UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

From: M. H. Slan
to SWERD
FYI

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MEMORANDUM

SUBJECT: Evaluating Mixed Funding Settlements Under CERCLA

FROM: J. Winston Porter
Assistant Administrator
Office of Solid Waste and Emergency Response

Thomas L. Adams, Jr.
Assistant Administrator
Office of Enforcement and Compliance Monitoring

TO: Regional Administrators, Regions I-X

I. Introduction

This document provides guidance for use when a party proposes, as part of a settlement negotiation, that both private and Fund resources be used at a site. This type of arrangement is generally referred to as a "mixed funding" settlement. Section 122(b) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 (hereinafter cited as "CERCLA") provides explicit authority for the Government to enter into these types of arrangements.

The primary goals of this guidance are to:

1) Encourage the Regions to consider mixed funding settlements, based on the statutory approval of these settlements in §122(b) of CERCLA;

2) Present a method for Regional enforcement personnel to analyze mixed funding in the context of a settlement offer, and

3) Indicate broad Agency preferences by specifying acceptable and poor candidates for mixed funding in general.

Historically, the term "mixed funding" has been used to describe three types of arrangements. Section 122(b)(1) of CERCLA describes one mixed funding arrangement, in which one or more of the potentially responsible parties (PRPs) agree to perform a response activity and the Agency agrees to reimburse those PRPs for a portion of their response costs. In such cases, the statute provides that the cost incurred by the Fund be recovered from non-settlors when possible.

Settlement agreements involving cleanups by PRPs and reimbursement of their response costs require the Agency to "preauthorize" the claim against the Fund prior to the initiation of the response action. 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~~ incurred 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.

Two other kinds of settlement agreements also constitute forms of mixed funding, but do not require preauthorization. Section 122(b)(3) describes one type of arrangement, in which the Agency conducts the response action and the PRPs pay the Agency for a portion of the costs. This type of settlement is known as a settlement for cash, or "cash-out." A third type of mixed funding, known as "mixed work," involves an agreement which addresses the entire response action, but the PRPs and the Agency agree to conduct and pay for discrete portions or segments of the response action. The term "mixed funding", as used in this document, applies to any of the aforementioned types of settlements. It should be noted, however, that §122(b)(4), concerning future obligation of the Fund for remedy failure, only applies to mixed funding in the form of preauthorization, as described in §122(b)(1).

As noted above, the 1986 Amendments to CERCLA included an explicit statutory authorization of mixed funding settlements. Prior to these Amendments, the primary document which made reference to mixed funding was the Interim CERCLA Settlement Policy (50 FR 5034). This policy set out ten criteria to use when evaluating a settlement offer for less than 100% of the cost or cleanup at a site. In mixed funding settlements, the PRPs agree to pay for a portion of the response cost, and may conduct some or all of the response action.

A major portion of this guidance addresses the application of the Interim Settlement Policy to mixed funding settlements. Section II outlines the key principles underlying the Agency's Interim Settlement Policy, and the role of mixed funding within these general principles. Section III then provides an approach for applying the ten settlement criteria to mixed funding settlement offers in general (e.g., without regard to any specific

funding arrangement.) This section first highlights factors of key importance to mixed funding settlements, and then suggests the Agency's preferences among various combinations of these factors.

Section IV identifies criteria to be used to determine if a particular type of mixed funding is appropriate for a site, and then lists secondary considerations related to all mixed funding settlements. Section V outlines the general procedure for review and approval of mixed funding.

II. The Role of Mixed Funding in the CERCLA Cleanup Program

The Interim CERCLA Settlement Policy identified negotiated private response actions as an essential component of the Agency's overall program for obtaining cleanup of the nation's hazardous waste sites. This program, to be effective, depends upon a balanced approach, which includes a mix of Fund-financed cleanups, enforceable settlement agreements reached through negotiations, and litigation. Expeditious cleanups reached through negotiated settlements are preferable to protracted litigation.

Section 122 of the 1986 Amendments, which is devoted entirely to settlement issues, indicates Congressional affirmation of the emphasis in the Interim Settlement Policy toward increased flexibility in settling CERCLA cases in order to expedite cleanups. Like the Interim Settlement Policy, §122 covers a wide range of mechanisms designed to promote settlements. In particular, in §122(b), Congress acknowledged the need to consider settlements for less than 100% of the costs of cleanups"...by using monies from the Fund on behalf of parties who are unknown, insolvent, similarly unavailable, or refuse to settle." (See the Conference Report on Superfund Amendments and Reauthorization Act of 1986, 99 Cong., 2d Sess. Report 99-962 pp. 183, 252 (1986).)

The Agency encourages the use of mixed funding to promote settlement and hazardous site cleanup. For example, preauthorization offers the advantage of PRP performance of the response activity and funding of a substantial portion of the response costs, thus conserving Agency resources for use at other sites. In addition, §122(b)(1) requires the Agency to make all reasonable efforts to recover these costs. The Agency will therefore pursue nonsettlors to make the Fund whole, unless it would be unwarranted to undertake such efforts. To the extent that mixed funding reduces the number of PRPs to be sued in such cost recovery cases, it will also reduce the Agency's costs for litigation.

Support of mixed funding as a settlement tool, however, does not imply that the standard and scope of liability under CERCLA has changed. As established by court decisions prior to the 1986 Amendments, PRP liability under CERCLA remains strict, joint and several, unless the PRPs can clearly demonstrate that the harm at the site is divisible. Thus, the Agency will assess mixed funding settlements in a manner consistent with the Interim Settlement Policy, where complete cleanup or collection of 100% of costs remains a primary goal.

For example, the Agency will not approve mixed funding simply on the basis that a share of wastes at a site may be attributable to an unknown or financially non-viable party. The Agency may conduct an allocation of liability among PRPs at a site, or may evaluate the PRP's allocation and allow volume to be considered as one factor used to assess the reasonableness of the PRPs' offer. However, the availability or the amount of any Fund-financing for a particular site will not be dependent solely on consistency with any volumetric or "fair-share" allocation. The Agency may, as a policy decision, determine that mixed funding is the best method to promote cleanup at a particular site, based on the totality of the circumstances. Mixed funding should be viewed as one tool, approved by Congress, to be used to promote settlements in the context of the existing Interim Settlement Policy.

Section 122 also contains settlement provisions related to: a) de minimis settlements [§122(g)], in which parties who are liable for only a minor portion of the hazard or cost of cleanup at a site may resolve their liability to the Government in an expedited process; b) non-binding allocations of responsibility (NBARs), [§122(e)(3)], which involve a discretionary EPA allocation of the total response costs among PRPs at a site; and c) covenants not to sue, [§122(f)], in which the Government agrees to certain releases from liability at a site.

These settlement mechanisms may influence the decision as to whether a settlement should include mixed funding. Thus, the use of mixed funding at a site should be evaluated both in the context of §122 as a whole, which encourages settlement in general, as well as individual §122 settlement provisions and their relevance to the proposed mixed funding settlement.

For further guidance on these settlement provisions, see "Interim Guidelines for Preparing Non-Binding Preliminary Allocations of Responsibility (NBAR)," 52 FR 19919; "Interim Guidelines on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," Adams/Porter, June 19, 1987; "Covenants Not to Sue Under SARA," Adams/Porter July 10, 1987.

III. Assessment of Mixed Funding Settlement Proposals Using the Interim Settlement Policy Criteria

In the evaluation of a proposed mixed funding settlement, Agency enforcement personnel should first focus on the quality of the overall settlement offer. Thus, the initial determination in each case will not be whether a particular type of mixed funding should be used, but whether the underlying offer for a mixed funding settlement is a good one. This determination should be made by applying the ten settlement criteria set out in the Interim Settlement Policy.

The factors and hypothetical examples set forth below provide guidance as to how to apply the ten settlement criteria to settlement offers in which PRPs have requested some form of mixed funding. The Agency does not intend to limit the availability of mixed funding to the fact patterns described below, but recommends the following approach as a means of focusing the analysis of the settlement. Regions must continue to consider the totality of the circumstances for each mixed funding settlement offer.

In settlement offers in which any form of mixed funding is proposed, factors of primary importance include:

- Strength of the liability case against settlors and any non-settlors. This factor includes:
  - litigative risks in proceeding to trial against settlors, and
  - the nature of the case remaining against non-settlors after the settlement;
- Government's options in the event settlement negotiations fail (e.g., if a state cost-share will be available for a Fund-lead action);
- Size of the portion or operable unit for which the Fund will be responsible (or the amount of the PRP's offer);
- Good-faith negotiations and cooperation of settlors and other mitigating and equitable factors.

The following examples indicate the combinations of the above factors which may be considered acceptable candidates for any type of mixed funding, and those cases considered poor candidates for mixed funding:

Acceptable Candidates for Mixed Funding

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 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 viable non-settling PRPs, from which the Fund portion may be recovered.

While this combination of factors represents the optimum conditions under which mixed funding may be approved, cases will more typically involve one or more variations of this scenario. Thus, the Agency anticipates that a range of cases will be considered acceptable candidates for mixed funding. The following examples indicate the circumstances under which a mixed funding settlement may represent the Government's preferred alternative:

Example one:

A strong case against potential settlors may initially weigh in favor of litigation, especially if the case against non-settlors is weak. However, a mixed funding settlement may still be acceptable upon evaluation of additional factors, such as:

- The settling PRPs offer to conduct or pay for a substantial portion of the response;

- Public interest considerations (e.g., if settlement would expedite cleanup and/or a §104 Fund-financed action is not feasible);

- Whether settlors have negotiated in good-faith;

- The Government's time and resources saved by simplification or avoidance of litigation.

* As noted later, the Agency's preference is for the PRPs to perform the response action, rather than finance a Governmental response action.

Example two:

If a substantial portion of the waste at a site cannot be attributed to known and financially-viable parties, as determined, for example, by a preliminary nonbinding allocation of responsibility by the Government), the Agency may initially consider pursuing the recovery of all costs under joint and several liability. However, if the litigative risks appear substantial, a mixed funding settlement may represent more than the Government would recover in litigation, especially when the cost and time required for litigation is considered. Litigative risks which may weigh in favor of settlement include:

- Weak evidence against financially viable potential settlors;
- Equitable considerations which weigh against the imposition of joint and several liability.

In addition, if the hazard at the site is serious and no Fund-financed response is possible, a delay in the response action pending the conclusion of litigation might represent an unacceptable risk to the public and the environment.

Poor Candidates for Mixed Funding

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 settlors' offer is insufficient.)

These factors do not automatically preclude mixed funding for a case. However, for mixed funding to be seriously considered in such instances, other compensating factors must be present, such as the ability of the settlors to initiate the response action more quickly than the Government in a Fund-financed action.

IV. Selection of the Mixed Funding Technique

As noted in the Introduction, the term mixed funding has been used to refer to three different types of settlement arrangements:

1) Preauthorization, in which the PRPs conduct the response action and the Agency agrees to allow a claim against the Fund for a portion of the response costs;

2) Cash-outs, in which the PRPS pay for a portion of the response costs up front, and the Agency conducts the response action;

3) Mixed Work, in which the PRPs and the Agency each agree to conduct discrete portions of the response activity.

Once Regional enforcement personnel have determined that a mixed funding settlement is appropriate, based on the settlement criteria as described in Section III and the Interim Settlement Policy, then the Agency must decide which type of mixed funding best suits the situation at hand. Among the three major types of mixed funding, the Agency generally prefers preauthorization, since the PRPs conduct the response action. However, as noted below, cash-outs and mixed work may be appropriate under certain circumstances.

PREAUTHORIZATION

The assessment and approval of preauthorization, once a mixed funding settlement is approved, is a two-part process. The first stage, as described below, is the determination by the Agency enforcement personnel that preauthorization is appropriate in the context of the settlement as a whole. The second stage represents the actual process of preauthorization of the claim against the Fund by the Office of Emergency and Remedial Response (OERR) (see Section V.) The Response Claims regulations, which are presently in draft form, will provide guidance on the preauthorization process itself.

a) Technical and timing concerns related to preauthorization

For the first stage of the review, the nature of the proposed remedy and the PRPs' ability to perform it in a timely manner are major factors to consider when assessing a settlement offer which contemplates preauthorization. In addition, the size of the PRPs' portion is important. When PRPs are responsible for a sufficiently high percentage, they will have a strong economic incentive to keep the actual response costs within or close to estimates. The nature and

the severity of the threat posed by the site may also weigh in favor of settlement, if preauthorization would increase the speed at which the hazard could be addressed. For example, prompt initiation of the remedial action would be of particular importance for sites which are not currently scheduled for full Fund-financing.

On the other hand, Regional negotiators must also consider the time required for the preauthorization process itself when determining if preauthorization is appropriate for particular types of response actions. While the Agency has set a goal of completing review of individual preauthorization applications within a 45-day period, this timing limitation will vary on a case-by-case basis. The Agency is unlikely to have time to consider preauthorization requests when action is required to avert an immediate threat to the public health or the environment, therefore, no reimbursement would be possible. Regions should anticipate the processing time in managing negotiations.

b) Availability of preauthorization for various response actions

For agreements involving activities such as an RI/FS or a removal, preauthorization in general will not be warranted, because the process of preauthorization will usually prove too burdensome for the small amounts or short time-frames often encountered in these cases. Limited exceptions may be considered in unusual circumstances, as where preauthorization will facilitate a broader agreement (e.g., an area-wide RI/FS) which will be less resource intensive than several agreements of smaller scope. A large, extensive removal (e.g., greater than $2 million) may also qualify as an extraordinary circumstance justifying preauthorization. However, Headquarters approval must be obtained before preauthorization may be offered during negotiations for such activities.

HQ approval b/s offer. Mixed fund in RI/FS/ removal negotiations

c) Covenants not to sue for preauthorization settlements

For preauthorization of remedial design and remedial action (RD/RA) activities, the statute contains a specific provision related to remedy failure. Section 122(b)(4) of CERCLA states that for cases involving preauthorization, as described in §122(b)(1), the Fund will be responsible for costs of remedy failure, up to a proportion equal to that contributed for the original remedial action. This section also states that the Fund portion may be met either through Fund expenditures or by recovering such costs from parties who were not signatories to the original agreement. However, it should be noted that remedy failure due to negligence of the PRP will not trigger any Fund obligation. In any case, a covenant not to sue granted in preauthorization settlements must comport with Agency guidance on covenants not to sue, as cited above.

d) Settlement provisions needed to process claims

Settlement agreements involving preauthorization should contain the following restrictions to facilitate the processsing of claims:

- Settlement agreements should specify a percentage of the total estimated cost to be included in the pre-authorization claim for PRP reimbursement, subject to a maximum dollar limit.

- Claims against the Fund are not subject to the §104(c)(3) requirement that States contribute 10% of the cost of the remedial action. However, prospective claimants are encouraged to file a letter of cooperation from the State along with their request for preauthorization. This letter should describe any agreements resulting from the claimants' consultation with the State, including any State assurance of cooperation with the remedial action. Further, all actions conducted pursuant to a preauthorized claim must be consistent with the NCP and the proposed draft Response Claim regulations, when promulgated.

- Claims may be filed only for costs incurred after the date of preauthorization. Parties will not be eligible to make a claim against the Fund until the entire cleanup or agreed-upon preauthorized phase (e.g., an operable unit) is completed according to specifications set out in the settlement agreement and the Preauthorization Decision Document.

- Applicants must demonstrate that their proposed response costs are reasonable. The applicant should justify any proposal to perform an activity in-house, or to contract it out. Applicants may look to Federal and State procurement practices for guidance on how to meet EPA's objectives in the area of contracting and subcontracting.

- PRPs must be financially and technically capable of implementing all of the agreed upon response action. Parties may be required to submit financial assurances or performance bonds to substantiate their financial capability for completing the response action.

CASH-OUTS

For settlement proposals involving a cash-out by some of the PRPs, the nature of the remedy and the public interest factors are generally not decisive, since the Government will be conducting the response action. Thus, of the criteria in the Interim Settlement Policy noted in Section III, the key issues in these agreements include:

- The percentage of the total costs to be paid by settlors (i.e., a substantial portion should be offered);
- The Agency's level of confidence in information related to liability and cost estimates at the time of settlement;
- Equitable considerations for both the settling and non-settling parties, including the nature of any covenants not to sue in the cash-out settlement.

In general, cash-out settlements may occur at any stage of the remedial process. Such offers should generally be assessed in light of the criteria in Part IV of the Interim CERCLA Settlement Policy. It is important to note that, once a Fund-lead response action is ongoing, the potential benefit of mixed funding as a means of expediting cleanup is largely eliminated. In addition, a cash-out of some of the PRPs during the response action may serve to fragment the Government's enforcement proceedings, since cost recovery will generally be pursued once the remedial action is completed. Other issues related to cash-outs include:

a) Information needs related to cash-out settlements

One example of the use of cash-out settlements could involve PRPs which have contributed a low percentage of the waste to a site, and are not technically or financially capable of conducting the entire response action (e.g., preauthorization is not an option.) In order for this type of settlement to be appropriate for both settling and non-settling responsible parties, the Agency should have sufficient information to determine a settlement amount for the settlors as a group. This amount should be based on the Settlement Policy, and should include their waste contribution and other relevant information. Thus, the Agency should have a fairly high level of confidence in the information concerning the liability at the site and the expected cost of the remedy in order to determine an appropriate cash-out settlement.

The settlement may include a risk premium which may partially offset the Government's risk due to uncertainties such as remedy failure or cost overruns, as well as uncertainties which may be present if the necessary information is less than complete.

b) Covenants not to sue in cash-out settlements

The sufficiency of the Agency's information related to PRP liability and the nature, stage of development and the cost of the potential remedy has particular bearing on the scope of any covenant not to sue in cash-out settlements. In general, if the Agency has only limited information in these areas (e.g., if the cash-out settlement entered into early in the remedial process), then covenants not to sue should contain appropriate reopeners to reflect this uncertainty. In reference to these reopeners, it is important to note that the obligation of the Fund to pay for a portion of any costs incurred due to remedy failure, under §122(b)(4), is limited to mixed funding in the form of preauthorization under §122(b)(1). Thus, for cash-outs, the statute does not limit the potential PRP liability for costs resulting from remedy failure. Any future obligations will be specified in the cash-out agreement, including the covenants not to sue. Further guidance concerning covenants not to sue is provided in the Agency guidance "Covenants Not to Sue Under SARA" cited above.

In addition, although cash-out settlements need not involve de minimis parties, as defined by §122(g), similar analytical factors are important in both instances. Thus, Agency guidance entitled "Interim Guidelines on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA", cited above, may also be helpful for cash-out settlements.

c) State cost-share requirements for cash-out settlements

When the Federal government uses its response authority to conduct a remedial action, §104(c)(3) of CERCLA requires that the State "pay(s) or will assure payment" of 10% of the remedial action, including all future maintenance, or 50% or greater for sites involving a state operated facility. Since cash-out settlements involve PRP payment toward a federally-conducted remedial action, the applicable cost share is required for these settlements. The cost-share will be calculated using the total remedial costs, rather than a percentage of the Fund share alone.

There are a variety of ways that the State can "pay or assure payment" of the appropriate cost-share. For example, the State, the Federal government and the PRPs may enter into an agreement under State law and CERCLA in which the PRPs pay 10% to the State, and the State obligates the money for use at the site in question. The State may also use its own funds to pay for any portion of its share that cannot be paid for by PRPs. In general, cash-out settlements should only be considered when the litigation team is reasonably certain that the State is willing and able to pay for its 10% share, although the cost-share need not be part of the consent decree between the Federal government and the PRPs.

MIXED WORK

Mixed funding in the form of mixed work may be appropriate for cases in which the Agency can identify discrete phases or operable units of the response action. One common example involves a settlement with the PRPs to conduct the RD/RA once the Agency has conducted the RI/FS.

A second, more complicated mixed work arrangement could involve an agreement in which the Agency and the PRPs agree to conduct separate portions of an area-wide RI. In this example, the Agency might agree to conduct soil testing if the PRPs conduct ground-water monitoring. Regional enforcement personnel should be reasonably assured of PRP cooperation and the ability to identify in detail the individual activities for which each party will be responsible before entering into any mixed work settlement. In addition, any covenants not to sue in mixed work settlements should be clearly limited to the operable units addressed in the agreement. Mixed work should be avoided where there is a significant potential for delays in response actions as a result of inadequate coordination or potential conflicts. Thus, due to the high potential for technical and legal complications, mixed work in the form of mixed construction should generally not be considered.

Additional Considerations Regarding Mixed Funding

Operation and Maintenance

For preauthorized settlements, full responsibility for payment of operation and maintenance (O & M) activities remains with the PRPs. In some circumstances, a State may agree, as a party to the settlement, to manage O & M activities which are financed by PRPs. The Agency will generally resort to enforcement actions rather than committing Fund money for cleanup at the site when both the PRPs and the State refuse to be responsible for O & M.

Actions Against Non-settlors

It is the policy of the Department of Justice that the Federal government will not commit in a consent decree or other agreement to sue other non-settling parties. Consistent with this policy, mixed funding settlement agreements should not contain provisions which commit the Federal government to sue non-settling parties at a particular site. At most, the agreement may indicate that the Government has a "present intention" to sue non-settlors, subject to the exercise of the Government's enforcement discretion. Such provisions, however, must be approved by Headquarters and the Department of Justice (DOJ) on a case-by-case basis, and may not be offered in negotiations until such approval is obtained.

Reservation of Rights

Potential settlors occasionally will agree to allow the Government to reserve the right to bring an enforcement action against them, contingent upon a certain event, such as an unsuccessful enforcement action against non-settlors. Such an arrangement is not desirable, although it may be acceptable in limited circumstances. Such an offer should not be used by settlors as a means of reducing the amount offered up front. In addition, the negotiation team should consider the practical problems that might arise in implementing such an arrangement, including statute of limitation issues and fragmented enforcement actions involving successive suits covering similar issues. The Government generally prefers to settle for a substantial portion up front, rather than being required to bring a second enforcement action against settlors for an additional amount.

Documentation

For preauthorization and mixed work cases in which the Agency will take enforcement actions against non-settling parties, the Agency must assure that the settling PRPs agree to provide the necessary documentation and any other assistance required for support of the cost recovery cases. This assistance may include an agreement to provide witnesses to substantiate response costs. Government oversight will also be required, not only to assure that reimbursement by the Government is appropriate, but also that PRP documentation constitutes sufficient and admissible evidence for the cost recovery cases.

V. Procedural Considerations for Review of Settlements Involving Mixed Funding

As noted in Section I, consideration of a site for any type of mixed funding involves a two-stage process. The site first should be evaluated to determine if an offer for a mixed funding settlement in general (e.g., without regard to the particular funding arrangement) should be accepted. This analysis includes the settlement criteria, with the hypothetical examples in Section III indicating the Agency's preferences among various combinations of factors. Once the Regional enforcement personnel determines that a mixed funding settlement will be acceptable, then the factors noted in Section IV should be used to evaluate whether a particular type of mixed funding is appropriate.

The Agency has developed guidance on streamlining and improving the CERCLA settlement decision process, which, in part, highlights the need for improved preparation for negotiations and for a more systematic management review process. (See "Interim Guidance: Streamlining the CERCLA Settlement Decision Process", Porter/Adams, Feb. 12, 1987.) In keeping with the goals of this improved process, Regions should conduct both stages of the mixed funding analysis as early as possible (e.g., prior to the appropriate special notice.)

Timely Headquarters and DOJ notification is particularly important for cases involving preauthorization, since the use of preauthorization in settlements requires both the approval of the settlement for preauthorization, as described above, and the review by OERR of the request for preauthorization itself. Early DOJ involvement is necessary in mixed funding negotiations, as it is for other types of negotiations. While the preauthorization process need not be completed at the time of settlement, the settlement document must describe the major parameters of the proposed preauthorization agreement. Therefore, OERR should be contacted once the mixed funding analysis has been completed and the Region supports further consideration of preauthorization. For further information on the draft Response Claims regulations and the procedure for preauthorization with OERR, contact William O. Ross, Office of Emergency and Remedial Response (WH-548), (FTS) 382-4645.

Issues which cannot be resolved at the staff level may be raised to the Settlement Decision Committee (SDC), a Headquarters-based review panel. Like all consent decrees, mixed funding settlements will require final approval by the Assistant Administrator (AA) for the Office of Solid Waste and Emergency Response (OSWER), the AA-OECM, and the Assistant Attorney General for Lands and Natural Resources.

If the amount to be paid by the Fund exceeds $750,000 or 10% of the total response cost (whichever is greater), approval by the Deputy Attorney General at DOJ will also be required. Regional enforcement personnel may, of course, decline to consider mixed funding at a particular site without prior Headquarters consultation.

VI. Conclusion

Settlement agreements incorporating mixed funding provisions, as described in part under §122(b) of CERCLA, offer an alternative to either up front Fund financing of the total costs of response actions at a site, or possible delays in cleanup resulting from litigation required to force PRP action. Mixed funding represents one component of the Agency's comprehensive approach toward increased flexibility in settling CERCLA cases. This approach originates from the CERCLA Interim Settlement Policy as well as the codification of much of this Policy in §122 of the 1986 Amendments.

The assessment of mixed funding for a particular site must always begin with the determination as to whether any type of mixed funding settlement is appropriate, based on the ten settlement criteria. At the broadest level, this evaluation will involve a determination as to the most effective means of promoting cleanup at a site while insuring the most efficient use of the Agency's resources, including the Fund itself. Regions are encouraged to consider a mixed funding settlement when an assessment of the settlement criteria, including the strength of the evidence, the equities of the settlement, and the public interest, indicate that mixed funding is in the best interest of the Government, the public and the environment.

For further information or questions concerning this guidance, contact Kathy MacKinnon, OWPE (WH-527) at FTS: 475-6770.

DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of Government personnel. They are not intended and can not be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

OAK OPENING

CITY OF STOUGHTON

— OFFICE OF THE MAYOR —

381 EAST MAIN STREET/CITY HALL STOUGHTON, WISCONSIN 53589 608/873-6677

February 4, 1988

Ms. Kathy MacKinnon
U.S. Environmental Protection Agency
Waste Programs Enforcement Section
401 M Street, S.W.
Washington, DC 20460

Re: Municipal Settlement Policy

Dear Ms. MacKinnon:

We have been advised through Charles McKinley, with the Regional Counsel's Office in Region 5, that you are heading a work group on municipal settlements under Superfund. The City of Stoughton operated a municipal landfill from about 1953 until 1978. From 1953 until late 1962, a large industrial company located in Stoughton, U. S. Rubber Company (now Uniroyal Plastics Company, Inc.) contributed liquid and solid wastes containing hazardous substances to the site. In analyzing the Hazardous Ranking System materials, it is the City's view that this municipal landfill would not be included on the National Priorities List, were it not for its having served its residents, including industrial residents, by making available City land as a municipal waste site.

On November 27, 1987, the City received a Special Notice of Potential Liability letter from EPA Region 5, and has since been engaged in discussions of a Consent Order for purposes of conducting an RI/FS. In addition, City representatives have discussed with Region 5 the possibility of utilizing City control over the water supply as a fast track remedy to address any conceivable drinking water problems which might arise from the site.[1]

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[1] Under our HRS materials, surface water and air contamination received scores of zero, and the concern with the site revolves around groundwater impacts on the drinking water supply.

We have been advised that EPA does not have a municipal settlement policy formulated at this time, and thus we face potential liability of several hundred thousand dollars in connection with conducting the RI/FS (even if a no action remedy is chosen), all of which seems to be directed toward the issue whether a municipal well may at some time in the future show the presence of pollutants. Thus, even though that well currently contains no pollutants of the type shown in the HRS package, and even though the City has suggested the possibility of removing the well in question from service and thus making moot the question of groundwater contamination of that well, EPA Region 5 has advised that they simply have no tools with which to cope with this type of proposal.

We believe that several significant factors should be taken into account in formulating a municipal settlement policy:

1. Time is of the essence. The City of Stoughton believes that it is critical that EPA develop a municipal settlement policy immediately. Although U.S. EPA Region 5 tells us that we are already too far along in the process to have the benefit of such a policy, we believe that if guidelines for settlement are issued promptly by EPA, there may still be an opportunity to reach a sensible solution to water supply issues as to this site.

2. The City of Stoughton believes it is important that EPA not compel municipalities to expend extensive resources, to be borne by a very small group of citizens, for common municipal waste components. In the case where a municipal landfill contains hazardous substances from industrial sources which warrant NPL inclusion, EPA should be directed to undertake in each RI/FS, a specific analysis of divisibility in order to segregate those portions of the site, if possible, which consist of typical municipal waste, as distinct from industrial waste which may have been causal in the NPL listing. Further, each Record of Decision and remedy should specifically take account of divisibility if such can be established through the engineering analysis in the RI/FS and thus remedies should not be constructed to address typical municipal waste issues. This issue of divisibility should be carried throughout the process with municipal sites, so that it may become a recognized policy in settlement discussions.

3. We think it is appropriate that the unique capability of municipalities to exercise control over public works, principally water supply, should be recognized in the proposed settlement policy. To the extent that a municipality is willing to take steps through control of its water supply to alleviate potential groundwater pollution threats to the public, this should be given great weight in arriving at a fast track settlement with municipalities. This is not to argue that water supply concerns should completely exclude other environmental threats, where they can be established. However, in the case where characterizing the extent of a threat to a public drinking water supply is the principal thrust of an RI/FS (as in Stoughton), the municipality's willingness to take

steps to eliminate any potential ingestion of contaminants through the water supply by performing public works improvements (even, as in Stoughton, where there is presently no evidence of any pollutants in the drinking water supply) should be regarded as a practical tool available to U.S. EPA to accomplish what in many cases will prove to be a much more meaningful and permanent remedy than those available through the Feasibility Study. In addition, performance of public works improvements as remediation can be less financially burdensome for a municipality than participation in further investigatory efforts.

4. Finally, we believe that municipal landfills are an appropriate area where mixed funding should be utilized by EPA. Although a municipality's share is not a true "orphan's share", a municipality of 8,500 people, with many elderly citizens, simply cannot realistically spread the cost of cleanup of municipal waste the way industrial generators may spread the cost of cleaning up their waste through pricing of their products on a regional or national basis. If there is no mandate for addressing divisibility in order to segregate municipal waste issues, then municipalities will be fully involved as PRPs on a random and discriminatory basis, due solely to the location of industrial generators, and not due to the peculiar nature of the waste generated by the municipality. Further, if there is no willingness to listen to remedies which a municipality can initiate on its own, off-site, to address drinking water supply issues, there is great potential for irrationally proceeding to analyze potential impacts on water supply without any consideration for public works solutions to head off any potential threats of that kind.

EPA has authority, within the general framework of its current settlement guidelines, as well as the statutes, to refine particular settlement possibilities for municipalities who can offer public works improvements to address water supply concerns, and divisibility and mixed funding concepts can be applied to alleviate the arbitrary imposition of huge response costs on small communities with no evidence of any extraordinary activities by the municipality as a generator.

Thank you for your consideration of these views.

Very truly yours,

Douglas G. Pfundheller
Mayor

DGP/ljb

cc: Mr. Basil Constantelos, Director, Waste Management Division, U.S. EPA Region V

Mr. Charles McKinley, U.S. EPA Regional
Counsel's Office, U.S. EPA Region V
Mr. Doug Ballotti, Project Manager
U.S. EPA Region V
Mr. J. Michael Skibinski, City Attorney
Mr. Robert Kardasz
Mr. Michael D. Doran
U.S. Senator Robert W. Kasten, Jr.
U.S. Senator William Proxmire
U.S. Representative Robert W. Kastenmeier
WI State Assemblyman Thomas A. Loftus
WI State Senator Charles Chvala

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAY 27 1988

OSWER Directive #9834.9a

From: McHale
to: SWERB

FYI

MEMORANDUM

SUBJECT: Interim Policy on Mixed Funding Settlements Involving the Preauthorization of States or Political Subdivisions

FROM: J. Winston Porter
Assistant Administrator
Office of Solid Waste and Emergency Response

Thomas L. Adams, Jr.
Assistant Administrator
Office of Enforcement and Compliance Monitoring

TO: Regional Administrators, Regions I - X

I. INTRODUCTION

The purpose of this memorandum is to establish the Agency's interim policy on the use of mixed funding settlements that involve the preauthorization of States or political subdivisions when such parties are potentially responsible parties (PRPs) at Superfund sites. [1] This memorandum addresses one specific question that arose during negotiations at a municipal landfill. The question was whether the Agency could approve a request for preauthorization submitted by a political subdivision seeking to file a claim against the Fund for reimbursement of a portion of response costs at a Superfund site. The question of whether a political subdivision is eligible to request preauthorization in the context of a mixed funding settlement was resolved during a November 1987 Assistant Administrator Review Team (AART) meeting. This policy formalizes that decision and is expanded to include States as well.

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[1] This policy supplements the guidance on "Evaluating Mixed Funding Agreements Under CERCLA." The Mixed Funding guidance presents a method for determining whether it may be appropriate to settle for less than 100% of response costs and provides examples of the types of sites that are good and poor candidates for mixed funding. This guidance was signed on October 20, 1987 and was issued under OSWER Directive #9834.9.

II. ISSUE

Mixed Funding (Section 122(b)(1))

Section 122(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA) authorizes EPA to enter into mixed funding settlements with PRPs. Section 122(b)(1) authorizes one type of mixed funding where PRPs agree to perform the response activity and the Agency agrees to reimburse the PRPs for a portion of their response costs. The Agency implements this type of mixed funding by approving the PRP's request for preauthorization to undertake the response and by awarding monies from the Fund once the response action is completed.

The term preauthorization refers to the approval that PRPs must obtain from EPA prior to the conduct of cleanup actions and before a claim for reimbursement of response costs is presented to the Fund. If preauthorization is granted, it serves as an Agency commitment that, if the response is conducted pursuant to the settlement agreement and the costs are reasonable and necessary, reimbursement will be available from the Fund as specified by the agreement. EPA will grant preauthorization to PRPs only in the context of settlement agreements. [2]

Although section 122(b)(1) provides authority for mixed funding, it does not specify a mechanism for permitting the Fund to be used for this purpose. CERCLA's principal claims mechanism is section 111(a) and the Agency uses this mechanism for reimbursing PRPs for a portion of their response costs pursuant to a mixed funding agreement.

Reimbursement of Claims (Section 111(a))

Section 111(a) provides that the President shall use the money in the Fund for:

(1) payment for governmental response costs incurred pursuant to section 104 ...

(2) payment of any claim for necessary response costs incurred by any other person ... (emphasis added).

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[2] For a more detailed discussion about preauthorization see the guidance on "Evaluating Mixed Funding Settlements Under CERCLA" cited earlier.

A question arose on the precise meaning of "any other person" under section 111(a)(2). Specifically, the question was whether, when read in conjunction with section 111(a)(1), "any other person" means any person other than a governmental entity. The Agency believes that "any other person" can include governmental entities when they are PRPs and when they are acting pursuant to a settlement agreement as discussed below. Note that any person who plans to file a claim against the Fund under the section 111(a)(2) response claims process must first obtain preauthorization (i.e., prior EPA approval).

III. PREAUTHORIZATION OF STATES OR POLITICAL SUBDIVISIONS

In considering mixed funding at a site that involves a State or political subdivision as a PRP, the Region must first determine whether the offer is an acceptable candidate for mixed funding. This determination must be made at all sites where mixed funding is being considered and must be made by applying the criteria established in the "Interim CERCLA Settlement Policy" and the guidance on "Evaluating Mixed Funding Agreements Under CERCLA." [3]

The Settlement Policy establishes ten criteria that must be applied to a settlement offer to determine whether it is appropriate to settle for less than 100% of response costs. The Mixed Funding guidance provides a more detailed discussion about how to apply the ten settlement criteria to mixed funding settlement offers, including a discussion about which factors generally make an offer an acceptable candidate for mixed funding.

The Region must also consider the following additional criteria. States or political subdivisions are eligible to file claims against the Fund only when:

(1) the State or political subdivision is a PRP under section 107 at the site; and

(2) the State or political subdivision will carry out the response pursuant to a settlement agreement under section 122.

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[3] The "Interim CERCLA Settlement Policy" was issued under OSWER Directive #9835.0 on February 5, 1985. The Mixed Funding guidance was cited earlier.

If you have any questions or comments regarding this interim policy, please contact Kathleen MacKinnon in the Office of Waste Programs Enforcement at FTS-475-9812.

cc: Jon Cannon, OWPE
Lisa Friedman, OGC
Edward Reich, OECM
Henry Longest, OERR
David Buente, DOJ
Waste Management Division Directors, Regions I - X
Regional Counsels, Regions I - X
Municipal Settlement Workgroup Members

Virchow, Krause & Company
Certified Public Accountants

4130 Lien Rd. • P.O. Box 7398 • Madison, WI 53707-7398
608/249-6622 • FAX Ext. 271 or 608/249-8532

City of Stoughton
381 East Main Street
Stoughton, Wisconsin

We have compiled the accompanying projected impact analysis - EPA Alternatives of the City of Stoughton for December 31, 1991 through December 31, 1996, in accordance with guidelines established by the American Institute of Certified Public Accountants.

The accompanying projections present, to the best of management's knowledge and belief, the projected debt and city mill rate. It is not intended to be a projection of expected financial position, results of operations, or cash flows based on the various EPA Alternatives. The projections and this report were prepared for internal use and for the information of the EPA and should not be used for any other purpose.

Management has elected to omit the summary of significant accounting policies. If the omitted disclosures were included in the projected presentation, they might influence the user's conclusions about the City's results of operations for the period. Accordingly, these projections are not designed for those who are not informed about such matters.

A compilation is limited to presenting projected information that is the representation of management and does not include evaluation of the support for the assumptions underlying such information. We have not examined the projected information and, accordingly, do not express an opinion or any other form of assurance on the accompanying projected debt and city mill rate or assumptions. Furthermore, even if various EPA Alternatives are implemented, there will usually be differences between the projected and actual results, because events and circumstances frequently do not occur as expected, and those differences may be material. We have no responsibility to update this report for events and circumstances occurring after the date of this report.

VIRCHOW, KRAUSE & COMPANY

Virchow Krause + Company

Madison, Wisconsin
August 7, 1991

CITY OF STOUGHTON

PROJECTED IMPACT ANALYSIS-EPA ALTERNATIVE #2

	91	92	93	94	95	96
BEGIN YEAR DEBT	$3,605,687	$5,634,823	$5,480,583	$5,904,853	$5,492,285	$7,203,662
NEW DEBT	$2,350,500	$197,000	$797,000	$47,000	$2,200,000	$200,000
PRINCIPAL PMTS.	$321,364	$351,240	$372,730	$459,568	$488,623	$547,572
END OF YEAR	$5,634,823	$5,480,583	$5,904,853	$5,492,285	$7,203,662	$6,856,090
DEBT LIMIT	$11,112,080	$11,445,442	$11,788,806	$12,142,470	$12,506,744	$12,881,946
% OF MAXIMUM	51%	48%	50%	45%	58%	53%
REALISTIC MAXIMUM	65%	65%	65%	65%	65%	65%
AVAILABLE DEBT	$5,477,257	$5,964,859	$5,883,953	$6,650,185	$5,303,082	$6,025,856
(REALISTIC DEBT AVAILABLE)	$1,588,029	$1,958,955	$1,757,871	$2,400,320	$925,722	$1,517,175
EPA DEBT LEVY	$0	$215,803	$215,803	$215,803	$215,803	$215,803
EPA O&M LEVY	$0	$150,000	$156,000	$162,240	$168,730	$175,479
TOTAL EPA LEVY	$0	$365,803	$371,803	$378,043	$384,533	$391,282
CITY VALUATION*	$208,907,104	$215,174,317	$221,629,547	$228,278,433	$235,126,786	$242,180,590
EPA MILL RATE	0	0.0017	0.0017	0.0017	0.0016	0.0016
TAX IMPACT**	$0	$119	$117	$116	$114	$113
MILL RATE CHANGE	0.00%	26.56%	26.21%	25.88%	25.55%	25.24%

*=ASSESSED VALUE
**=$70,000 HOME

SUMMARY OF SIGNIFICANT ASSUMPTIONS:
==========

1. This projection does not include R.I.F.S. costs, or governmental (EPA & DNR)oversight costs, which can be substantial.
2. Prudent city management dictates the maintenance of a debt reserve equaling 35% of the total debt limit.
3. Debt limit and city valuation are adjusted each year by 3%.
4. The EPA debt is calculated at 2.2mm,@7.5%,@20years.
5. Debt limit equals 5% Of city's equalized valuation.
6. EPA related debt & O&M costs,are taken from the EPA fact sheet. O&M costs are adjusted by an inflation factor of 4%.
7. New debt is based on the city's 5 yr. Capital Improvement Plan.
8. "MILL RATE CHANGE" assumes stable city mill rate of 6.40/ thousand for other city needs.(i.e. non EPA related).

SEE ACCOUNTANTS' REPORT
==========

CITY OF STOUGHTON

PROJECTED IMPACT ANALYSIS-EPA ALTERNATIVE #3

	91	92	93	94	95	96
BEGIN YEAR DEBT	$3,605,687	$6,434,823	$6,262,109	$6,666,520	$6,232,603	$7,921,030
NEW DEBT	$3,150,500	$197,000	$797,000	$47,000	$2,200,000	$200,000
PRINCIPAL PMTS.	$321,364	$369,714	$392,589	$480,917	$511,573	$572,243
END OF YEAR	$6,434,823	$6,262,109	$6,666,520	$6,232,603	$7,921,030	$7,548,787
DEBT LIMIT	$11,112,080	$11,445,442	$11,788,806	$12,142,470	$12,506,744	$12,881,946
% OF MAXIMUM	58%	55%	57%	51%	63%	59%
REALISTIC MAXIMUM	65%	65%	65%	65%	65%	65%
AVAILABLE DEBT	$4,677,257	$5,183,333	$5,122,286	$5,909,867	$4,585,714	$5,333,159
(REALISTIC DEBT AVAILABLE)	$788,029	$1,177,429	$996,204	$1,660,002	$208,354	$824,478
EPA DEBT LEVY	$0	$294,277	$294,277	$294,277	$294,277	$294,277
EPA O&M LEVY	$0	$150,000	$156,000	$162,240	$168,730	$175,479
TOTAL EPA LEVY	$0	$444,277	$450,277	$456,517	$463,007	$469,756
CITY VALUATION*	$208,907,104	$215,174,317	$221,629,547	$228,278,433	$235,126,786	$242,180,590
EPA MILL RATE	0	0.0021	0.0020	0.0020	0.0020	0.0019
TAX IMPACT**	$0	$145	$142	$140	$138	$136
MILL RATE CHANGE	0.00%	32.26%	31.74%	31.25%	30.77%	30.31%

*=ASSESSED VALUE
**=$70,000 HOME

SUMMARY OF SIGNIFICANT ASSUMPTIONS:
==========

1. This projection does not include R.I.F.S. costs, or governmental (EPA & DNR)oversight costs, which can be substantial.
2. Prudent city management dictates the maintenance of a debt reserve equaling 35% of the total debt limit.
3. Debt limit and city valuation are adjusted each year by 3%.
4. The EPA debt is calculated at 3mm,@7.5%,@20years.
5. Debt limit equals 5% Of city's equalized valuation.
6. EPA related debt & O&M costs,are taken from the EPA fact sheet. O&M costs are adjusted by an inflation factor of 4%.
7. New debt is based on the city's 5 yr. Capital Improvement Plan.
8. "MILL RATE CHANGE" assumes stable city mill rate of 6.40/ thousand for other city needs.(i.e. non EPA related).

SEE ACCOUNTANTS' REPORT
==========

CITY OF STOUGHTON

PROJECTED IMPACT ANALYSIS-EPA ALTERNATIVE #5

	91	92	93	94	95	96
BEGIN YEAR DEBT	$3,605,687	$7,134,823	$6,945,945	$7,332,980	$6,880,383	$8,548,729
NEW DEBT	$3,850,500	$197,000	$797,000	$47,000	$2,200,000	$200,000
PRINCIPAL PMTS.	$321,364	$385,878	$409,965	$499,597	$531,654	$593,830
END OF YEAR	$7,134,823	$6,945,945	$7,332,980	$6,880,383	$8,548,729	$8,154,899
DEBT LIMIT	$11,112,080	$11,445,442	$11,788,806	$12,142,470	$12,506,744	$12,881,946
% OF MAXIMUM	64%	61%	62%	57%	68%	63%
REALISTIC MAXIMUM	65%	65%	65%	65%	65%	65%
AVAILABLE DEBT	$3,977,257	$4,499,497	$4,455,826	$5,262,087	$3,958,015	$4,727,047
(REALISTIC DEBT AVAILABLE)	$88,029	$493,593	$329,744	$1,012,222	($419,345)	$218,366
EPA DEBT LEVY	$0	$362,941	$294,277	$294,277	$294,277	$294,277
EPA O&M LEVY	$0	$210,800	$219,232	$228,001	$237,121	$246,606
TOTAL EPA LEVY	$0	$573,741	$513,509	$522,278	$531,398	$540,883
CITY VALUATION*	$208,907,104	$215,174,317	$221,629,547	$228,278,433	$235,126,786	$242,180,590
EPA MILL RATE	0	0.0027	0.0023	0.0023	0.0023	0.0022
TAX IMPACT**	$0	$187	$162	$160	$158	$156
MILL RATE CHANGE	0.00%	41.66%	36.20%	35.75%	35.31%	34.90%

*=ASSESSED VALUE
**=$70,000 HOME

SUMMARY OF SIGNIFICANT ASSUMPTIONS:

1. This projection does not include R.I.F.S. costs, or governmental (EPA & DNR)oversight costs, which can be substantial.
2. Prudent city management dictates the maintenance of a debt reserve equaling 35% of the total debt limit.
3. Debt limit and city valuation are adjusted each year by 3%.
4. The EPA debt is calculated at 3.7mm,@7.5%,@20years.
5. Debt limit equals 5% Of city's equalized valuation.
6. EPA related debt & O&M costs,are taken from the EPA fact sheet. O&M costs are adjusted by an inflation factor of 4%.
7. New debt is based on the city's 5 yr. Capital Improvement Plan.
8. "MILL RATE CHANGE" assumes stable city mill rate of 6.40/ thousand for other city needs.(i.e. non EPA related).

SEE ACCOUNTANTS' REPORT

CITY OF STOUGHTON

PROJECTED IMPACT ANALYSIS-EPA ALTERNATIVE #6B

	91	92	93	94	95	96
BEGIN YEAR DEBT	$3,605,687	$12,534,823	$12,221,247	$12,474,231	$11,877,530	$13,390,964
NEW DEBT	$9,250,500	$197,000	$797,000	$47,000	$2,200,000	$200,000
PRINCIPAL PMTS.	$321,364	$510,576	$544,016	$643,701	$686,566	$760,360
END OF YEAR	$12,534,823	$12,221,247	$12,474,231	$11,877,530	$13,390,964	$12,830,604
DEBT LIMIT	$11,112,080	$11,445,442	$11,788,806	$12,142,470	$12,506,744	$12,881,946
% OF MAXIMUM	113%	107%	106%	98%	107%	100%
REALISTIC MAXIMUM	65%	65%	65%	65%	65%	65%
AVAILABLE DEBT	($1,422,743)	($775,805)	($685,425)	$264,940	($884,220)	$51,342
(REALISTIC DEBT AVAILABLE)	($5,311,971)	($4,781,709)	($4,811,507)	($3,984,925)	($5,261,580)	($4,457,339)
EPA DEBT LEVY	$0	$892,639	$892,639	$892,639	$892,639	$892,639
EPA O&M LEVY	$0	$400,000	$416,000	$432,640	$449,946	$467,943
TOTAL EPA LEVY	$0	$1,292,639	$1,308,639	$1,325,279	$1,342,585	$1,360,582
CITY VALUATION*	$208,907,104	$215,174,317	$221,629,547	$228,278,433	$235,126,786	$242,180,590
EPA MILL RATE	0	0.0060	0.0059	0.0058	0.0057	0.0056
TAX IMPACT**	$0	$421	$413	$406	$400	$393
MILL RATE CHANGE	0.00%	93.87%	92.26%	90.71%	89.22%	87.78%

*=ASSESSED VALUE
**=$70,000 HOME

SUMMARY OF SIGNIFICANT ASSUMPTIONS:

1. This projection does not include R.I.F.S. costs, or governmental (EPA & DNR)oversight costs, which can be substantial.
2. Prudent city management dictates the maintenance of a debt reserve equaling 35% of the total debt limit.
3. Debt limit and city valuation are adjusted each year by 3%.
4. The EPA debt is calculated at 9.1mm,@7.5%,@20years.
5. Debt limit equals 5% Of city's equalized valuation.
6. EPA related debt & O&M costs,are taken from the EPA fact sheet. O&M costs are adjusted by an inflation factor of 4%.
7. New debt is based on the city's 5 yr. Capital Improvement Plan.
8. "MILL RATE CHANGE" assumes stable city mill rate of 6.40/ thousand for other city needs.(i.e. non EPA related).

SEE ACCOUNTANTS' REPORT

CITY OF STOUGHTON

PROJECTED IMPACT ANALYSIS-EPA ALTERNATIVE #7

	91	92	93	94	95	96
BEGIN YEAR DEBT	$3,605,687	$8,634,823	$8,411,307	$8,761,105	$8,268,479	$9,893,794
NEW DEBT	$5,350,500	$197,000	$797,000	$47,000	$2,200,000	$200,000
PRINCIPAL PMTS.	$321,364	$420,516	$447,202	$539,626	$574,685	$640,088
END OF YEAR	$8,634,823	$8,411,307	$8,761,105	$8,268,479	$9,893,794	$9,453,706
DEBT LIMIT	$11,112,080	$11,445,442	$11,788,806	$12,142,470	$12,506,744	$12,881,946
% OF MAXIMUM	78%	73%	74%	68%	79%	73%
REALISTIC MAXIMUM	65%	65%	65%	65%	65%	65%
AVAILABLE DEBT	$2,477,257	$3,034,135	$3,027,701	$3,873,991	$2,612,950	$3,428,240
(REALISTIC DEBT AVAILABLE)	($1,411,971)	($971,769)	($1,098,381)	($375,874)	($1,764,410)	($1,080,441)
EPA DEBT LEVY	$0	$510,000	$510,000	$510,000	$510,000	$510,000
EPA O&M LEVY	$0	$400,000	$416,000	$432,640	$449,946	$467,943
TOTAL EPA LEVY	$0	$910,000	$926,000	$942,640	$959,946	$977,943
CITY VALUATION*	$208,907,104	$215,174,317	$221,629,547	$228,278,433	$235,126,786	$242,180,590
EPA MILL RATE	0	0.0042	0.0042	0.0041	0.0041	0.0040
TAX IMPACT**	$0	$296	$292	$289	$286	$283
MILL RATE CHANGE	0.00%	66.08%	65.28%	64.52%	63.79%	63.09%

*=ASSESSED VALUE
**=$70,000 HOME

SUMMARY OF SIGNIFICANT ASSUMPTIONS:

1. This projection does not include R.I.F.S. costs, or governmental (EPA & DNR)oversight costs, which can be substantial.
2. Prudent city management dictates the maintenance of a debt reserve equaling 35% of the total debt limit.
3. Debt limit and city valuation are adjusted each year by 3%.
4. The EPA debt is calculated at 5.2mm,@7.5%,@20years.
5. Debt limit equals 5% Of city's equalized valuation.
6. EPA related debt & O&M costs,are taken from the EPA fact sheet. O&M costs are adjusted by an inflation factor of 4%.
7. New debt is based on the city's 5 yr. Capital Improvement Plan.
8. "MILL RATE CHANGE" assumes stable city mill rate of 6.40/ thousand for other city needs.(i.e. non EPA related).

SEE ACCOUNTANTS' REPORT

HENRY A. FIELD, JR.
RICHARD L. OLSON
KENNETH T. McCORMICK, JR.
THOMAS J. SOBOTA
GERALD T. CONKLIN
BRADWAY A. LIDDLE, JR.
PAUL A. HAHN
JOHN E. KNIGHT
JAMES F. LORIMER
CLAUDE J. COVELLI
REBECCA A. ERHARDT
J. LEROY THILLY
PAUL R. NORMAN
GEORGE R. KAMPERSCHROER
MARK W. PERNITZ
WALTER KUHLMANN
MICHAEL P. MAY
MICHAEL G. STUART
RICHARD J. DELACENSERIE
RICHARD A. LEHMANN
JOHN S. ROBISON
JAMES E. BARTZEN

BOARDMAN, SUHR, CURRY & FIELD

FIRST WISCONSIN PLAZA, SUITE 410

ONE SOUTH PINCKNEY STREET

P.O. BOX 927

MADISON, WISCONSIN 53701-0927

TELEPHONE (608) 257-9521

FACSIMILE (608) 283-1709

DIRECT DIAL NUMBER:

CARL J. RASMUSSEN
STEVEN C. ZACH
GEORGE R. EDGAR
GAIL V. PERRY
AMANDA J. KAISER

CATHERINE M. ROTTIER
JON C. NORDENBERG
BONNIE A. WENDORFF
LAWRIE J. KOBZA
SUSAN J. ERICKSON
MARK J. STEICHEN
MADELYN D. LEOPOLD
RICHARD L. SCHMIDT
JOYCE L. KIEL
WILLIAM C. SCHAEFER
ANITA T. GALLUCCI

OF COUNSEL
FREDERICK C. SUHR
ROBERT L. CURRY
JOHN L. BRUEMMER

August 13, 1991

Ms. Linda Meyer, LC/5
WI Department of Natural Resources
P. O. Box 7921
Madison, WI 53707

RE: Stoughton City Landfill Superfund Site

Dear Linda:

In our meeting on Friday, August 9, we discussed the issue of Department support for holding discussions of mixed funding settlement possibilities prior to the issuance of special notice letters in the above case. Our discussion grew out of a meeting held on Thursday, August 8 among City representatives, DNR staff and Congressional and legislative representatives in which the subject of mixed funding was discussed.

I indicated to you that I felt EPA guidance contemplated the early discussion of mixed funding and specifically contemplated that such discussions could take place prior to the issuance of special notice letters.

You have told me that you have now received a copy of the comments filed by the City of Stoughton within the public comment period on the recommended clean up plan for the above site. You will note that the Mayor's letter transmitting those comments specifically requests that EPA conduct a discussion of mixed funding prior to the issuance of special notice letters.

The City of Stoughton would very much appreciate the support of the Department of Natural Resources for the scheduling of such a discussion promptly after issuance of the Record of Decision in this matter, and prior to issuance of Special Notice letters. If the Department is so inclined, I would appreciate receiving a copy of any such communication from DNR to U.S. EPA.

Thank you for your consideration of this request.

Very truly yours,

BOARDMAN, SUHR, CURRY & FIELD
By

Walter Kuhlmann

WK/cab
cc: Mayor Helen J. Johnson
Mr. Michael Skibinski
Mr. Robert Kardasz
Mr. Michael D. Doran

CITY OF STOUGHTON

381 East Main Street
Stoughton, WI 53589

(608) 873-6677

August 2, 1996

VIA FACSIMILE AND FEDERAL EXPRESS

Senator Herb Kohl
330 Hart Senate Office Bldg.
Washington, D.C. 20510

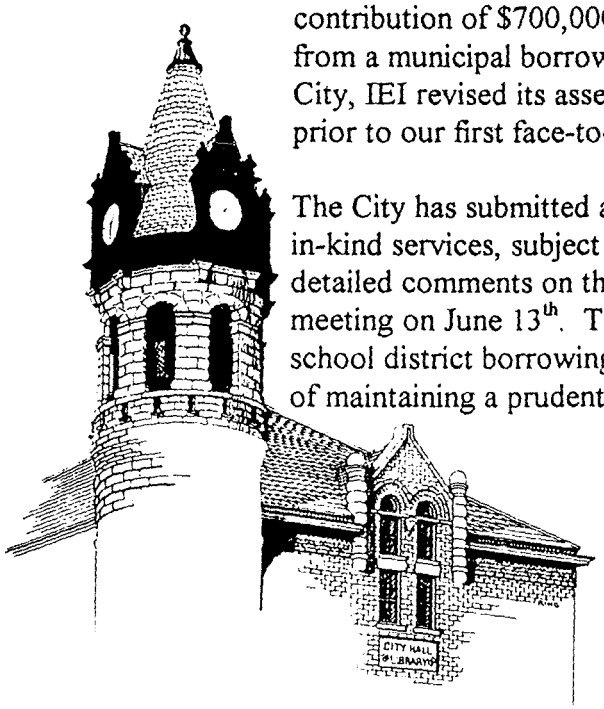
Re: Stoughton (Amundson Park) Landfill

Dear Senator Kohl:

I am writing to update you on recent developments at the Superfund Site at the Stoughton Landfill (Amundson Park). I summarize both the financial discussion and recent important developments at the site which have prompted the City to ask that a final decision on remedial action be deferred until new data is collected for one year from the new wells that the agencies are planning to install at the site.

Financial ("Ability to Pay") Negotiations. City representatives have met on June 17, 1996 and July 18, 1996 with representatives of U.S. EPA, U.S. Department of Justice (DOJ), and the Wisconsin DNR (WDNR). We have another meeting scheduled for August 7, 1996, and it seems likely to the City that another meeting or two beyond that may be necessary.

In late October 1995, DOJ made a settlement demand on the City of $4.2 Million, based on an analysis of Stoughton's ability to pay that had been performed by DOJ's contractor, Industrial Economics, Inc. (IEI) from Cambridge, MA. The demand was based on a contribution of $700,000 from the City's general fund, with the remainder coming from a municipal borrowing of $3.5 Million. Based on written comments from the City, IEI revised its assessment to a total of $3.7 Million on June 13, 1996, just prior to our first face-to-face meeting.



The City has submitted a recommended counter-proposal of $701,000 in cash and in-kind services, subject to formal Council approval. The City also submitted detailed comments on the IEI work, and discussed this at length at the first meeting on June 13th. The City raised concerns about the area's $25 Million school district borrowing, restrictions on the current general funds, the importance of maintaining a prudent level of reserves on hand, delays in the timing of state

revenue sharing payments, and the large percentage of Stoughton's population that is elderly (the highest of any Dane County community by a wide margin, and well above the state average).

Prior to the July 18, 1996 meeting, IEI submitted its second revision to its ability-to-pay assessment, taking into account a number of the City's concerns. The revised number now being requested of the City is $1.5 Million, to be fully funded by a municipal borrowing. The City remains very concerned that this amount would push the City's local share property tax burden substantially higher than other comparable size (4th class) cities in Dane County with which the City "competes" for new homeowners and businesses.

Threat of Suit Against the City. DOJ has made clear that if negotiations do not proceed in a manner satisfactory to the U.S. EPA and DOJ, that DOJ will promptly commence suit against the City. Tolling agreements, extending the time for suit by the United States, are discussed and executed after every negotiating session. Thus, the discussions are conducted under a cloud of immediate litigation if discussions are not satisfactory to the United States.

New Data at the Site; Reasons to Re-think the Remedy. One of the requests the City made in our first face-to-face meeting with federal and state representatives was that we be given the groundwater data from the last several years (which the agencies had not previously furnished to us). A summary of that data is enclosed. U.S. EPA has told us that the Tetrahydrofuran (THF) to the northwest of the landfill waste boundary appears to be separated from the waste (which suggests that it is no longer emanating from the landfill, and may have been originally deposited outside the waste boundary). U.S. EPA has also told us that this same condition may be the case for the other "plume" of THF to the southwest of the site, and they plan to install additional monitoring wells to determine this, as well as to better understand trends in the THF concentrations in the groundwater. If these areas of contamination are indeed separated from the landfill waste, then the "source control" presumed to occur by recapping the site (which was capped once, under then-current codes, when the site was closed) would appear to be of minimal, if any, value.

Moreover, the data enclosed shows that the THF concentrations are decreasing sharply over time. This has led the City to ask that any final decision to proceed with a costly remedy be deferred until the planned new monitoring wells are installed and data from new (and old) wells is collected for one (1) year and can be analyzed to see if natural attenuation is proceeding, and may address the problem at the site.

We think that exploring the possibility of natural attenuation makes sense in light of the DNR's recent adoption of a new "case closeout policy" and associated regulatory revisions which permit the agency to allow remedial choices to be based on natural attenuation. So far, the agencies have argued that a new landfill cap (which is a major expense in the proposed remedy) is needed in any event, even if concentrations are decreasing. Yet we understand the WDNR has allowed the selection of "no action" alternatives as long as there is (a) no threat to human health, (b) the contaminants of concern do not move onto another property owner's land, (c) deed restrictions bar new wells or surface disturbance, and (d) there is evidence that over time the contamination will abate through natural attenuation. The City believes all these circumstances exist here because (a) everyone in the area is on City water supply, (b) the City owns all the property to the west of the site, to the Yahara River, (c) the City is willing to enter into standard deed restrictions, and (d) the data we have seen so far shows that the contaminant of concern, THF, is reducing in concentration through the natural flushing of the system, which DNR has accepted at other sites as an appropriate alternative.

The City also seeks a deferral because we understand that the DNR has allowed the construction of soccer fields at another landfill remedial site in Wisconsin (the Holtz-Krause site in Wausau), and the City may want to pursue this option. To do so, the City would need to secure grant funds for such a park development, and this will take time.

Conclusion and Request. Based on the foregoing, we will continue to press U.S. EPA and the WDNR to:

- Put the ability-to pay negotiations on hold where they currently stand, and
- Wait to make final design plans for the remedy until the new wells are installed and new data over the ensuing year shows whether the THF is still emanating from the landfill (i.e., whether "source control" is of any value), and whether natural attenuation is going on at the site.

We emphasize that there is no human health risk to this proposal since the pathway of human ingestion of groundwater is not an issue, given the City water supply in the area.

We ask that you and your staff consider this situation, and offer your support for the City's position in whatever manner you think may be reasonable. To be clear, we are not asking you to insert your office in the financial negotiations with DOJ, but rather if you are satisfied that there is no current human health risk associated with a year deferral, to express your views, in support of the City, in favor of that deferral.

I would be pleased to talk to you or your staff about this situation at any time. Thank you for considering Stoughton's request.

Very truly yours,

CITY OF STOUGHTON
By

Helen J Johnson

Mayor Helen J. Johnson

HJJ:rb
Encl.
cc: Ms. Eve Galanter - Office of Senator Herb Kohl
Senator Herb Kohl's Environmental Representative
Atty. Joe Martin/U.S. Department of Justice
Atty. John H. Tielsch/U.S. EPA
Mr. Tony Rutter/U.S. EPA Remedial Project Manager
Senator Charles Chvala
Representative Rudy Silbaugh
Atty. Michael Skibinski
Atty. Walter Kuhlmann
Mr. John D. Neal
Ms. Judy A. Kinning
Mr. Robert P. Kardasz
Mr. Rodney Scheel

BSC&F
Boardman, Suhr, Curry & Field
ATTORNEYS AT LAW

410 Firstar Plaza
One South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

Telephone (608) 257-9521
Facsimile (608) 283-1709

WALTER KUHLMANN
Direct Dial Number (608) 283-1762
E-mail: wkuhlma@bscf.com

August 28, 1996

VIA FAX AND U.S. MAIL

Mr. John H. Tielsch **312-886-7160**
U.S. EPA C-29A
Office of Regional Counsel
Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3590

Mr. Joseph H. Martin **202-616-6584**
U.S. Department of Justice
Environmental Enforcement
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044

Ms. Linda Meyer **715-839-6076**
Department of Natural Resources
1300 W. Clairmont Ave.
Eau Claire, WI 54702

Re: **Stoughton Landfill**

Dear John, Joe and Linda:

This letter is an offer of settlement by the City of Stoughton (City) regarding its liability at the above Superfund site. The settlement offer is subject to all terms below.

1. Cash payment. The City of Stoughton offers to pay the sum of $1.5 Million in full settlement of its liability to both the United States and the State of Wisconsin with respect to the Stoughton Municipal Landfill site.

2. Payment terms. (a) Installments. The payment of the $1.5 Million would be in four (4) equal installments of $375,000.00 with the first payment due on March 1, 1997, or the first date for payment of amounts under the settlement as specified in the Consent Decree approving this settlement offer, whichever is later. The second, third and fourth installments would be payable on the anniversary dates of the first payment.

(b) No interest. No interest shall be charged or paid in connection with the cash payments.

(c) Instructions. The payments would be made in accordance with the instructions of the Consent Decree, but in no event will such terms be inconsistent with the terms of this offer letter.

3. Procedural issues. (a) Integrated whole. Each element of this offer is subject to satisfactory conclusion of the remaining elements. That is, the offer is one integrated whole, and neither U.S. EPA, U.S. DOJ nor WDNR, nor any one of them, may accept certain portions of the letter and not others. If the entirety of the offer is not acceptable, then the offer will be deemed not accepted, and we will move to counteroffers or new offers.

(b) Offer must be accepted by all three agencies. Further, the offer is made to all three agencies jointly, and must ultimately be acceptable to all three agencies. It may not be accepted by one agency and not accepted by one or more other agencies. If the offer is not acceptable to all three agencies, then it will be deemed not accepted.

(c) State and federal plaintiffs. In the suit in which the Consent Decree is lodged, both the United States and the State of Wisconsin must be plaintiffs. The protections of the settlement, and any covenants in the settlement, must run from both the United States and the State of Wisconsin, to the City. The City is amenable to any allocation of the settlement proceeds among the agencies, provided however, that some portion of the first payment must go to both U.S. EPA and WDNR.

(d) Definitive documents. This offer is subject to the completion of definitive documentation, including the form and content of a Consent Decree and

Complaint commencing the action in which the Consent Decree will be lodged. The City commits to expeditious work on such documents and is optimistic that such documentation can be agreed upon within a few weeks, provided the agencies are also able to act expeditiously, as we anticipate they will be.

(e) Effective and "final" dates. The effective date of the settlement, and the commencement of its binding effect, shall occur upon acceptance of the Consent Decree reflecting this settlement by the U.S. District Court, after lodging of the Consent Decree and after the required comment period. The Court will retain jurisdiction of the matter to ensure that the terms of the Consent Decree are adhered to, and the action brought in which the Consent Decree is lodged will not be deemed "final" until the last payment or other last item of performance under the Consent Decree is executed, and the Court's jurisdiction is terminated.

(f) Pendency of offer. This offer is not intended to be pending for an indefinite period, and hence if not accepted, it will expire and be of no further force or effect after the close of business on September 16, 1996. Since the agencies have expressed a desire to move expeditiously in this matter, this should give you ample time to prepare a response to this offer and communicate it to the City.

4. Effect of new legislation and EPA funding levels. (a) In the event that Congress passes new legislation which becomes effective before the approval of the Consent Decree in this matter (and hence, before this settlement is effective, under item (3)(e), above), and the effect of such legislation, among other things, is to terminate or eliminate liability for municipalities (either as owners and/or operators, or as arrangers for disposal or transporters of municipal solid waste) with respect to landfills on the NPL that accepted municipal solid waste or which were owned or operated by municipalities, then this settlement offer will be deemed null and void according to this termination provision.

(b) In the event that Congress passes new legislation which becomes effective before any one or more of the payment anniversary dates, and the effect of such legislation, among other things, is to terminate or eliminate liability for municipalities (either as owners and/or operators, or as arrangers for disposal of municipal solid waste) with respect to landfills on the NPL that accepted municipal solid waste or which were owned or operated

by municipalities, then the City may halt further payments under the schedule set out above, and the City will be deemed to be relieved of its obligation to make further payments under the settlement.

(c) Nothing in the settlement documentation shall provide that the settlement shall bar qualification of the City for any reimbursement or like provisions that might be included in any future amendments to CERCLA. The Court will retain jurisdiction of the matter to ensure that the terms of the Consent Decree are adhered to, and the action brought in which the Consent Decree is lodged will not be deemed "final" until the last payment or other last item of performance under the Consent Decree is executed, and the Court's jurisdiction is terminated.

(d) In the event the State of Wisconsin enacts a program affording any reimbursement or other form of payment to municipalities with respect to expenditures made with respect to CERCLA settlements or liabilities, then the City shall remain eligible for such a program without any limitation or prejudice as a result of this settlement. Statements in this offer regarding the City's position vis-a-vis the State shall be construed as referring to the State acting through the DNR in its solid waste response and enforcement program, and not referring to any such reimbursement or payment program.

(e) If the RD/RA work for the site is not funded in federal fiscal year 1997 (commencing October 1, 1996), then the second, third, and fourth payments in the payment schedule will be delayed so that the second payment will be due when cap construction commences, and the third and fourth payment will be made on the anniversary dates of that second payment. The purpose of this clause is to ensure that if the cap is delayed due to funding shortfalls in the Superfund program, or for any other reason, we do not have a situation in which the City has paid in its contribution to the RD/RA work before the work is done, and in the worst case, pays in such contributions and the cap or other portions of the remedy are never actually completed (such that some or all of the City's payment goes into the Superfund and is ultimately used at other sites rather than for the construction of the RD/RA work at this site).

5. Scope of coverage of the settlement. The settlement will resolve all liability of any kind whatsoever to the agencies and each of them which has arisen or may arise with

respect to the Record of Decision (ROD) executed by the U.S. EPA on September 30, 1991, as amended, changed, or in any way modified thereafter, and all liability with respect to the listing of the Stoughton Landfill on the National Priorities List (NPL), and any liability under State law (including but not limited to the solid waste laws or hazardous spill laws). Without limiting the foregoing, the following elements shall be reflected in the settlement documentation:

(a) The settlement will cover any claims or potential claims against the City regarding oversight costs, past costs, or other expenses incurred by the agencies, and each of them, with respect to this site, or any future such costs related to carrying out the ROD, as amended, changed, or in any way modified thereafter,.

(b) The coverage of this settlement includes any liability related to possible groundwater remediation activities that may be decided upon in the future as a result of any decisions made under the ROD, or any amendments or modifications thereto, during periodic review of the site's remedial effectiveness, or other future actions, excepting only such actions which are the subject of a new listing on the NPL after de-listing of this site after completion of all aspects of remedial action carried out as a result of the 9/30/91 ROD.

(c) The settlement covers all liability, on whatever theory or basis for liability, for the City's activities or status as owner and/or operator of the site, as well as all liability, on whatever theory or basis for liability, for the waste that was transported and disposed of by the City at the site. Without limiting the foregoing, the settlement documentation shall include a covenant not to sue the residents of the City (whether individual, corporate, commercial, agricultural, or otherwise) who arranged for disposal of waste at the site and as to which the City is also a covered party under CERCLA for any reason.

As stated at two of the recent meetings, it is important for the City to know that when it is offering a cash settlement "on behalf of the City" that there are no intentions on the part of the agencies to sue others in the City (who might conceivably have some independent basis of liability as an arranger for disposal) whose waste was handled by the City in some manner. That is why we have asked repeatedly whether the agencies have any

plans to sue any other parties at this site. Our understanding from our meetings is that the agencies have answered that it does not have any intent to sue any other parties. Thus, we merely wish to see this understanding reflected in the documentation.

6. Site issues. The following aspects of the site work have been discussed previously with the agencies. The City wishes to have these issues resolved as a part of the process of finalizing the settlement, but they may be resolved through letters or other forms of assurance and need not necessarily be reflected in the Consent Decree.

(a) The agencies agree to utilize a fence enclosure for the landfill that is as close as practicable to the waste boundary while still achieving the objectives of the ROD, and agree that the fence will not be of cyclone and visible barbed wire construction, but rather will be of wood or other building material that is aesthetically acceptable to the City Council, and in conformity with the City's Municipal Code of Ordinances, and if any barbed wire or other similar material must be included, it will be concealed from the view of the public using the neighboring City streets and walkways.

(b) Any signage related to the Superfund program or other warnings will be discussed with the City prior to its use, will be without lighting, and the agencies will respond to City requests as to the placement and size of such signs except to the extent required to meet the minimal requirements of the NCP.

(c) The agencies will confirm in a letter to the City that the remedy does not preclude the use of the property outside of the fenced area for a bike path, and that the City may make any use of the remainder of the property.

(d) Any required institutional controls, such as deed restrictions, will be identified by the agencies as part of the definitive documentation of the settlement, and concluded simultaneously with that documentation.

(e) The testing that the City had been conducting as a part of the old site closure (monitoring of several non-NCP wells) may be terminated by the City. Closure of those wells will be carried out as part of the RD/RA work. All future monitoring plans for the site will be a part of the NPL process which is being settled, and no new monitoring

requirements will be imposed on the City with respect to this site by the State or federal government.

(f) WDNR and U.S. EPA will continue to furnish the designated City official (at this time Bob Kardasz) with all data results from the site, promptly upon receipt of that information by the agencies. Copies of all public notices or announcements relating to the site will be furnished to the Mayor simultaneously with any public release. The Stoughton Public Library shall continue to be the designated Public Repository for the site.

Please contact either Mike Skibinski or me to discuss the position of the agencies with respect to this offer, and how you wish to proceed.

Very truly yours,

BOARDMAN, SUHR, CURRY & FIELD
By

Walter Kuhlmann

cc: Mayor Helen Johnson
Mike Skibinski, City Attorney
Bob Kardasz
Mike Doran, Strand
(via fax and U.S. Mail)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

October 3, 1996

Walter Kuhlmann
Boardman, Suhr, Curry & Field
410 Firstar Plaza
One South Pinckney Street
P.O. Box 927
Madison, Wisconsin 53701-0927

Re: Stoughton Municipal Landfill Superfund Site

Dear Walter:

This letter and the enclosed draft consent decree constitute the governments' response to the City of Stoughton settlement offer conveyed in your letter of August 28, 1996. As you will note from the consent decree language, EPA, the Department of Justice and the State of Wisconsin Department of Natural Resources accept much of the proposal you have made. I would like to address the specific points raised in your August 28th letter so that there is a clear understanding of the issues which remain unresolved.

1. Cash payment. The City's offer of $1.5 Million is acceptable.

2. Payment terms. (a) Installments. We propose that payments be made over three years, consistent with Industrial Economics' analysis of the City's ability to pay.

(b) No interest. When the United States accepts payments over time, it is its policy to collect interest on those payments. In this case the $1.5 Million figure is inclusive of interest. We may need to reword the language in the consent decree to reflect this, but the City's total of payments will not exceed the $1.5 Million. Stipulated penalties will apply if payments are late. See Section IX of the draft consent decree.

© Instructions. See Section V of the draft consent decree. These are the standard payment mechanisms used by the United States and the State of Wisconsin.

3. Procedural Issues. (a) Integrated whole. The governments expect the City to work with them to resolve those terms and conditions about which there are differences.

(b) Offer must be accepted by all three agencies. The proposal presented in the draft consent decree is acceptable to all three agencies.

(c) State and federal plaintiffs. The government agencies agree to each term in this paragraph of your August 28th letter and have incorporated them into the draft consent decree.

(d) Definitive documents. The agencies expect to receive from the City any proposed modifications to the language of the draft consent decree in a timely fashion. The Department of Justice has agreed to execute another tolling agreement through October 31, 1996, in order to allow time for the parties to reach agreement on a final consent decree.

(e) Effective and "final" dates. The agencies agree with the proposal presented by the City and have incorporated such terms into the draft consent decree.

(f) Pendency of offer. The government agencies believe that the enclosed proposal should allow the parties to resolve the outstanding issues prior to the expiration of the new tolling agreement.

4. Effect of new legislation and EPA funding levels. (a) The agencies decline to put language in the consent decree to deal with new legislation. If Congress does pass legislation which exempts municipalities retroactively from Superfund liability, we will follow the law. This settlement, however, must create finality in order to be acceptable to EPA and the Department of Justice.

(b) Again, for legislation passed prior to the termination of the consent decree, we will comply with the terms of any new law, but will not write such contingencies into this consent decree.

(c) The terms of this paragraph of your August 28 letter are addressed in the draft consent decree.

(d) The agencies have no objection to the terms proposed in this paragraph of your letter.

(e) EPA and DOJ will not agree to delay payment based on the progress of work at the site. The City's payments, while resolving its liability for the site, are only a portion of the estimated cost to complete the remedy. A substantial portion of the work will be funded through the trust fund created by Superfund. In the highly unlikely event that the work costs less than the total of the payments the City is obligated to make under the consent decree, the City has the ability to seek a modification of the decree either consensually from the governments or by motion to the Court. In such a circumstance the governments would certainly give all due consideration to such a request.

5. Scope of coverage of the settlement. The agencies agree that the settlement will resolve all CERCLA liability of the City of Stoughton which has arisen or may arise with respect

to the Record of Decision executed by EPA on September 30, 1991, as amended or in anyway modified thereafter, for the site currently listed on the National Priorities List under the name Stoughton Municipal Landfill site. In addition, the DNR is willing to covenant not to sue the City for actions related to the site under sections 144.442 and 144.76, Wis. Stats. However, the agencies will not agree to a covenant not to sue that limits the City's liability under other state solid or hazardous waste laws.

(a) The language of the draft consent decree provides covenants to the City for all the claims addressed in this paragraph of your letter.

(b) The language of the draft consent decree provides a covenant to the City for all the claims addressed in this paragraph of your letter, except for presently unknown conditions. This reservation is mandated by Section 122(f)(6) of CERCLA.

(c) The covenant language is intended to address all of the City's liability for the site under CERCLA and under sections 144.442 and 144.76, Wis. Stats., except for unknown conditions. The covenants do not cover any liability that the City may have (after the remedy selected in the ROD is completed) under statutes other than CERCLA or sections 144.442 and 144.76, Wis. Stats, because of its status as owner of the landfill. In addition, we cannot provide a covenant not to sue to the individual residents of the City because they are not parties to the litigation. However we have drafted language expressing the intention of the governments with respect to any other persons. See paragraph I. F. of the draft consent decree.

Site issues. EPA and WDNR will work with the City with respect to these issues. The settlement will not, however, be contingent on the resolution of these issues.

(a) EPA is studying the acceptability and cost of using wooden fences for some or all of the site.

(b) EPA will place signs which will provide the necessary warnings and information to the public. EPA will discuss alternatives with the City, but reserves the final decision concerning the size, placement and language of the signs.

(c) A letter confirming that using the area beyond the site fence near the river for a bicycle path will not interfere with the Superfund remedial action will be drafted.

(d) Draft deed restrictions are included with the draft consent decree.

(e) EPA and WDNR will discuss with the City the closure of the old wells and whether they can be closed as part of the remedy for the site. The site monitoring plans are covered by the covenants provided by the United States and the State in the draft consent decree.

(f) EPA and WDNR will continue to furnish the City all data results from the site. Documents will continue to be placed in the Stoughton Public Library as well as the other two local site repositories.

When you have completed your review of the enclosed draft, please send any proposed language changes to Joe Martin, Linda Meyer and me. If you wish to discuss any of the issues raised in this letter or in the draft consent decree will be happy to arrange a conference call, or, if necessary, a face to face meeting. All of the government agencies involved believe that we can reach a final agreement promptly, certainly before the expiration of the new tolling agreement, and will work diligently to that end.

Sincerely,

John H. Tielsch
Assistant Regional Counsel

cc: Tony Rutter
Joe Martin
Linda Meyer
Paul Kozol