase to assist in resolving differences among the PRPs. For example, the private PRPs at the Army Creek Landfill site in New Castle County, Delaware, hired two mediators to work as a team. In our capacity as mediators, we provided the following services: (1) recommending a private investigation firm experienced in Superfund cases and managing their investigation, which was designed to identify additional PRPs who could be invited to participate in the ongoing settlement discussions with EPA or, if they declined, to advise EPA of the results of the PRP search; (2) meeting separately with the disputants to hear more about their concerns; (3) functioning as neutral factfinders in reviewing confidential hazardous waste disposal information, confidential business information, and internal company documents and materials presented by the PRPs; (4) serving as message carriers between and among the disputants; (5) serving as a liaison to the EPA Region III enforcement staff, and to the public sector PRP (New Castle County); (6) suggesting "trades" or "packages" that met the needs of all the parties; (7) meeting separately with the disputants to discuss, in our view, the relative position of each of their companies with respect to their percentage of the total costs of the cleanup based on their waste-in lists, and the volume and the toxicity of the hazardous wastes disposed; and (8) providing all the disputants with a proposed cost allocation. We were also prepared to assist the PRPs with: (1) managing joint factfinding when highly technical matters were involved; (2) participating as neutrals in the settlement discussions with EPA; and/or (3) helping the disputants hold each other to their commitments by playing a monitoring role on behalf of the PRP group, as a whole. Thus, with the Army Creek Landfill site as an example, mediators can be especially useful to PRP steering committees or negotiating committees, or both, when pursuing a mixed funding settlement agreement.

Competent technical consultants can provide services that are equally valuable to the PRPs. Again, the PRPs at the Army Creek Landfill site retained the services of a consulting firm that assisted the PRPs tremendously in their settlement discussions with EPA on the vast array of technical issues at the site. Typically, technical issues may include geotechnical, electrical engineering, mechanical engineering, structural engineering, and field survey matters. Since a successful application for preauthorization will result in the PRPs conducting the remedial design/remedial action, the technical consultants may also be responsible for performing a myriad of tasks including: (1) evaluating and interpreting technical data, such as treatability data and geotechnical investigations; (2) collecting and evaluating additional data for the design phase; and (3) identifying critical technical requirements and activities where quality may be at risk.

The public and private PRPs at the Army Creek Landfill site submitted separate applications for preauthorization. The Agency issued the PDD for New Castle County on September 27, 1990, and agreed to reimburse the county in an amount not to exceed $2 million, or 40 percent, for the reasonable and necessary eligible response costs to pump and treat the contaminated groundwater. Also, on September 27, 1990, the Agency issued the PDD for the private PRPs and agreed to reimburse the PRPs in an amount not to exceed $1.976 million or 10 percent for the reasonable and necessary eligible response costs to construct a cap and to control the sediment and any soil erosion. At this writing, a consent decree with the PDDs attached has not yet been approved by the district court of Delaware.

Pitfalls of Preauthorization

When PRPs negotiate a mixed funding settlement agreement with EPA, they are responsible for the adequacy of the remedial design and, ultimately, the implementation of the remedies specified. EPA says:

> An approval of any of the Remedial Design work elements at any stage by EPA in no way guarantees the success or failure of the ultimate remedy. This is analogous to a city issuing a building permit to a developer for construction of a building. The permit does not guarantee the building will be structurally sound, it merely indicates compliance with the minimum design criteria and standards of the city for such buildings. The soundness of the building's construction is still the complete responsibility of the owner. Similarly, EPA review and approval of a PRP's work plan or design merely assesses their acceptability with regard to Remedial Action goals in accordance with the ROD and the Settlement Agreement. It does not warrant that the specified performance standards will be met.[18]

Athough the Agency approves the remedial design, the PRPs are responsible if the remedial design proves inadequate or the remedial action fails to respond to the hazardous waste problems at the site. The PRPs are, nonetheless, still responsible for responding to the release and are legally responsible for complete site remediation as specified in the consent decree and the PDD.

Moreover, the PRPs must comply with all applicable federal, state, and local laws, regulations, and cleanup standards and requirements, and must meet all performance standards, terms, and conditions specified in the PDD and the consent decree. From the point of view of the PRPs, they assume a heavy burden since EPA's role is now restricted to only ensuring that (1) the remedies are protective of human health and the environment during the course of the remedial action activities; and (2) the remedial action is conducted in accordance with all of the terms and conditions of the consent decree and the PDD.

PRPs should also be familiar with EPA regulations and programs to speed the preauthorization process. At ICF Incorporated, my project team, at EPA's request, re-

18. Interim Final Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties, OSWER Directive 9355.5-01, at 4-4 to 4-5 (Feb. 1990).

viewed almost all of the draft applications for preauthorization submitted by various PRP groups when the Agency's mixed funding program was still in its embryonic stage of development. These draft applications for preauthorization required considerable modification since the parties or their consultants did not understand the national contingency plan, or EPA regulations and programs. Many times the draft applications were returned to the PRPs with lengthy comments. Unfortunately, this delayed the Agency's decision to preauthorize the proposed PRP-conducted response actions and caused the PRPs to absorb additional costs in revising and resubmitting the applications for Agency review and approval. In some instances, it may have even discouraged the PRPs from resubmitting the application for preauthorization.

Conclusion

In conclusion, both the Agency and PRPs should realize that PRPs are, indeed, looking to settle cases and avoid costly litigation, and that the Agency cannot litigate every Superfund case. Mixed funding settlements can be an excellent compromise, but, as a settlement tool, mixed funding has not been used effectively or frequently enough by EPA and PRPs. But, with more experience, mixed funding holds great promise for speeding environmental cleanups at Superfund sites.