

SUPERFUND PROGRAM (Part 2)

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TRANSPORTATION AND HAZARDOUS MATERIALS
OF THE
COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES
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FIRST SESSION**

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JUNE 30, 1993—ENVIRONMENTAL RESPONSE, COMPENSATION, AND
LIABILITY
OCTOBER 14, 1993—PUBLIC INVOLVEMENT
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Mr. SWIFT. I think the gentleman from Idaho is sitting between two signs. The one that says Mr. Crapo is the correct one.

Mr. CRAPO. What I did is scooted over to the mike.

Mr. QUARLES. I apologize.

Mr. SWIFT. It was certainly not your fault.

Mr. Revesz.

STATEMENT OF RICHARD L. REVESZ

Mr. REVESZ. Mr. Chairman and members of the subcommittee, thank you for inviting me to testify today. My testimony is based primarily on a study that I conducted as a consultant to the Administrative Conference of the United States, together with one of my colleagues, Professor Lewis Kornhauser. As part of that study, we reviewed all settlement documents and de minimis settlements entered as of June 30, 1992. We also analyzed data on de minimis settlements at the EPA's Superfund databases and we interviewed the EPA attorneys primarily responsible for the de minimis settlements at each of the regions, as well as a number of private attorneys who had experience with it.

Our study reached three principal conclusions: (1) that the de minimis settlement tool has been vastly underutilized by EPA; (2) to the extent that de minimis settlements have been entered, they have been entered very late in the process at a time when most of the transaction costs have already been expended; and (3) there is enormous variation in the terms of settlement that has encouraged wrangling between de minimis parties and major parties, increasing transaction costs and reducing the appetite of the EPA regions for entering into de minimis settlements. And I will go through each of these.

On the first, the number of settlements through June 30, 1992: When our empirical study ended, EPA had entered 77 de minimis settlements at 49 different sites. There are two types of de minimis settlements: landowner settlements entered with the current or prior owners of Superfund sites that typically involve only one or two parties. Waste contributor settlements are entered with generators and transporters of waste to the site and typically involve a large number. From the perspective of saving transaction costs, it is waste contributors that are most relevant.

I believe that any site at which EPA has entered a record of decision, a ROD, and that has at least 20 PRP's is a good candidate for de minimis settlement. For the distribution of waste contribution among the parties, a site that has 20 or more parties is likely to have several parties who contributed less than 1 percent.

Now, there are 233 such sites on the National Priorities List. Through June 30, 1992, EPA had entered waste contributor settlements in only 42 sites; that is 18 percent, less than one-fifth of the sites in which such settlements could be useful.

Now, our interviews with EPA attorneys suggested quite clearly why that is. They indicated almost unanimously that EPA does not generally initiate discussions concerning de minimis settlements. They essentially wait for de minimis parties to form committees and then to have committees present settlement proposals to EPA. Thus EPA's role is primarily reactive. The formation of de minimis committees is itself quite cumbersome, and as a result, many of

these proposals never make it to EPA, and as a result, the EPA is not able to enter into those settlements.

I believe that EPA should advise PRP's for potential de minimis candidates about that potential status as soon as the waste-in list, including the volumetric contribution, is available and should circulate drafts of the model consent decrees as soon as there is adequate information on cost, and should not wait for the parties to form de minimis committees and send proposals to EPA.

On the second question, the delay, as I indicated, most of the settlements occur very late in the settlement process. Ninety percent of the waste contributors' settlements occurred after the signing of the record of decision of those settlements. The average delay between the signing of the record of decision and the decree of the settlement was about 2 years. A different way of stating this is that the average de minimis settlement was entered 6½ years after the listing of the site on the National Priorities List, and therefore, this was a period in which these parties faced joint and several liability and expended transaction costs.

The second manifestation of delay is the reluctance of EPA to enter into de minimis settlements before it is in a position to enter into settlement with major parties, usually as part of global settlements under which the major parties take responsibility for the cleanup. In only 42 percent of sites did EPA enter de minimis settlements before it entered into settlements with major parties. It is pretty clear that the intent of Congress in section 122(g) was to relieve the small parties' responsibility and save them the transaction costs at an early time in the process before EPA was able to do that with the major parties. That has not occurred.

I endorse the recommendation of the Administrative Conference of the United States which urged EPA not to rely on global settlements as a primary vehicle for settling de minimis settlement cases. The de minimis cases they had involving inconsistencies of settlement terms, I will focus on three matters because of the lack of time.

The first is the cutoff to determine de minimis status. In the settlements we examined, the cutoffs varied from one-tenth of 1 percent to 10 percent; that is, they varied by a factor of 100. While a reasonably large number chose 1 percent as a cutoff, there were a considerable number of settlements on either side of 1 percent.

Now, we did examine the distribution of the volumetric contributions of PRP's and don't believe that this enormous variation is due to differences in distribution of volumetric contributions of PRP's among the sites.

The second issue concerns the reopener for additional information on volumetric contribution. Typically, de minimis settlements included reopeners which essentially state that if EPA finds out that a party contributed more, a lot more or something of that sort, then the settlement would be reopened. The model consent decree contains one formulation for this reopener. In the settlements that we examined, 11 different formulations were used.

The third issue concerns the premium that EPA charges in return for waiving reopeners for cost overruns and further response actions. In the settlements that we studied, the premiums ranged from 50 percent to 250 percent of a party's allocated share of the

cleanup costs. Moreover, in some settlements, the premium was charged only in the future cost component of the cleanup cost, whereas in others it was charged in the total cost component, that is, including the past costs in which presumably there was no uncertainty. As a result, there is a great incentive for major parties to get involved in the de minimis process because there is so much variation in what can come out of it.

And our interviews with EPA regional attorneys confirmed that because of the possibility of this involvement, regions are reluctant to enter into de minimis settlements before they are in a position to settle the liability of major parties. This problem could be reduced significantly—perhaps not eliminated, but reduced by urging much greater standardization of the terms of de minimis settlements. That hasn't been true so far.

Thank you very much.

[Testimony resumes on p. 328.]

[The prepared statement of Mr. Revesz follows. The report entitled "De Minimis Settlements Under Superfund" is retained in the subcommittee files.]

Written Statement of

Richard L. Revesz

Professor of Law,
New York University School of Law1. Introduction

Mr. Chairman and members of the Subcommittee: Thank you for inviting me to testify before you today. My name is Richard L. Revesz and I am a Professor of Law at New York University School of Law. During 1991 and 1992, together with my colleague, Professor Lewis Kornhauser, I was a consultant on Superfund settlements to the Administrative Conference of the United States. In connection with this project, we authored a report to the Conference, dated November 1992, entitled De Minimis Settlements Under Superfund, which is attached as Appendix I. This report formed the basis for the Conference's Recommendation 92-9, which was adopted on December 11, 1992, and is attached as Appendix II.

Subsequently, Professor Kornhauser and I continued our work in this area under a grant from EPA's Office of Exploratory Research. Much of this work is still ongoing. Thus, my testimony today is based primarily on my work as a consultant to the Administrative Conference, although I present some subsequent data. The views I present are my own, and do not necessarily reflect those of the members of the Conference or its committees, or those of EPA.

The centerpiece of our study was an empirical examination of the process of settlements between EPA and parties that bear responsibility for only a small percentage of the liability at a site, commonly referred to as de minimis parties. We examined the settlement documents for every de minimis settlement entered

through June 30, 1992, and analyzed data contained in the Superfund databases. We also interviewed the attorneys primarily responsible for de minimis settlements at each of EPA's Regions, as well as some private attorneys with experience concerning such settlements.

The problem raised by de minimis settlements can be stated simply. Sites on the National Priorities List (NPL) often have large numbers of potentially responsible parties (PRPs), sometimes several hundred. The vast majority of the parties typically are responsible for only a very small percentage of the waste at a site. Thus, even though the average cost of a cleanup at an NPL site is over \$25 million, many de minimis parties are responsible for only a few thousand dollars of the cost, sometimes even less. At the same time, the cleanup process at Superfund sites is very lengthy. In 1989, a Rand Corporation study estimated that it would take an average of eight-and-a-half years between the listing of the site on the NPL and the completion of the cleanup. It may well be that this estimate is overly optimistic. If PRPs who are responsible for only small amounts of the waste must remain as parties in the protracted legal proceedings that usually accompany the cleanup process at NPL sites, they will have to expend transaction costs (typically lawyers' fees) that could be several times their share of the liability. It was precisely to avoid this waste that the Superfund Amendments and Reauthorization Act of 1986 (SARA) enacted section 122(g), which directs EPA "[w]henever practicable

and in the public interest ... as promptly as possible reach a final settlement" with de minimis parties.

Our work has three central conclusions, all of them critical of EPA's administration of the program, at least through June 30, 1992, when we concluded our empirical work. On two of these issues, EPA's most recent guidance document, issued on June 2, 1992, takes steps in the right direction. It is too early to tell, however, whether this document has affected the actual practices of EPA's Regions, which handle individual settlements.

First, EPA has vastly underutilized the de minimis settlement tool, offering such settlements only in a small fraction of the sites at which they could be beneficial. Second, to the extent that such settlements have taken place, they have occurred late in the cleanup process, when considerable transaction costs had already been expended. Third, there has been enormous variation in the terms used for de minimis settlements, even on issues for which the model consent decrees and administrative orders adopted by EPA contemplate uniformity; the result has been wrangling among EPA, the major parties, and the de minimis parties that has delayed and compromised settlements. I will deal with each of these matters in turn.

2. The Low Number of Settlements

Through June 30, 1992, there were a total of 77 de minimis settlements involving 49 sites. All but one of these sites were on the NPL; the remaining site had undergone an emergency

removal. Of the 77 settlements, 68 were settlements with generators and/or transporters (i.e., waste contributor settlements) and 9 were settlements with current or prior owners of Superfund sites (i.e., landowner settlements). There were 41 sites with one or more waste contributor settlement, 1 site with both waste contributor and landowner settlements, and 7 sites with one or more landowner settlement.

Landowner settlements typically involve only one or two parties. In contrast, waste contributor settlements often involve dozens, sometimes even hundreds of parties. Thus, from the perspective of saving transaction costs, the latter are more significant. Thus, I focus on the 42 sites at which there was at least one waste contributor settlement and evaluate whether EPA has made sufficient use of de minimis settlements.

I believe that any site at which EPA has issued a Record of Decision (ROD) and that has at least twenty PRPs is a good candidate for a de minimis waste contributor settlement. While EPA needs to have sufficient information about cleanup costs to enter into a de minimis settlement, there is no plausible argument that the cost estimate in the ROD for the chosen remedial plan is inadequate for these purposes. Moreover, because of the typical distribution of percentage contributions among generators, a site with twenty parties is likely to have several that contributed less than one percent of the waste--the most commonly used cut-off for de minimis settlements.

The analysis of the EPA databases reveals that 233 sites,

out of approximately 1200 sites on the NPL, meet these criteria.¹ Thus, EPA has entered settlements in only about 18 percent of these sites. Moreover, every Region has underutilized the tool of de minimis settlements, although there are important variations across Regions. Table I shows, for each Region, the number of sites that would be good vehicles for de minimis settlements with waste contributors, the number of settlements actually entered, and the latter number as a percentage of the former.

Table I: Waste Contributor Settlements

Region	Qualifying Sites (1)	Sites with Settlements (2)	$[(1)/(2)] \times 100\%$
I	28	8	28.6%
II	30	3	10.0%
III	33	1	3.0%
IV	24	6	25.0%
V	57	12	17.9%
VI	14	6	42.9%
VII	5	1	20.0%
VIII	9	0	0.0%
IX	13	1	7.7%
X	10	4	40.0%
Total	233	42	18.0%

I should stress that the criteria used (entry of ROD and

¹If one assumes that only sites with RODs and at least 50 PRPs are good vehicles for waste contributor settlements, the number of eligible sites declines only to 149.

twenty or more parties) are likely to understate the number of sites that could benefit from de minimis settlements, suggesting that this settlement tool has been even more underutilized than Table I reveals. First, the completion of a ROD is not a prerequisite for de minimis settlements. While EPA needs to have sufficient information about the cleanup costs, such information can be estimated at earlier stages in the cleanup process. In fact, about 10 percent of the existing settlements were reached before the entry of a ROD. Second, even sites with fewer than twenty PRPs may be appropriate for de minimis settlements. About 30 percent of the sites with de minimis settlements did not have twenty or more PRPs, at least as recorded in the databases that we analyzed.

Our interviews with attorneys at EPA's regional offices revealed a powerful explanation for the under-utilization of de minimis settlements. The unanimous response was that EPA does not generally initiate discussions concerning such settlements. Similarly, EPA does not make an effort to encourage the formation of de minimis groups that could present settlement offers. Instead, the Agency's position is largely reactive: it considers settlement proposals made by the de minimis parties. The problem with this approach is that it is often quite difficult for de minimis parties to organize a de minimis committee, so that in many cases, if EPA does not take the lead at offering de minimis settlements, such settlements will not occur.

EPA's most recent guidance document suggests greater

willingness to take affirmative steps to facilitate de minimis settlements. It indicates that the Regions may take two important affirmative steps: "assist in the formation of an early de minimis group (e.g., send out letters, hold meetings, publish notice in a local newspaper)" and "[s]end a draft settlement document to parties identified as de minimis, take comments over a specified period of time, and send the final settlement document (incorporating appropriate comments) to all de minimis PRPs for signature."

Thus, the new approach does not require PRPs to bear the costs of organizing a de minimis committee, which can be substantial for groups with several hundred parties. Moreover, individual parties can decide whether to settle without being subject to the wishes of the committee, which is likely to be dominated by the larger de minimis parties and by parties that are PRPs at many sites. The large parties are more likely to be willing to spend more to attempt a better settlement, and the parties that are PRPs at many sites may be more interested in the precedential value of a settlement.

The new approach, which has not been in effect long enough to allow a serious assessment of its effectiveness, does not go far enough. Consistent with the recommendations of the Administrative Conference, instead of merely authorizing Regions to seek de minimis settlements, EPA should establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis

parties. As soon as EPA has a waste-in list of the contributions, it should advise any PRPs deemed to have made de minimis contributions about the availability of de minimis settlements and explain their general features, and as soon as there is sufficient information to estimate the cleanup costs at the site, it should circulate to these parties a draft settlement agreement. This approach would enable de minimis parties to settle without the burden of organizing de minimis committees.

3. The Delay in Entering Settlements

Even at sites at which de minimis settlements occur, the delay in the entry of such settlements significantly compromises the savings in transaction costs. This problem manifests itself in two principal ways.

First, and most importantly, the vast majority of the settlements are concluded very late in the cleanup process. At 90 percent of NPL sites, the first de minimis settlement was entered after the ROD. Moreover, on average, considerable time elapsed between the signing of the ROD and the entry of the de minimis settlement. The average lag between the ROD and the first de minimis settlements at a site was 1.82 years.

The Rand Corporation study I mentioned earlier showed that after the listing of a site on the NPL, on average 20 months elapse until the beginning of the Remedial Investigation/ Feasibility Study (RI/FS), 38 additional months until the issuance of the ROD and 43 additional months until the completion

of the Remedial Design/Remedial Action (RD/RA): a total of 101 months from the NPL listing to the completion of the cleanup. Thus, the average first de minimis settlement at a site is concluded 80 months after the NPL listing.

There are no studies about the pattern of expenditure of transaction costs throughout the cleanup process. If one were to assume that the expenditures are evenly distributed over time, by the time the average de minimis settlement is entered, the de minimis parties have expended approximately 80 percent of the total transaction costs that would be expended if the case did not settle until after the completion of the cleanup.

The recent guidance document contains a positive development with respect to this issue. It urges the Regions to consider pre-ROD de minimis settlements, before there is site-specific information about the cleanup costs. Instead of waiting for such information to become available, it urges the Regions to identify similar sites at which cleanup is ongoing and to analogize to the costs at those sites. Alternatively, the guidance document authorizes the Regions to establish costs per unit of waste treated under different remedial technologies.

While this step is positive, it is not sufficient. Consistent with the Administrative Conference's recommendation, I believe that primary responsibility for determining the cleanup costs of different types of sites and the unit costs of various remedial technologies should be vested with EPA's Headquarters rather than with the Regions. It is not practical for a Region

to confine itself to its own sites in determining the costs of similar cleanups, as the inventory of comparable sites that have progressed sufficiently in the cleanup process may be small or nonexistent. Unless serious attention is given to this issue it is unlikely that a significant proportion of de minimis settlements will be entered prior to the signing of the ROD.

The second indication of undue delay concerns the relationship between settlements with de minimis and non-de minimis parties. The central congressional objective in designing the provisions for de minimis settlements was to induce EPA to resolve the liability of parties with a small share of the liability as soon as possible, before it was in a position to resolve the liability of parties with a greater share of the liability. For the most part, EPA has not acted consistently with this mandate. A de minimis settlement took place before a settlement with major parties in only 42 percent of the sites with at least one de minimis settlement. Not surprisingly, our interviews with attorneys at the Regions revealed a strong and almost unanimous preference for pursuing de minimis settlements as part of global settlements.

This approach is undesirable because global settlements are generally not reached until the RD/RA phase, principally because of the need to have fairly detailed information about the cleanup and its costs. By definition, proceeding in this manner is inconsistent with the central goal of the statutory provisions governing de minimis settlements, which is to provide incentives

for resolving the liability of de minimis parties before the Agency is in a position to negotiate with the major parties. For this reason, I strongly endorse the recommendation of the Administrative Conference, which stressed that "EPA should not rely on global settlements as the preferred mechanism for resolving the liability of de minimis parties."

4. The Undesirable Inconsistencies in the Terms of Settlements

The final issue on which I would like to focus concerns the wide variation in the terms of de minimis settlements. Three examples are particularly noteworthy. First, the maximum contribution allowed for a party claiming de minimis status, expressed as a proportion of the total volume of waste at the site, ranged from 0.1 percent to 10 percent. The cut-offs used in various settlements therefore differ by a factor of 100. In all, there were 17 different cut-offs--10 under 1 percent and 6 above 1 percent. There were also large differences within single Regions.²

The second example concerns the wording of the clause allowing a settlement to be reopened if additional information concerning a settling party's volumetric contribution becomes available. According to EPA's guidance document, this reopener

²This wide variation cannot be explained by differences in the distribution of volumetric contributions at the various sites. The differences also persist even after adjusting for the number of parties that qualify for de minimis status. At sites with de minimis settlements involving 100 or more parties, the cut-off ranged from 0.1% to 1%.

"would allow the Government to seek further relief from any settling party if information not known to the Government at the time of the settlement is discovered which indicates that the volume ... criteri[on] for the sites de minimis parties are no longer satisfied with respect to that party." The guidance document seems to link the reopener to information about whether the parties' contribution exceeded the cut-off for de minimis status, rather than to information about whether the party's actual contribution exceeded the estimated contribution on which the settling party's payment was based. If, for example, EPA defines parties that contributed less than 1 percent of the waste at site as de minimis, a party that at the time of the settlement appeared to have contributed only 0.4 percent but was later shown to have in fact contributed 0.8 percent would apparently not be subject to the additional information reopener.

A review of the settlements showed that, rather than uniformly following the guidance document, eleven different approaches, including the following:

(1) whether the volume contributed by the settling party is greater than the cut-off used to determine de minimis status (the approach of the guidance document);

(2) whether the settling party's actual volumetric contribution exceeds the amount attributed to it at the time of the settlement (and the reopener is triggered);

(3) whether the settling party's actual volumetric contribution exceeds the amount attributed to it at the time of

the settlement (but the reopener is not triggered; instead, the settling party pays an additional proportional amount);

(4) whether the settling party's actual volumetric contribution significantly exceeds the amount attributed to it at the time of the settlement;

(5) whether the settling party made material misrepresentations concerning its volumetric contribution; and

(6) whether the settling party made any misrepresentations concerning its volumetric contribution.

In addition, some settlements contain no reopener for additional information concerning volume, and others link the reopener to more than one of the factors listed above. Even within a single Region, multiple approaches were used: one Region used five different formulations.

The third example of the variation in the terms of settlements concerns the use of premiums. The guidance documents contemplate that EPA can waive reopeners for cost overruns and further response action (additional cleanup not contemplated at the time of the de minimis settlement), in return for a premium payment. The premiums used in the different settlements ranged from about a 50 percent increase in a party's share of the total cleanup costs to a 250 percent increase. Moreover, whereas some settlements charged the premium only on future costs, others charged it on all costs, even though presumably no uncertainty surrounds the computation of past costs.

Part of the variation in settlements is due to the lack of

concrete guidance on important issues, including the cut-off for de minimis status and the level of premiums. But even where the guidance documents are quite specific, such as on the question of reopeners, there is great variation in the terms of individual settlements. This variation is particularly pernicious because it increases the transaction costs surrounding settlements and it reduces the probability that settlements will be entered. Because de minimis parties rightly believe that almost every term is open to negotiation, they have an incentive to attempt to obtain the best possible outcome; doing so, of course, is expensive and time consuming.

More importantly, however, the lack of uniformity gives the major parties a strong incentive to become involved in the de minimis settlement process. Because their liability is reduced by the amount of the settlement, they benefit if they can persuade EPA to insist on a higher premium or more liberal reopeners. Such behavior would be less prevalent if the Regions had little discretion on these matters. Our interviews with attorneys at the Regions confirmed that major parties tend to oppose de minimis settlements (except when they are part of global settlements) and that their opposition can lead to a substantial delay of the de minimis settlement and a drain of EPA's resources. While it does not appear that major parties have been successful at blocking de minimis settlements once negotiations were underway, they seem to have diminished the interest of several Regions in pursuing such settlements. This wrangling would be significantly reduced if de minimis settlements exhibited more standardized terms, as urged by the Administrative Conference.

I appreciate the opportunity to testify before this Subcommittee.

Mr. SWIFT. Thank you very much.

Several witnesses have suggested that the Superfund statute should require EPA to make de minimis settlements at an early point in the process. One witness has proposed that if EPA decides not to pursue de minimis settlements, it should be required to make a formal finding to that effect; and other testimony suggested EPA be precluded from filing cost recovery actions or issuing other types of administrative orders except in true emergencies until de minimis settlements have been offered—those three kinds of suggestions have been made for trying to get greater emphasis on de minimis settlements.

I would be interested particularly in Professor Revesz commenting on those three kinds of ideas. Is that the way to achieve the end, or is it a little bit of a meat-cleaver approach?

Mr. REVESZ. It may be desirable for EPA to have somewhat more discretion than that. I believe it is desirable for EPA to have, as a policy promulgated by headquarters and communicated in some effective way to the regions, that parties that have contributed small amounts be advised as early as possible, as soon as EPA knows that they have contributed small amounts, that there is this tool available so they know about it.

A lot of parties are not repeat players—are pizza restaurants, whatever, you know, small clinics—and they just don't know how this process works. It would be useful for them to understand what the de minimis tool was about as soon as EPA has some information on costs. Information is available well before the record of decision. It should send essentially the model document and tell parties, this is our model document for de minimis settlements. We believe you have contributed 0.05 of 1 percent; if you pay us \$250,000, you are out of this case. I believe that the settlement rate on these offers would be astoundingly high.

I am not sure that EPA needs to make formal findings. They should be precluded from other things. I can imagine when we try to think of requirements like that, some of them do more bad than good. I believe a strong directive from EPA that is communicated to the regions and the regions take seriously, somewhat along these lines, would improve the process enormously.

Mr. SWIFT. Does anyone else want to comment on that particular question?

Mr. Quarles.

Mr. QUARLES. I would only comment, as Mr. Mays pointed out, 4 years ago there was an earlier study of this program and an earlier commitment to do more de minimis settlements, so that some prod from Congress would be worthwhile.

Mr. SWIFT. Even in my opening statement, in alluding to the new initiatives that EPA has taken, I kind of suggested the proof is in the pudding; and we haven't seen the pudding yet. But what do you think of the new approach that was announced last week by the EPA, assuming, of course, it gets followed through? Is that a step ahead? Is it a significant one?

Mr. Quarles.

Mr. QUARLES. Clearly it is a step in the right direction, and I was encouraged this morning. I think we have been encouraged right along by the statements and philosophy that seem to be being

communicated. But your skepticism, or at least inclination to wait and see how it turns out, is surely something that the PRP community shares.

Mr. SWIFT. Mr. Revesz.

Mr. REVESZ. I think it is a step ahead. In fact, there was another step ahead in June of 1992 when EPA promulgated a new guidance document on de minimis settlements; and it is actually too early to tell whether that has done any good. Mr. Sussman's statement is clearly a step in the right direction but it is hard to know until we see what the regions all actually do with these settlements whether the statement itself will make any difference.

I still think that EPA is trying not to commit itself to offer this tool in every case; that is, to do what I suggested, to inform every party that has sort of low contribution that this tool is available and to send a model settlement as soon as there is enough information on cost. I think there is some hedging both in the guidance document of June 1992, when the initiative was announced last week, and Mr. Sussman's testimony today. I think going a little further may be desirable.

Mr. SWIFT. Do you think it would be helpful if EPA was statutorily required to inform?

Mr. REVESZ. It would help.

Mr. SWIFT. OK.

Mr. MAYS. Mr. Chairman, may I comment?

Mr. SWIFT. Yes.

Mr. MAYS. I think that with regard to EPA's new initiative, if that is what you want to call it, that—as I said earlier, I think anything is a step in the right direction. But I have been here in this same room on numerous occasions when I have heard EPA officials promise essentially the same thing, and I would again repeat, there is a long way between EPA headquarters and EPA's regional offices where a lot of action takes place and these settlements are negotiated and the policies are implemented, and frequently the EPA regional people don't get the message or they—and that is partly due to the fact that EPA headquarters officials don't give them the message forcefully enough.

There are a lot of mixed signals that one can get in the regional office, and it is not their fault. They work very hard. They have a lot to do, and they have to have their priorities made very clear to them by EPA headquarters. And I think this committee is going to have to oversee that to make sure that EPA carries out what they say they are going to do.

Mr. HEMBRA. Mr. Chairman, let me make a couple of comments because I think it is relevant, and I haven't heard them discussed yet. For years, EPA has been an Agency where there hasn't been a lot of management accountability. And as a result, when programs are criticized, deficiencies are noted, headquarters usually creates a policy statement, issues guidance, and business goes on as usual.

Something I saw in the initiatives that were announced last week, that I have never seen before in looking at an EPA program or actions, that the Agency intends to take, that I think are quite positive—and I would bear this in mind if we are considering adjusting the statute—this is the first time I ever saw the Agency

talk in terms of needing to sit down and deal with the resource issue, making the transaction costs settlement tools that they have an integral part of the strategy that the regions would employ and finding out what resource mix you have to have to make that happen.

It is the first time I have ever seen that. And as an auditor—and Mr. Oxley and I have discussed auditors before—I would say something else is in that initiative that I found very attractive. It is the first time that I have ever seen EPA stand up and build an accountability mechanism into the plan; and that is that this Agency and the regions have to develop implementation plans that talk in terms of resources, milestones, goals, but also an evaluation mechanism, so that at points in time EPA management will go in and look to see if those implementation plans are being carried out.

Now, whether that suggests there is not a need for a change in the statute, I am not sure, but it is sure the first time I have ever seen it with EPA.

Mr. SWIFT. The gentleman from Ohio is recognized for 5 minutes.

Mr. OXLEY. Thank you, Mr. Chairman.

Let me ask the panel, starting with Mr. Mays: It appears to me, that institutionally within the EPA there may be a bias towards prosecution—punishment, if you will—versus settlements. Indeed maybe career advancement within the EPA may have something to do with it; that is, if you are tough and you are going to put somebody away or you are going to fine the devil out of them or something like in the mode of the old western sheriff, then you are perceived as potentially moving up in your career. This works against coming to some kind of a mutually agreeable settlement that doesn't get a lot of headlines, but probably solves a problem or at least goes a long way toward solving a problem.

Am I way off base on this view?

Mr. MAYS. No, sir. Having been there and having been in the Senior Enforcement Council for 4 years, I probably helped contribute to that. There is a certain, I think, mentality at EPA, and I think it goes along with the job, that you are helping to clean up the world, if you will, and that is part of the reward that you get for working at EPA. That is not altogether bad, because it gives you a sense of mission. On the other hand, it can be overdone.

The Superfund program is a no-fault program. It is not based upon negligence or any gross activity that anybody consciously did to create Superfund sites. Congress has said, this is a strict liability program.

I think that EPA could be perhaps more balanced and perhaps more fair in the administration of the program. It has wavered, as you know, throughout the history of the program from an enforcement-led which it had at the very beginning of the program. There were a lot of lawsuits being filed and very little cleanup work being done. One of the reasons for that is to save the resources, to save the fund; and then it went back the other way to where there was a fund lead program for a number of years; and now it is back to an enforcement-led, so that 70 percent, according to EPA, of the cleanups are being done by PRP's.

I think there should be a goal to establish a balance between enforcement-led and fund-lead-type sites where you take a look at

each site and develop the type of lead that is most suitable for that type of site.

Mr. OXLEY. Let me break in. Can we do that—should we do that, or should that be done administratively?

Mr. MAYS. Well, part of the problem, at least in my opinion, that EPA has experienced over the years, in bouncing back and forth, has been the lack of direction from Congress. I don't say that in a negative way, but Congress is a big organization, and it is hard to get direction out of it in many instances. EPA will be hauled up before one committee and be told that it is important to get these sites cleaned up as fast as possible, and then they will be brought before another committee who tells them that it is important to save the Fund and get the PRP's to do this; and the two are not—there is a lot of tension between enforcement—lead and Fund-lead sites and getting sites cleaned up fast and having PRP's pay for them.

I think Congress could perhaps do a better job of deciding how it wants the program—the type of face it wants to put on the program—and give EPA the benefit of that direction perhaps a little better.

Mr. OXLEY. Mr. Hembra.

Mr. HEMBRA. Mr. Oxley, I would just mention a couple of things. One, this was an Agency that for many years, in looking at site cleanups, just kind of muddled along; and because of a lot of criticism, the Agency began an aggressive enforcement program, and in fiscal year 1992, 72 percent of the cleanups were being handled by responsible parties.

We don't believe there is anything wrong with that. We think that is very consistent with the legislation that those responsible for the pollution are the ones that should be responsible for the cleanup. What has happened is that the Agency has moved forward with enforcement and not thought about integrating other tools available to it, to work in concert to get settlements to occur and to move on, then, with the cleanup. That has been the problem with the transaction-cost-reducing tools; they haven't been integrated.

The regions say, we haven't had the resources; and that is true. But I don't know if I would fault the Congress. Quite frankly, the Agency has the tools. They historically have not used those tools, and they have not come before Congress to sit down and help Congress understand what the problems are and where they need relief and where they need assistance in setting priorities. So I would not blame the Congress.

Our work has shown that this Agency has decided to go in the direction it wants to go; regions have decided—in a sense, there are 10 EPA's out there. Headquarters has not provided adequate oversight in the past, has not tried to bring about some baseline level of consistency. That is why you have a few regions that have been doing a much better job of using the transaction-cost-reducing tools than others. There has been no accountability.

But it is the Agency's problem. The tools are there. The legislative backing is there. The Agency has chosen not to particularly use certain mechanisms available to it.

Mr. OXLEY. Mr. Quarles.

Mr. QUARLES. I agree with that in part, but not in part. I think that a good part of the blame does lie up on the Hill and I will come to that in just a moment. But I think that there is a tension between doing what is going to move an individual site ahead and doing that which is needed to build a foundation to move the entire program ahead. And this has been such a beleaguered program from the very beginning that Agency staff have been under tremendous pressure to show results. That pressure intensified during the criticisms of the early 1980's, and so the Agency came to an even greater feeling of a need to do something. And if you are trying to move forward an individual site, it is very tempting to just reach back and grab that big enforcement stick and swing it.

And I would agree with the statement that Mr. Sussman made, that that enforcement pressure has brought PRP's to the table and has moved individual sites ahead, but it has often done so at a cost of injecting more resentment and dissension, as well as confusion and misunderstanding, into the overall program and made it more difficult to bring the whole group of PRP's along on the ride for the program as a whole.

And I would urge that what is really needed is for EPA to enunciate a policy commitment to the goal of trying to get all of the PRP's into the process at each site. They cannot achieve it to perfection, but it should be the goal; and then attempting to have as fair an allocation of responsibility among that entire group of PRP's as is possible. Again, they can't achieve that fully, but it should be the goal.

In the last year, the Agency has begun finally to articulate a sense that fairness counts, and that is progress. But the Agency, I believe, has brought the program along to a point now that it can really pause and not feel so much pressure to show individual results at specific sites and do what is good for the program as a whole.

Now, another word on criticism. In the course of this approach, the Agency was urged to take the opposite approach from what I have just recommended by the Senate committee in issuing its report, that also came out in May of 1989 at the same time that the EPA management study came out, which urged that the government should use its, quote, "coercive enforcement tools," close quote, against the bigger PRP's and don't worry about fairness. And the timing of that report, and the force with which it was delivered sent this whole program down the path of confrontation, and I believe that part of the responsibility for the delays we are now observing can be attributed to that report and that approach.

Mr. OXLEY. Thank you.

Thank you, Mr. Chairman.

Mr. SWIFT. I thank the gentleman. I appear to agree with that analysis.

Ms. LAMBERT. That was the Senate's report, wasn't it?

Mr. SWIFT. That was the Senate's report, one might expect.

The gentlelady from Arkansas is recognized for 5 minutes.

Ms. LAMBERT. Thank you, Mr. Chairman.

It seems to me that the consensus is basically the comment that my father used to always tell me: It is results that count. And we are not seeing a great deal of results here from this program.

Perhaps if EPA—and what I hear you all expressing is that if EPA could become more proactive and less reactionary, we could probably see some of the results.

In talking about dealing with the contribution from PRP's, there was a study on mixed funding recently that was commissioned by EPA, and it recommended the use of contingent mixed funding agreements under which EPA could seek a greater contribution from settling PRP's if EPA failed to recoup certain amounts provided for mixed funding from nonsettling PRP's; and I think an earlier panel in an earlier hearing—it was Nancy Newkirk of Clean Sites that had recommended several different ways of doing that.

Do you all have any comments on those proposals—I mean incentives, or do you feel like the PRP's are doing an adequate amount of what they need to be doing?

Mr. Mays.

Mr. MAYS. I will lead off with just a general comment that is, I think, that any form of use of the settlement tools that are in section 122 would be helpful, even if it is contingent on certain conditions being met in the future and you can negotiate any kind of an arrangement, using mixed funding or de minimis settlements and so forth. And as long as the parties who enter into these agreements feel that there is a reasonable expectation that they may well be out of it either through the de minimis settlement or that the government is going to contribute a reasonable sum for the orphan shares that are not present, and it is a substantial amount of money, they would be willing to enter into any number of variations of these types of agreements.

Everybody wants to settle these things. There is not much point in litigating them unless you have got a really good case on liability, that you feel that you can avoid any liability whatsoever. And that is pretty risky. So any variation of settlement, I think, would be accepted by most parties.

Ms. LAMBERT. You are basically saying that the objective of concluding PRP's' involvement is more of an incentive than a penalty.

Mr. MAYS. That is a big incentive, although the premium that you would have to pay is certainly a consideration. It is like adding bricks on a load until the load collapses. How much can you afford to carry?

But assuming that it is not out of reason, most people are willing to pay a premium in order to avoid any further involvement in the matter because of the transaction costs and the potential future liabilities.

Ms. LAMBERT. Well, New Jersey has, for example, recently enacted a law where it allows the PRP's to collect triple damages from nonsettling PRP's; and private parties are allowed to keep two-thirds of the reward, and the State gets the other third.

Mr. MAYS. Well, if you are asking me in my present position whether that is a good idea, I would have to say no. From EPA's perspective it would be somewhat like the treble damages, up to \$25,000 per day penalties for violation of the 106 order without sufficient cause.

Ms. LAMBERT. I guess my ultimate question goes back to results. Is it the kind of penalty—is it the kind of incentive that is going to get us results or put us in the same type of gridlock?

Mr. MAYS. I think it would probably achieve results, just as 106 orders and EPA's threats to issue 106 orders, which they do routinely now, have achieved considerable results in terms of getting PRP's to agree to settlements.

As to whether it is fair or not is a different issue, and if we are talking about injecting fairness into the program, I would not suggest putting any more penalties for a well-intentioned and good-faith effort to contest liability. I mean, a party ought to have that right, it seems to me; and perhaps EPA could set up some procedure administratively for having a fairly rapid hearing, if you will, on liability questions, which you can't do now. You have to wait until the cleanup is all over with, if you have the courage to do that, and then contest it in a cost recovery action.

Ms. LAMBERT. Of course, that, too, opens up a whole other can of worms of the States and EPA jurisdiction and how they work together.

Did you have a comment?

Mr. HEMBRA. Let me mention a couple of things on mixed funding. We believe that EPA should move cautiously in revisiting its mixed funding policy. They have some efforts that they are going to begin in terms of some pilots to look at how mixed funding is working. There is not a whole lot of information or experience with mixed funding right now.

Clearly there is some downside that has to be factored in. One is, the minute the PRP's go to the table with the notion that EPA is going to start picking up some portion of the cost, then you begin negotiation from the point that expectation is there.

Now, you have to weigh their enforcement effort. You have to weigh what has been an abysmal cost recovery effort on the part of EPA. You have to weigh the amount of the trust fund and the implications on the trust fund, but at the same time, that doesn't suggest that you should forget the value that mixed funding can have, because there have been examples where mixed funding has worked and worked well. EPA needs to look at that experience. They need to build on that experience. They certainly need to involve the responsible parties in the development of that policy and move from that point.

Ms. LAMBERT. Thank you.

Thank you, Mr. Chairman.

Mr. SWIFT. You are most welcome.

The gentleman from Idaho is recognized for 5 minutes.

Mr. CRAPO. Thank you, Mr. Chairman.

What I would like to do with my 5 minutes, is to put out a general observation, and then ask each of you if you would take a minute or so just to respond to it. I will give my time to you to respond. It appears to me, from listening to this panel, that several themes have been repeated: (1) the notion that the resolution and remedy techniques that are available have not been utilized; and (2) I think I have heard 2 or 3 of you mention that one of the reasons for that is that the message is not getting from EPA headquarters out into the regions effectively. For some reason, the water is not going to the end of the row in terms of the message, if there even is a solid message from Washington; I don't know whether that fault is here on the Hill or at the Agency.

I guess the concern I am getting at is, or the question I want to kind of address is, what is the role of Congress in addressing this and making it happen?

We have talked a lot today about the Superfund culture of hostility or confrontation and the question of whether the Agency should be in an enforcement mode. Some have suggested that Congress ought to get into the enforcement mode with the EPA, and maybe that is the right way to go. Maybe it isn't the right way to go.

The question I have is in this general arena. What is our proper role today? What should Congress do, if anything, today to try to get that water to the end of the row and be sure that we get these issues addressed where it counts; and that is out there in the field.

Mr. Mays.

Mr. MAYS. Well, I think you are absolutely right that there has been an underimplementation of section 122 and some of the other authorities of Superfund by EPA. There are a lot of reasons for that which I won't get into, including bureaucratic inertia and fear of eluding joint and several liability and a lot of other things, organizational problems. I think some of these problems could be cured if the enforcement program at EPA were reorganized structurally.

But in terms of Congress' role, I think that Congress in the last 10 years has enacted a lot of legislation that varies considerably from what they enacted before that time in the sense that prior to, say, 1984, the environmental statutes were fairly general. They laid out kind of a skeleton framework for the type of program that Congress wanted, and they delegated it to the executive to flesh that out with regulations and so forth, and then Congress assumed an oversight role to let the executive know whether that program was the way that Congress indeed wanted it. Beginning in 1984, Congress began to enact a great many very detailed environmental statutes, and there are various political reasons for that having happened.

I would be somewhat reluctant personally to see Congress pursue that further. I think that it is unfortunate sometimes when you have very detailed environmental statutes that lay out specific procedures and directives, because you can't possibly envision when you are enacting a statute all the possible problems and factors that might arise that might make that unworkable.

So I think that—I think Congress is doing what you ought to do, and that is, have these oversight hearings. Congress has a legitimate oversight function. Sometimes the executive doesn't like to recognize that, but you do, and by holding these hearings and holding EPA's promises to—their feet to the fire on their promises, I think it is something that is very important and that you ought to continue to do.

But I don't think that the enactment of very detailed statutes directing EPA to do certain things is a good idea.

Mr. CRAPO. Thank you. I will have to ask each of you to keep it to about 1 minute, since my time is limited here.

Mr. HEMBRA. Two points in terms of congressional role. One is oversight. And I would just cite a couple of examples. If this subcommittee and others in the House and in the Senate had, not a year ago, started expressing concerns to this Agency about the use

of transaction-cost-reducing tools, you would not have seen the EPA initiatives you saw announced last week. So oversight is important.

The same has held true for EPA and contract management in the Superfund program. Had it not been for this subcommittee and others on the House and Senate side you wouldn't see EPA taking the actions it is taking today with regard to improving contract management.

The second with regard to oversight is, when oversight is applied by the Congress, the issue should be dealt with in a comprehensive fashion. What you don't want to happen—you have the example that John mentioned where you push down on one problem and you have raised several others. So the oversight that is provided should be comprehensive in terms of dealing with the host of issues that have implications for and ramifications of any given problem.

Mr. CRAPO. Thank you.

Mr. QUARLES. I agree with the statement that oversight is important, and I think that the important aspect of it here is that you are beginning to broaden what is covered by that oversight to get into the issues of how the money really does get raised. Because there has been a shortsightedness about the implementation of this program from the viewpoint of the government, from the viewpoint of the Agency feeling that that was somebody else's problem and that would be taken care of.

And if we are beginning now to get into a question of how can the questions of allocation be resolved—not necessarily to say that the government should do it, but the government has a stake in how it gets done and that it gets done, and that there are elementary principles of fairness and due process followed in its getting done—that adds a new dimension which will be very helpful.

Mr. CRAPO. Thank you.

Mr. QUARLES. I also think that in the reauthorization process there are several minor points where Congress could include a statutory tweak that would carry out sending the Agency a message that this counts and should be done.

Mr. REVESZ. The settlement tools are clearly there. This program could have worked well since 1986, and the fact that it hasn't is not because of lack of statutory authorization. I guess what is needed is to say, what we really mean is that could be done through oversight or statutory amendments of the sort where they are practicable, EPA should send these things at these times and whatever, but the oversight process may, in fact, be very effective.

Mr. CRAPO. Thank you.

Mr. SWIFT. Thank you.

I thank this entire panel. You have been extremely helpful to the committee, and we appreciate your assistance.

Mr. SWIFT. Our last panel includes Mr. Paul Dague. Mr. Martin McCrory, Ms. Lynn Buhl, and Mr. Christopher Roberts. The subcommittee will come to order.

This vote may, in fact, be a couple of votes; and I think that is going to cause some inconvenience to the panel, for which I apologize in advance. What I would like to do, if it is agreeable with my colleague, is to—I think we ought to be able, if we abide by the 5-

minute rule, get at least one and maybe two of your testimonies in before that recess. And we will try to do that.

Let me begin, and that will mean I will have to rather rigorously enforce the 5-minute rule, and I apologize.

I am happy to recognize Mr. Paul Dague.

STATEMENTS OF PAUL DAGUE, PRESIDENT, JONES-BLAIR CO., ON BEHALF OF NATIONAL PAINT & COATINGS ASSOCIATIONS, ACCOMPANIED BY TIMOTHY HARKER; MARTIN A. McCRORY, ATTORNEY, NATIONAL RESOURCES DEFENSE COUNCIL; LYNN YERGES BUHL, COUNSEL, CHRYSLER CORP., ON BEHALF OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION; AND J. CHRISTOPHER ROBERTS, COUNCILMAN, NEW CASTLE COUNTY, DE., ON BEHALF OF U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

Mr. DAGUE. Thank you, Mr. Chairman.

I am Paul Dague, President and CEO of the Jones-Blair Company in Dallas, Tex., and President of the National Paint & Coatings Association, the paint industry trade association from Washington, D.C. I am honored to appear before you and your committee in our response on Superfund settlement policy, the Superfund law's overemphasis on liability and our company's plight as a so-called "de minimis contributor" on a massive Superfund site in Oklahoma.

Superfund is a retroactive law. When our company sent material to the Hardage Criner dumpsite, it was done in complete compliance with the law. The site was approved by the Oklahoma Department of Health under the auspices of EPA. Shipments were reported to the State as required.

Somewhere along the line, the management of the Hardage dumpsite did not maintain the standards required by EPA. The site was then declared an NPL hazardous dumpsite.

When you send anything to a dumpsite, you are responsible for the actions of the operator in perpetuity. You are guaranteeing until the end of time that the operator will perform up to standards even though the standards have not been written.

In 1986, EPA first named 32 defendants in the Hardage case as PRP's and ordered them to pay for cleanup of the site, estimating that it would cost over \$300 million. These PRP's named us as a third-party defendant, seeking contribution. A group of 61 PRP's formed the Hardage Steering Committee and proposed a cleanup remedy at \$60 million. In 1989, Jones-Blair and 178 other PRP's reached an \$11 million de minimis settlement with EPA. Our company's buy-out was \$206,000, three times our estimated fair-share allocation based on a \$160 million remedy.

And when it went down to the \$60 million, the remedy was 9 times. But the Hardage Steering Committee then sued us for contribution to help pay for the \$34 million in transaction costs they had expended over the years negotiating and litigating a final cleanup arrangement with the government.

Our position was that having settled at three times our fair share and paying our lawyers and other transaction costs through