

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Mission Valley Power Utility, MT;
Power Rate AdjustmentAGENCY: Bureau of Indian Affairs,
Interior.

ACTION: Final notice.

SUMMARY: Pursuant to 25 CFR 175.13 the Bureau of Indian Affairs has proposed and is now finalizing a power rate adjustment to reflect increased cost of purchased power for the Mission Valley Power Utility. The final determination on power rate adjustment is based on increased cost of power purchased from Montana Power Company's Kerr Dam Hydroelectric Facility. The increased cost of purchased power is the product of Montana Power Company's authority, under their Federal Energy Regulatory Commission license for Kerr Dam, to annually adjust their power rates based on the Consumer Price Index.

DATES: Interested parties were provided the opportunity to submit written comments on the proposed pass-through power rate adjustment to the Portland Area Director, Portland Area Office, Bureau of Indian Affairs, 911 NE. 11th Ave., Portland, Oregon 97232-4169 during the period 30 days subsequent to December 4, 1992. The pass-through rate adjustment is now final and effective on the date of this publication or January 1, 1993, whichever date occurs later.

FOR FURTHER INFORMATION CONTACT: Portland Area Director, Portland Area

Office, Bureau of Indian Affairs, 911 NE. 11th Ave., Portland, Oregon 97232-4169, telephone (503) 231-6750.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to announce a final decision on the adjustment in the Mission Valley Power Utility (MVP) electric power rates. This adjustment is the result of an increase in the electric power rates charged by Montana Power Company (MPC), one of three sources of electric power marketed by MVP. Pursuant to the Federal Energy Regulatory Commission license for the Kerr Dam Hydroelectric Facility, MPC is allowed to adjust their electric power rates annually based on the Consumer Price Index.

The affected public and interested parties were provided an opportunity to provide input to the Portland Area Director's decision on the proposed pass-through rate increase during the period from November 4, 1992 to December 4, 1992. No comments were received during the 30 day comment period.

Prior to September 5, 1992 MPC's electric rate was 14.24 mills per kilowatt hour (kWh). This rate increased to 14.57 mills per kWh effective September 5, 1992, an increase of .33 mills.

Pursuant to the authority provided in 25 CFR 175.13 the Bureau of Indian Affairs has finalized the decision to adjust consumer electric power rates charged by the Mission Valley Power Utility to reflect the increased electric power cost charged by MPC. The following table identifies the finalized power rate adjustment by consumer class.

Consumer class	Present rate (per kWh)	Proposed rate (per kWh)
Residential	\$0.04375	\$0.04385
No. 2 General ¹	0.0516	0.05170
Irrigation	0.03440	0.3450
Commercial ²		
Block 1 (first 18,000 kWh)	0.04135	0.04145
Block 2 (over 18,000 kWh)	0.03328	0.03338

¹ Includes metered street lighting rates.² Small and large commercial classes.

Based on 1,200 kWh usage a Mission Valley Power residential customer's bill would increase from \$63.50 under the current rate to \$63.62 under the proposed adjusted rate.

Authority: The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583, 25 U.S.C. 385).

This notice of final determination of the power rate adjustment and related information is published under the authority delegated to the Commissioner of Indian Affairs and the Deputy Commissioner of Indian Affairs by the Secretary of the Interior in Secretarial Order No. 3150, section 7b, and in accordance with § 175.13 of title 25 of the Code of Federal Regulations, which provides for the adjustment of electric power rates to reflect changes in the cost of purchased power or energy.

Dated: January 8, 1993.

Deborah J. Maddox,
Acting Deputy Commissioner of Indian Affairs.

[FR Doc. 93-1258 Filed 1-19-93; 8:45 am]

BILLING CODE 4310-02-M

Indian Affairs Federal Register

Thursday
January 21, 1993

Part IV

Department of the Interior

Bureau of Indian Affairs

Mohegan Tribe and Nation, CT; Receipt
of Petition for Federal Acknowledgment
of Existence as an Indian Tribe; Notice

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****Receipt of Petition for Federal
Acknowledgment of Existence as an
Indian Tribe**

AGENCY: Bureau of Indian Affairs,
Interior.

ACTION: Notice.

SUMMARY: This is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Pursuant to 25 CFR 83.8(a) (formerly 25 CFR 54.8(a)) notice is hereby given that the

Mohegan Tribe and Nation, c/o Eleanor Fortin, P.O. Box 58, Voluntown, Connecticut 06384

has filed a petition for acknowledgment by the Secretary of the Interior that the

group exists as an Indian tribe. The petition was received by the Bureau of Indian Affairs (BIA) on October 6, 1992, and was signed by members of the group's governing body.

This is a notice of receipt of petition and does not constitute notice that the petition is under active consideration. Notice of active consideration will be sent by mail to the petitioner and other interested parties at the appropriate time.

Under § 83.8(d) (formerly 54.8(d)) of the Federal regulations, interested parties may submit factual and/or legal arguments in support of or in opposition to the group's petition. Any information submitted will be made available on the same basis as other information in the BIA's files. Such submissions will be provided to the petitioner upon receipt by the BIA. The petitioner will be provided an opportunity to respond to such submissions prior to a final

determination regarding the petitioner's status.

The petition may be examined, by appointment, in the Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, room 1362-MIB, 1849 C Street, NW., Washington, DC 20240, Phone: (202) 208-3592.

FOR FURTHER INFORMATION CONTACT:
Holly Reckord, (202) 208-3592.

Dated: January 5, 1993.

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 93-1259 Filed 1-19-93; 8:45 am]

BILLING CODE 4310-02-M

Register

Thursday
January 21, 1993

Part V

Environmental Protection Agency

40 CFR Part 307

Hazardous Substance Superfund:
Response Claims Procedures; Final Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 307**

[FRL-4012-6]

Response Claims Procedures for the Hazardous Substance Superfund

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is promulgating this regulation to establish the procedures for filing, evaluating, and resolving claims asserted against the Hazardous Substance Superfund (the Fund) established under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), (CERCLA or the Act). These claims must be for costs incurred in responding to releases or threats of releases of hazardous substances, pollutants, or contaminants. In addition, this regulation establishes procedures for notifying concerned parties regarding limitations on the payment of response claims. This regulation is consistent with EPA's revisions to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).

EFFECTIVE DATE: This final rule is effective February 22, 1993.

ADDRESSES: The official record for this rulemaking is in the Superfund Docket, located in room 2427 at the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, telephone number (202) 260-3046. The record is available for inspection by appointment only, between the hours of 9 a.m. and 4 p.m., Monday through Friday, excluding legal holidays. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: William O. Ross, Office of Emergency and Remedial Response (5203 G), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (703) 603-8798, or the RCRA/CERCLA Hotline, (800) 424-9346, (TDD) (800) 553-7672 (or in the Washington, DC metropolitan area (703) 920-9810 (TDD) (703) 486-3323).

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

- I. Introduction
- II. Response to Comments on Each Subpart (a detailed index is set forth at the beginning of this section)
- III. Summary of Supporting Analyses

I. Introduction

EPA is today promulgating the Response Claims Procedures for the Hazardous Substance Superfund (40 CFR part 307) (hereafter referred to as the RCP). Today's final rule is based on the procedures proposed on September 13, 1989, at 54 FR 37892. Six commenters submitted a variety of specific comments on the Federal Register proposal.

This regulation provides the forms and procedures required by section 112(b)(2) of CERCLA for filing response claims authorized by sections 111(a)(2) and 122(b)(1) of the Act. The RCP applies only to claims submitted for reimbursement from the Fund established by section 517 of SARA. This regulation is intended for use by any individual, private entity, potentially responsible party (PRP), or foreign entity eligible to submit a claim pursuant to sections 111(a)(2) or 122(b)(1) of CERCLA. Such persons, as prescribed by CERCLA section 112, must use the forms and procedures as promulgated in this rule. EPA will utilize the procedures in this rule, which are issued under the authority of CERCLA section 112, to implement its authority to reimburse from the Fund parties who are potentially liable for a release and who agree to conduct response actions pursuant to section 122(b)(1) of CERCLA.

The RCP addresses only response claims; i.e., claims for necessary response costs incurred as a result of carrying out the NCP. The NCP is established under section 311(c) of the Clean Water Act, as amended (33 U.S.C. 1321 (c)) and is revised under section 105 of CERCLA. The purpose of the NCP is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants or contaminants.

The preamble to the proposed rule provided a detailed explanation of the provisions of the RCP. The preamble to today's final rule consists mainly of responses to public comments received on the proposed RCP. Therefore, both preambles should be reviewed for clarification of issues on the meaning or intent of today's final rule. Unless directly contradicted or superseded by this preamble or rule, the preamble to the proposed rule reflects EPA's intent in promulgating today's procedures.

The preamble to today's rule responds to the public comments received on the proposed RCP. In general, a separate discussion is provided for each section of the proposed rule on which comments were received. If a particular

section of the proposed rule is not listed below, comments were not received on that section.

Each of the discussions in the second section of this preamble is organized as follows: (1) A summary of the comments received on each issue is presented under the heading "Comment;" (2) EPA's response to the comments is set out under the heading "Response;" and (3) any revisions made to the proposed rule language are presented under the heading "Final Rule." Revisions to the proposed rule that are simply editorial or that do not reflect substantive changes may not be described under the heading "Final Rule." In addition, citations, particularly to the NCP, have been updated or corrected, where appropriate.

EPA recently initiated an evaluation of its policy and practices in regard to mixed funding, including preauthorization and procedures for evaluating response claims. The evaluation is being conducted in part in response to criticisms that the Agency has used its authorities for mixed funding too infrequently and has erected barriers to those interested in qualifying for mixed funding, including preauthorization. Although no conclusions are yet available from this evaluation, EPA will consider making revisions to today's rule that are deemed necessary to comport with the findings and recommendations accepted in this evaluation.

II. Response to Comments on Each Subpart*Index to Response to Comments*

Section numbers used in this index and in headings in preamble sections below refer to section designations in the final rule.

Subpart A—General

- Sec.
307.11 Scope and Applicability
307.13 Computation of Time
307.14 Definitions

Subpart B—Eligible Claimants; Allowable Claims; Preauthorization

- 307.21 Nature of Eligible Claims
307.22 Preauthorization of Response Actions
307.23 EPA's Review of Preauthorization Applications

Subpart C—Procedures for Filing and Processing Response Claims

- 307.30 Requesting Payment from the Potentially Responsible Party
307.32 Verification, Award, and Administrative Hearings

Subpart D—Payments and Subrogation

307.41 Subrogation of Claimant's Rights to the Fund

307.42 Fund's Obligation in the Event of Failure of Remedial Actions Taken Pursuant to Section 122

Appendix A—Application for Preauthorization of a CERCLA Response Action

Appendix B—Claim for CERCLA Response Action

Subpart A—General

Comment

One commenter indicated that the proposed RCP is straightforward and easy to comprehend. Another commenter endorsed EPA's effort to develop the proposed procedures and indicated that the proposed rule furthers the Agency's policy of encouraging private sector cleanups. However, a number of commenters expressed the opinion that the proposed rule is overly detailed, time-consuming, costly, complicated, and bureaucratic.

Response

EPA believes that the proposed RCP is not overly detailed, time-consuming, costly, complicated, or bureaucratic for the following reasons. Under section 111 of CERCLA, EPA, through delegation by the President (Executive Order (E.O.) 12580, 52 FR 2923, January 29, 1987), is assigned the responsibility of overseeing and managing the Fund. One of the Agency's primary roles in overseeing and managing the Fund is to ensure appropriate uses of Fund monies.

Specifically, CERCLA section 111(a)(2) provides that payment of any claim for necessary response costs incurred by "any other person" shall be made, provided that "such costs must be approved * * * and certified by the responsible Federal official." The Agency, therefore, believes that the RCP is consistent with Congressional intent with respect to ensuring the appropriate uses of Fund monies. In order to fulfill this responsibility, the RCP was developed in a manner under which the Agency can determine whether: (1) The response costs were "necessary"; (2) the response costs were incurred "as a result of carrying out" the NCP; (3) the response costs were "approved" under the NCP; and (4) the response costs were "certified" by the Agency.

In addition, section 112(b)(1) of CERCLA authorizes EPA, through delegation (E.O. 12580), to develop and promulgate the procedures for submitting response claims against the Fund. EPA believes that the procedures contained in the rule are necessary to ensure appropriate uses of Fund monies and to make certain that Fund monies

that are available for response claims are expended in accordance with environmental and public health priorities. Through its review of applications for preauthorization and response claims under the RCP, the Agency may grant preauthorization to pay for only those response actions that are of sufficient priority to merit Fund expenditures.

EPA believes that the RCP will also reduce the likelihood that a response action undertaken by a potential claimant will either create new or exacerbate existing environmental problems at a site. As stated above, section 111(a)(2) of CERCLA requires that payment of response claims from the Fund must be for response costs incurred in carrying out the NCP. Under the RCP, the Agency will have an opportunity to review a response action proposed by an applicant in order to ensure that it is consistent with the NCP and to evaluate the technical capabilities of that applicant to conduct the proposed response action. Moreover, in order to be reimbursed for response costs incurred, a PRP must conduct the response action in a manner consistent with the NCP, the Consent Decree, and the Preauthorization Decision Document (PDD).

Finally, EPA believes that a potential claimant should have a reasonable assurance of reimbursement when presenting a claim against the Fund. This reasonable assurance is achieved by identifying and describing in the RCP the Agency's expectations and standards that will be applied when a claimant seeks reimbursement of the response costs incurred.

Final Rule

EPA is promulgating the final rule as proposed, with the exception of the specific changes discussed below.

Comment

Several commenters also stated that the unnecessarily burdensome requirements set forth in the proposed procedures may discourage PRPs from entering into mixed-funding agreements, which would run contrary to the Congressional intent in establishing the CERCLA section 122 mixed-funding provision.

One of these commenters stated that under the Agency's Superfund settlement policy, the mixed-funding policy, and the detailed procedural and substantive requirements of the proposed rule, EPA has erected a significant and largely unnecessary obstacle to the negotiation of mixed-funding settlements. According to the commenter, at a minimum, the Agency has made the settlement process more time-consuming and costly for the

Federal Government and PRPs to negotiate. The commenter expressed the belief that the approach under the proposed rule, while possibly conserving Superfund monies in the short term, is counter-productive and contrary to Congressional intent in the long run, as it makes it less attractive and more costly for PRPs to enter into Superfund settlements.

Another commenter noted that mixed-funding agreements routinely provide for EPA oversight, and often for State involvement as well, and that this substantial, continuous oversight throughout the project ensures that the work is not only necessary and protective of human health and the environment, but is also managed and performed in an efficient manner. However, because the proposed rule imposes a variety of requirements that are unnecessary in the settlement context, and adds another level of EPA oversight, it will result in substantial costs being devoted to meeting excessive administrative requirements instead of being used toward the efficient cleanup of sites. The inefficiency caused by the proposed rule will, therefore, make mixed-funding settlements less attractive financially to PRPs. The commenter also stated that the imposition of these numerous requirements and additional Agency oversight in mixed-funding situations will serve to stifle not only the initiative and efficiency of PRPs, but also that of EPA and Department of Justice (DOJ) negotiators.

Finally, one of these commenters maintained that because the proposed procedures are costly and time-consuming, and because the process is complicated, it is unlikely that EPA will be willing to wait for the process to take place. Also, the burdensome process will discourage the submission of applications for preauthorization from innocent landowners of contaminated sites as well as from PRPs with less than 100 percent responsibility for contaminating a site. The commenter also noted that by imposing overly burdensome requirements concerning the filing of applications for preauthorization and the awarding of response claims, the Agency has not fulfilled the intent of Congress.

Response

The Agency disagrees with the commenters who maintained that the RCP will create an obstacle to or discourage a PRP from negotiating a mixed-funding settlement with the Federal Government because the RCP will make reaching the settlement more costly and time-consuming. EPA believes that the promulgation of the

RCP, which sets forth clearly the requirements for a PRP to obtain prior approval to conduct a response action and, subsequently, to seek reimbursement of the costs incurred, in combination with the Model CERCLA Remedial Design/Remedial Action (RD/RA) Consent Decree, will actually encourage more mixed-funding settlements and will, therefore, result in a greater number of voluntary cleanups being undertaken by PRPs at Superfund sites.

Under section 107 of CERCLA, PRP liability is strict, joint, and several, unless PRPs can clearly demonstrate that the harm at a site is divisible. Because of joint and several liability, the negotiation of a mixed-funding settlement should be preferable to PRPs. The alternative of negotiating a mixed-funding settlement with the Agency can significantly reduce the overall financial burden for a PRP.

EPA also believes that the RCP will not serve to stifle the initiative of EPA and DOJ negotiators. In situations where EPA has determined that the most effective method to clean up a site is through the use of a mixed-funding agreement, the Agency will actively pursue negotiations with PRPs.

The Agency does not agree that the RCP adds a costly, additional level of EPA oversight to response actions conducted under mixed-funding settlements. In fact, ongoing oversight may be diminished because the RCP clearly illuminates the requirements concerning overall management of the response action, procurement of response action contractors, implementation, and documentation, the ongoing oversight of these areas may be diminished. A brief discussion of the Agency's "focused approach" to overseeing a remedial design and remedial action performed by a PRP under a mixed-funding settlement should help to clarify this point.

A preauthorized response action undertaken pursuant to a mixed-funding settlement presents an unusual management situation for EPA because the response action is partially reimbursed by the Agency but is carried out by a private party. Because EPA, prior to entering the agreement, will have evaluated the applicant's capabilities to perform the response action consistent with the NCP, EPA has determined that a resource-intensive, day-to-day oversight of the preauthorized response action will not be necessary. However, the Agency has developed a focused approach to oversight in an effort to ensure that a PRP carries out the RD/RA consistent

with the NCP, the Consent Decree, and the PDD, and to hold the PRP accountable and responsible for all activities at the site.

Under this approach, the Agency will focus on the most significant aspects of the response action, such as scheduling, major modifications, emergency actions, and project closeout. EPA will oversee these activities by reviewing and approving certain key documents submitted by the PRP throughout the RD/RA, such as the RD and RA work plans, project schedules, preliminary design, final design, and Construction Quality Assurance and Construction Quality Control Plans. In addition, as part of the Consent Decree, EPA may require the PRP to retain an Independent Quality Assurance Team to evaluate the remedial and quality control activities. Thus, the level of EPA's oversight effort may be increased or decreased over time, depending on the capabilities of the PRP's design and construction teams, the nature of the technology selected, and the provisions of the Consent Decree and the PDD. A more detailed discussion of this focused approach to oversight is contained in the "Interim Final Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties" (OSWER Directive 9355.5-01, February 1990).

EPA disagrees with the commenters that it is unlikely that the Agency will be willing to wait for the response claims process to take place. EPA will preauthorize a response action only if the response action is of sufficient priority to merit Fund expenditure. The Agency will consider all applications for preauthorization against the alternatives of initiating an enforcement action or conducting the remedial action through a cooperative agreement or a contract. If the Agency determines that a response action by a private party or a PRP under the response claims process is the best available means to address a release at a site, EPA will grant preauthorization for the proposed response action at the site through the response claims process. In addition, the Agency has already issued and plans to issue further guidance on the claims process for applicants and claimants that will reduce the amount of time necessary to complete the required procedures at each stage of the response claims process.

Final Rule

EPA is promulgating the final rule as proposed, with the exception of the specific changes discussed below.

Comment

Another commenter stated that the proposed NCP should be revised to allow a private-party response action to be exempt from on-site permit requirements. The commenter maintained that the EPA oversight associated with the PDD and the subsequent evaluation of the clean-up process is adequate to address the on-site environmental concerns. The commenter also encouraged EPA to publish in the *Federal Register* (on a periodic basis) the identity of those parties that have submitted either an application for preauthorization or a claim form. This commenter felt that the commitment to do this on an annual basis would document the success that the claims approach has had for encouraging PRP-lead CERCLA response actions.

Response

Suggestions concerning the permit waiver provisions of CERCLA section 121(e)(1) were considered in the revisions to the NCP and are therefore inappropriate for this rulemaking effort. Under the revised NCP, the Agency at § 300.400(e)(1), has determined that certain types of response actions may qualify for the permit waiver contained in CERCLA section 121(e)(1). CERCLA section 121(e)(1) provides that no Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with CERCLA section 121. Response actions qualifying for the permit waiver include those conducted by a lead agency pursuant to CERCLA sections 104, 106, 120, 121, and 122. Response actions by a lead agency include those response actions conducted by a private party pursuant to CERCLA sections 106 or 122. Such response actions will also qualify for the permit waiver.

Because EPA does not at this time anticipate preauthorizing removals or RI/FSs, except on a limited basis, most applications for preauthorization will be for RD/RAs. However, EPA will only preauthorize remedial actions for site that is on the NPL, provided that it does not intend to: (1) compel a PRP to clean up the site using enforcement mechanisms under CERCLA section 106; or (2) initiate a Fund-financed response through a contract or cooperative agreement. Thus, EPA's use of preauthorization will be limited primarily to RD/RAs conducted by PRPs pursuant to mixed-funding settlements.

Final Rule

EPA is promulgating the final rule as proposed.

Section 307.11 Scope and Applicability**Comment**

Several commenters questioned how the final rule will affect PDDs that were issued by the Agency prior to the effective date of the rule. These commenters suggested that EPA should explicitly state in the final rule that the procedures contained in the rule do not in any way alter the effect or interpretation of any pre-existing PDDs, and that the terms of any previously executed PDD will take precedence in the event of procedural or substantive conflicts with the rule.

Response

EPA concurs with these commenters that the procedures set forth in the RCP should not in any way alter the effect or interpretation of any PDDs that were issued by the Agency prior to the effective date of the final rule. In the event of a procedural or substantive conflict between the final rule and a previously issued PDD, the terms and conditions of the previously issued PDD will take precedence.

However, a potential claimant whose proposed response action was preauthorized by the Agency prior to the effective date of the RCP who determines that one or more provisions of the RCP are more favorable to him than the terms and conditions contained in the previously issued PDD may elect to comply with the provisions of the RCP. If a potential claimant elects to comply with the provisions of the RCP, he must notify the appropriate EPA Regional Office in writing of this election prior to such provisions taking effect, but not later than the time of the submittal of any claim. The Regional Office, in turn, will acknowledge receipt of such notice of election to comply with the provisions of the RCP and may revise the PDD as appropriate.

Final Rule

Section 307.11 is modified as follows:

1. Section 307.11(b) is added to the rule as follows:

"This part does not affect the terms and conditions contained in PDDs issued prior to the effective date of this part. However, a potential claimant may elect to comply with the provisions of this part, rather than the terms and conditions of a PDD issued prior to the effective date of this part, if he so chooses. Written notice of this election must be provided to EPA by the potential claimant prior to such provision taking effect, but not later than the time of the submittal of any claim to EPA. EPA will provide a written acknowledgement of the potential claimant's election and may revise the PDD as appropriate."

2. The section has been renumbered accordingly.

Section 307.13 Computation of Time

In order to clarify how EPA will compute any period of time described or allowed in the RCP, the Agency is adding new § 307.13—Computation of Time.

Final Rule

Subpart A is modified as follows:

1. New § 307.13—Computation of Time—is added to the rule as follows:

"In computing any period of time described or allowed in this part, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or Federal legal holiday, the stated time period shall be extended to include the next business day."

2. Sections 307.13 and 307.14 are redesignated as new §§ 307.14 and 307.15.

Section 307.14 Definitions**Comment**

A commenter stated that the definition and potential interpretation of the term "necessary costs" is critical to the operation of the procedures contained in the proposed rule. A "necessary cost" is defined as one that is determined by EPA to be "required," "reasonable," "allocable," and "otherwise allowable." The commenter expressed concern that the potential interpretation of these criteria introduces an excessive element of risk and uncertainty into the claims process. The commenter recommended that EPA should constrain its review of whether costs are "necessary" to avoid potentially unfair, inconsistent, or unduly burdensome claims review procedures. The commenter also suggested that any costs that the PRP incurred in good faith, in substantial compliance with the PDD, and that are not unreasonable, should be paid promptly and in full. Reimbursement of such costs should not be denied, reduced, or delayed due to trivial or inconsequential deficiencies in the paperwork.

Response

The Agency disagrees that the potential interpretation of the term "necessary costs" introduces an excessive element of risk and uncertainty into the claims process. Section 111(a)(2) of CERCLA authorizes the Agency, through delegation (E.O. 12580), to use the Fund to reimburse a claimant only for "necessary" response costs incurred as a result of conducting a preauthorized response action. The Agency has defined the term "necessary costs," in part, to provide more certainty as to the meaning of this term. EPA has

explicitly defined the term "necessary costs" under § 307.14 of the RCP as follows:

"Necessary response costs are costs determined to be:

- (1) Required (based upon the site-specific circumstances);
- (2) Reasonable (nature and amount do not exceed that estimated or which would be incurred by a prudent person);
- (3) Allocable (incurred specifically for the site at issue); and
- (4) Otherwise allowable (consistent with the limitations and exclusions under the appropriate Federal cost principles) * * *"

In addition, EPA has developed and will issue guidance to prospective claimants on the response claims process that addresses the determination of "necessary" response costs.

EPA generally agrees with the commenter that the PRP should be reimbursed for response costs promptly and in full if the PRP incurs response costs in good faith, in substantial compliance with the Consent Decree and the PDD, and the costs are not unreasonable. As provided for in the RCP, if a claim sufficiently fulfills the requirements established in the PDD, the Agency will promptly award the claim and reimburse the claimant in the amount of the approved response costs. Also, payment of a claim will not be denied, reduced, or delayed due to trivial or inconsequential deficiencies in the paperwork. For mixed-funding claims, once a perfected claim has been received by the Agency, EPA will pay the amount due within 60 days or interest will begin accruing on that amount. However, the Agency would like to emphasize that in order for EPA to be able to adequately evaluate a claim in a timely manner, the claimant must submit complete and accurate information and documentation.

Final Rule

In order to clarify the meaning of the term "perfected," the Agency is making a minor revision to the definition of this term in § 307.14. The definition of "perfected" will read as follows:

"Perfected means the point at which EPA determines that the written demand for a sum certain (i.e., claim) has the documentation necessary to substantiate the appropriateness of the amounts claimed; i.e., the claim is technically complete."

Subpart B—Eligible Claimants; Allowable Claims; Preauthorization

Section 307.21 Nature of Eligible Claims**Comment**

One commenter urged the Agency to promulgate a final rule that would allow

for the use of mixed-funding settlements for remedial actions at both National Priorities List (NPL) and non-NPL sites. The commenter argued that the statutory language of CERCLA section 122 does not prohibit mixed-funding settlements for remedial actions at non-NPL sites. The commenter also stated that mixed-funding settlements at non-NPL sites make practical sense, since there are occasional hazardous waste sites that warrant expedited remediation, although the sites have not yet gone through the lengthy process to qualify for listing on the NPL.

Response

EPA does not agree with this commenter. Section 122(a) of CERCLA, which authorizes the use of mixed-funding agreements, requires that such agreements be facilitated, whenever practicable, that are " * * * in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation." (Emphasis added.) Section 111(a)(2) of CERCLA requires that payment of a claim must be for necessary response costs that were incurred " * * * as a result of carrying out the National Contingency Plan." (Emphasis added.)

Section 300.68(a)(1) of the 1985 NCP (and § 300.425(b) and 300.700(d)(3)(iii) of the 1990 NCP) provides that only those releases at sites included on the NPL will be eligible for Fund-financed remedial actions. This principle was upheld in *State of Ohio v. U.S. EPA*, 838 F.2d 1325 (D.C. Cir., 1988). The NPL is EPA's list of the most serious hazardous waste sites identified for possible long-term remedial response. Thus, the NPL is used to identify priorities among releases and potential releases and serves as a basis to guide the allocation of Fund resources among releases. The purpose of the NPL restriction is to ensure that the limited monies in the Fund are used only at sites that have been identified as posing the greatest potential threats to human health and the environment. Inclusion on the NPL, however, is not a precondition for the preauthorization of removal actions or remedial planning activities.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

Another commenter stated that the proposed rule will result in a costly process for a PRP to obtain Agency approval to conduct a cleanup. The commenter maintained that the additional planning and management costs incurred by an applicant must also be reimbursed from the Fund.

Response

The costs incurred for obtaining EPA's grant of preauthorization is a cost associated with the negotiation of a settlement and, as such, is not reimbursable from the Fund. The preauthorization process is an application for a benefit (i.e., a reimbursement from the Fund). Thus, the costs associated with such applications are not reimbursable. In addition, the preauthorization process is an opportunity for a PRP to propose his methods for management of the remediation at a site and to receive comments from EPA concerning the eventual reimbursement of the eligible response costs. Consequently, the preauthorization process is in the best interests of both the Agency and the applicant. It is the applicant, and not EPA, who determines in the first instance whether his application is sufficient and in compliance with EPA's guidance. The more complete the draft application, the more streamlined the preauthorization process becomes for both parties.

A PRP would be legally responsible for clean-up costs at a site, including planning and management costs, regardless of whether or not the PRP had entered into a mixed-funding agreement. As discussed above, section 111(a)(2) of CERCLA authorizes the reimbursement of claims only for "necessary" response costs. All costs that meet the criteria for "necessary costs" contained in the RCP will be eligible for reimbursement from the Fund. In addition, section 112(b)(3) of CERCLA provides that a claimant shall bear the burden of proving his claim. Therefore, if a claimant can demonstrate that particular planning and management costs meet the criteria for "necessary costs" and are otherwise eligible, these costs will be reimbursed from the Fund.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

One commenter raised a number of issues concerning the requirements for contractor claims under mixed-funding settlements. First, the commenter noted that § 307.21(c)(1) of the proposed rule requires that a contractor claim must arise from work within the scope of the contract. This commenter maintained that in most contracts, including those for work at Superfund sites, one of the primary types of contractor claims is for "changes" or "extras." The commenter stated that in situations where a "changes" claim does not fundamentally alter the basic response technology or scope of work, the contractor claim should be processed

and reimbursed without the need for submitting a revised application for preauthorization. This commenter also recommended that the proposed rule should be clarified by allowing contractor claims that are " * * * within the general scope of work * * * established by the contract."

Response

EPA disagrees with this commenter. The preamble to the proposed rule stated that contractor claims must " * * * arise from work that is preauthorized and that is within the scope of the contract at issue." Change orders should never be used for modifications beyond the "scope of the contract." A PDD that is issued to a potential claimant will not require a revised application for preauthorization to expand the scope of a specific contract. However, if a particular PDD, for example, authorizes both site excavation and construction, and a contract is awarded for construction only, the site excavation component cannot be "added" to this contract by a change order. Similarly, in order to be reimbursed from the Fund, a design component could not be "added" to this contract without submitting a revised application for preauthorization.

The Agency concurs with the commenter's statement that contractor claims that are within the "general" scope of work established by the contract should be allowed. However, EPA believes the addition of the word "general" to the regulatory language is unnecessary because the Agency already interprets the phrase " * * * within the scope of work * * *" as meaning within the "general" scope of work established by the contract. Moreover, the phrase is generally understood as having such a meaning.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

Second, the commenter noted that § 307.21(c)(3) of the proposed rule will result in EPA denying contractor claims if the claims are "caused by the mismanagement of the claimant." This commenter maintained that the term "mismanagement" is an open-ended standard and is ambiguous. The commenter stressed that the final rule should delete the mismanagement standard and clarify that contractor claims for cost overruns are reimbursable from the Fund "unless they are due to the negligence of the PRPs or the contractor."

Response

The Agency does not agree that the mismanagement standard concerning contractor claims should be deleted or

that the term "mismanagement" is open-ended or ambiguous. In general, public funds will not be used to reimburse a claimant when there is fraud, waste, abuse, or mismanagement of the response action. Therefore, EPA believes that it is essential that claimants be held responsible for the competent management of the response action and of their contractors. In addition, § 307.32(h) of the RCP provides for the adjustment of costs where a response action is determined to be ineffective due to acts of omission or commission of the claimant himself, the claimant's employees, or the claimant's contractor.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

Third, the commenter stated that § 307.21(c)(4) of the proposed rule also provides that contractor claims may be denied if they are "caused by the claimant's vicarious liability for the improper actions of others." This commenter noted that contractors hired by PRPs to perform remedial construction are usually independent contractors and, therefore, the PRPs are generally not vicariously liable for their actions. The commenter suggested that the Agency consider eliminating PRP vicarious liability as a grounds for denying Fund reimbursement of contractor claims in order to avoid unfair denials of legitimate claims. The commenter also stated that if EPA decides to continue to include the concept of vicarious liability, the rule should at least clarify that a PRP may be found vicariously liable only under the following circumstances: (1) where the PRP negligently hires an incompetent contractor; or (2) where the PRP assumes direct control of the day-to-day operations of the contractor.

Response

EPA disagrees that the claimant vicarious liability standard should be modified or deleted as a grounds for denying contractor claims. A claimant's vicarious liability refers to the liability for the actions of others that a claimant must accept as a part of his general management responsibility. The Agency believes that a claimant must accept this management responsibility if the claimant is to competently direct and oversee a response action at a site.

Final Rule

EPA is promulgating the final rule as proposed.

Section 307.22 Preauthorization of Response Actions

Comment

Several commenters discussed issues related to the preauthorization of response actions in the context of mixed-funding agreements, and emphasized the need to streamline the process. One commenter stated that in the context of mixed-funding settlements for remedial actions under Consent Decrees at NPL sites where Records of Decision (RODs) have been issued, the proposed requirements for the submission of information in the application for preauthorization are excessive and redundant. This commenter concurred with the suggestion in the preamble to the proposed rule (at 54 FR 37905) that the preauthorization process be streamlined by incorporating existing documents by reference in the application.

Another commenter indicated that because cleanups under mixed-funding settlements are subject to public comment, Federal court review, and EPA approval and oversight, the same regulatory safeguards needed for non-PRP cleanups should not apply to cleanups conducted under mixed-funding settlements. The commenter stressed that the information required by a number of the application provisions can be easily obtained from other sources (e.g., the work plan, the remedial investigation/feasibility study (RI/FS), the Consent Decree). This commenter suggested that EPA propose a separate rule that would be applicable only to mixed-funding claims and that would contain a streamlined application process. This commenter also recommended that PRP applications not be required to include information on the identity of other PRPs or persons who may have received special or general notice letters from EPA, because the Agency will already have the desired information in its possession. Finally, this commenter stated that if the Agency elects not to propose a separate rule or not to continue with the current system of mixed-funding preauthorization which, in the commenter's view, has proven to be workable in a number of instances, the proposed rule should be revised appropriately to take into account the unique nature of mixed-funding settlements.

A commenter also noted that mixed-funding settlements are subject to Federal court approval as part of a Consent Decree. The commenter questioned whether the extent and complexity of the information required in the application for preauthorization is necessary when the settlement is already subject to court review and enforcement. In addition, the commenter suggested that EPA

reevaluate the extent of the preauthorization requirements for mixed-funding settlements, because the Agency's need for adequate response claims information must be balanced with its need to maximize mixed-funding settlements, consistent with the mandate of SARA and the recent management review of the Superfund program ("A Management Review of the Superfund Program," William K. Reilly, Administrator, U.S. EPA, 1989).

Finally, one of these commenters suggested that although the proposed rule encourages private party cleanups, the Agency should simplify the process, wherever possible, to allow for PRPs to initiate cleanups promptly, without unnecessary government intervention or delay.

Response

Although a mixed-funding settlement with a PRP will provide for public comment, Federal court review and approval, and EPA oversight, the Agency believes that the preauthorization requirements for a mixed-funding settlement that are set forth in the RCP are necessary to ensure appropriate uses of Fund monies and to guarantee that Fund resources that are available for mixed-funding settlements are expended in accordance with environmental and public health priorities. EPA, however, does recognize the unique nature of mixed-funding settlements under the preauthorization process.

As referenced above, the Agency has developed guidance on the mixed-funding/response claims process for applicants and claimants. The guidance effectively streamlines the process for requesting the Agency's prior approval for a PRP to conduct a response action by allowing PRP applicants to utilize information that was developed for the Consent Decree as a basis for meeting the information requirements of the application for preauthorization. This process will reduce the amount of new information that a PRP must develop and, therefore, will reduce the time and cost required to prepare an application.

However, the Agency disagrees that a separate rulemaking is necessary for mixed-funding claims. EPA will utilize the procedures in the RCP, which are issued under the authority of section 112 of CERCLA, to implement its authority to reimburse from the Fund parties who are potentially liable for releases and who agree to conduct response actions pursuant to section 122(b)(1) of CERCLA. EPA believes that both mixed-funding claims and claims that are authorized by CERCLA section 111(a)(2) can be effectively regulated under a single rulemaking and that the

proposal of a separate rule for mixed-funding claims is neither necessary nor would it be an efficient use of Agency resources.

In addition, EPA disagrees that an applicant should not be required to provide or include information in the application for preauthorization on the identity of any known PRP, including the applicant and persons who may have received special or general notice letters from the Agency. Section 307.22(b)(3) of the RCP requires applicants to provide the identity of any such person. This requirement applies to all requests for preauthorization, by both PRP and non-PRP applicants. The emphasis of this requirement concerns applicants identifying any additional PRPs that are unknown to the Agency. In meeting this requirement, applicants may assist EPA in identifying and locating additional PRPs who can be brought into the negotiations to arrive at a mixed-funding settlement agreement or from whom EPA can recover the costs of the Fund-financed portion of the preauthorized response action. Rather than requiring an applicant to determine whether EPA has sent special or general notice letters to all parties on the applicant's list of PRPs, the Agency is requesting that the applicant provide a complete list of PRPs. In order to clarify the intended purpose of the requirement, EPA has modified the requirement to stress that the applicant must identify any known potentially responsible parties.

Final Rule

Section 307.22(b)(3) is modified as follows:

"The identity of any potentially responsible parties known to the applicant, (including the applicant), and any contact with such parties, including, but not limited to, any correspondence, agreements, or litigation with such parties;"

Comment

One commenter recommended that EPA should not rule out the preauthorization of an RI/FS, even in a situation where no agreement has been reached with the PRP concerning the PRP conducting the final response action. The commenter concluded that the legislative history of CERCLA makes it clear that mixed funding is appropriate for conducting an RI/FS, even though there is no guarantee that the PRP will conduct the response action. The commenter also noted that the use of a mixed-funding agreement for performing an RI/FS would be useful because it would establish an early precedent of cooperation between EPA and the PRP, while, at the same time, expediting the preliminary stages of the cleanup.

Response

EPA wishes to clarify that it has not ruled out the preauthorization of an RI/FS to be conducted by a PRP under a mixed-funding settlement. As noted by another commenter, in fiscal year 1989, the Agency preauthorized an RI/FS on the technical merits of a single study of the ground water at three contiguous sites in Tampa, Florida. It is Agency policy, however, that preauthorization of an RI/FS in the context of a mixed-funding agreement is generally not available unless the PRP agrees to undertake any response action that EPA may subsequently determine is necessary. This is because EPA has concluded that it would be an inefficient use of Agency resources to negotiate settlement agreements that are limited in scope to RI/FSs. In addition, there is generally insufficient information available to both a potential applicant and the Agency during the early stages of RI/FS negotiation to evaluate fully the relative merits of a mixed-funding agreement.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

A commenter recommended that the preauthorization provision in § 307.22(f)(3) requiring an applicant to obtain the assurance of State cooperation be amended to require that the PRP need only establish that he has made a "good faith" effort to obtain such an assurance of cooperation. The commenter stressed that under the proposed rule, a State's refusal to cooperate for various reasons could significantly delay or even imperil a settlement and cleanup. The commenter stated that the Agency should not expand the authorities concerning States' role in Superfund response actions that are carefully established by statute and should not provide the States with what is tantamount to veto power over all mixed-funding settlements by requiring a PRP to assure State cooperation as a condition of preauthorization.

Response

While the Agency believes that its intent is clear when § 307.22(f)(3) is read in conjunction with the instructions for the Application for Preauthorization, EPA will clarify the requirement concerning the assurance of State and Indian Tribe cooperation. Sections 104(c)(2) and 126(a) of CERCLA provide that EPA will consult with affected States or Indian Tribes before determining the appropriate remedial action to be taken at a site pursuant to section 104. Preauthorized response actions are not response

actions under section 104 of CERCLA. However, as a matter of policy, the Agency, or the applicant, will seek to coordinate preauthorized response actions with the appropriate State. In the preamble to the proposed rule (at 54 FR 37903), the Agency stated that "the applicant seeking preauthorization of a remedial action is encouraged, at the time the application for preauthorization is filed, to obtain a letter signed by the designated State or Indian Tribe hazardous waste official that: (1) concurs with the proposed action; and (2) assures the cooperation of the State or Indian Tribe in the proposed action." (Emphasis added). The preamble also stated that "If the applicant does not supply a letter from the State or Indian Tribe official, documentation must be supplied that every reasonable effort was made to obtain the cooperation of the State or Indian Tribe." (Emphasis added).

The submission of a letter by an applicant will minimize or eliminate entirely the time required by EPA for coordination and consultation with States or Indian Tribes. The absence of this letter, however, will not be used as the basis for denying preauthorization to an applicant as long as documentation is supplied that indicates that "every reasonable effort" was made to obtain the cooperation of the State or Indian Tribe. Consequently, the proposed rule does not provide States or Indian Tribes with what is tantamount to veto power over all mixed-funding settlements.

Final Rule

Section 307.22(f)(3) is modified and will read as follows:

"Documentation of reasonable effort to obtain the cooperation of the State or Indian Tribe;"

Comment

One commenter suggested that the proposed policy stipulating that it is not appropriate to preauthorize a response action unless long-term operation and maintenance (O&M) will be undertaken and/or paid for by a party other than EPA is not prudent and is not required by CERCLA. The commenter stated that there is no reason to arbitrarily limit mixed-funding settlements to capital costs or to require a settling PRP to provide assurance of long-term O&M expenses. Instead, the issue of O&M expenses is better left for resolution through negotiation in an appropriate Consent Decree.

Response

EPA does not agree with this commenter. It is true that the provision concerning O&M is not specifically required by CERCLA. However, it is EPA policy, as stated in "Evaluating

Mixed-Funding Settlements Under CERCLA," 53 FR 8279, March 14, 1988, that the Agency will not pay for O&M costs necessary to maintain the effectiveness of a response measure following its completion under a mixed-funding settlement. The Agency does not believe it is appropriate to preauthorize a response action under a mixed-funding settlement that provides for the payment of O&M costs by EPA because the Agency would not utilize Fund monies for these costs under a CERCLA section 104 response action that is financed from the Fund.

Moreover, it is important to note that it is the PRP, not EPA, who remains legally responsible and accountable for the continued success of the response action. The reason for authorizing a PRP to conduct an RD/RA is to place the responsibility for a successful cleanup of hazardous waste disposal sites on those who are liable. The Agency policy not to preauthorize a remedial action unless the PRP assumes the long-term O&M costs is designed to conserve the limited resources of the Fund.

The final rule provides examples of how claimants may finance O&M costs. A PRP or other claimant may satisfy long-term O&M activities, if applicable, in one of two ways: (1) By posting a bond or other financial assurance, satisfactory to EPA, which is sufficient in amount to cover the costs of necessary long-term O&M; or (2) by submitting a written assurance from the State to provide for long-term O&M of the response action. The mixed-funding guidance (at 53 FR 8284) cited above also notes that "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."

Final Rule

EPA is promulgating the final rule as proposed.

Comment

Section 307.22(i) of the proposed rule provides that if a preauthorized response action requires modification or if it appears that project costs will exceed approved costs, a revised application for preauthorization must be submitted by the PRP and approved by EPA before different or additional response activities can be undertaken at the site, if such activities are to be eligible for compensation from the Fund. One commenter maintained that this requirement is wasteful and unnecessary in mixed-funding situations. The commenter noted that if extra response work under a mixed-funding agreement is to be conducted, it is likely that EPA, in its oversight

capacity, will have requested or approved the work, and the PRP should not be obligated to obtain approval for what the Agency has initiated or already has concluded is necessary.

Response

EPA does not agree with this commenter. In accordance with section 111(a)(2) of CERCLA and § 300.700(d) of the revised NCP, all response actions and costs must be approved in advance by EPA through the preauthorization process in order for a claim to be submitted against the Fund. This requirement avoids ambiguity as to whether particular activities are within the scope of the preauthorized response action, which protects the interests of both the potential claimant and the Agency. Without advance approval of response activities by EPA, a potential claimant has no assurance that the costs will be deemed eligible. The revised application for preauthorization needs, therefore, to reflect the specific changes concerning the modified response activities or the additional response costs, and the Agency will consider these changes only.

EPA's involvement in the response activities at a site, through the focused approach to oversight, will tend to minimize the time required for the approval of the activities and will, therefore, provide an indication of whether the additional work is appropriate. However, EPA's oversight does not involve constant monitoring of whether additional amounts of money are available in the Fund.

Final Rule

EPA is promulgating the final rule as proposed.

Section 307.23 EPA's Review of Preauthorization Applications

Comment

A number of commenters expressed concern about the time required for EPA's review of an application for preauthorization. One commenter suggested that the proposed rule would benefit from setting a time limit for EPA's review of a completed application. This commenter also suggested that the Agency identify a timeframe in which a PDD would be prepared. Another commenter noted that as part of its management review of the Superfund program, EPA stated that it will establish a single, integrated timeline for both enforcement and Fund-financed activities. Thus, EPA indicated that it will establish deadlines for completing negotiations, and follow-up with enforcement or response actions. At the same time, the management review acknowledged that the preparation of PDDs by EPA

Headquarters has already led to delays. This commenter expressed concern that these conflicting constraints "may mean that mixed-funding settlement offers will be caught in a time squeeze and will not be accepted by the Agency."

Response

The Agency does not believe that it is advisable to include time limits within the regulatory language of the RCP for the review and evaluation of applications for preauthorization or for the preparation of a PDD. The time required by the Agency to review and evaluate an application for preauthorization and to prepare the corresponding PDD will fluctuate because of the wide range of conditions and response activities for which applicants will be seeking preauthorization. EPA has not included these time limits in the proposed or final rule because the Agency believes that it is important to thoroughly review each application for preauthorization and to carefully prepare the corresponding PDD, rather than to attempt to complete these activities under a self-imposed regulatory deadline.

However, EPA has set an internal goal of 45 days for the review and approval of an application for preauthorization under a mixed-funding settlement ("Evaluating Mixed-Funding Settlements Under CERCLA," 53 FR 8279, at page 8282, March 14, 1988). In all cases, the Agency will attempt to review applications for preauthorization and to prepare PDDs in as expeditious a manner as possible.

The Agency would also like to stress the importance of receiving complete and accurate information from applicants submitting applications for preauthorization. When reviewing an application for preauthorization, a lack of complete and accurate information can lengthen unnecessarily the time required by EPA to reach a decision concerning preauthorization. An applicant should be careful to meet the requirements contained in the RCP and to follow the corresponding guidance issued by the Agency when he is preparing an application for preauthorization.

In addition, mixed-funding settlements should not be denied by EPA because of time conflicts between any deadlines set for the completion of negotiations or follow-up enforcement actions and the time required by the Agency to prepare a PDD. Section 122(e) of CERCLA provides that EPA may not commence an action under sections 104(a) or 106 of CERCLA for 120 days after providing notice to a PRP. A PRP has 60 days from the date of receipt of

such notice to submit a good-faith offer to EPA. The time required by EPA to prepare a PDD will be significantly less than this time period. Also, as applicants and EPA gain more experience with mixed-funding, preparation of the PDD should not delay the settlement process.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

One commenter stated that even after an application for preauthorization is filed, the temptation for the Agency to deny preauthorization will be great because there are more timely ways to address the hazardous waste problems at sites and because there is such competition for Fund money. The commenter suggested that in the case of a legitimate application, this temptation must be resisted and the Agency must be required to reasonably process and approve the request for preauthorization and associated claim.

Response

In response to this comment, the Agency believes that a distinction needs to be made between an application for preauthorization that is submitted by a non-PRP and an application that is submitted by a PRP under a mixed-funding agreement. With regard to an application submitted by a non-PRP, the Agency will first consider an enforcement action against a PRP or a Fund-financed CERCLA section 104 action conducted by trained response action personnel. In evaluating a non-PRP application for preauthorization, EPA will consider the time required to implement either one of these options versus the time required to determine the capability of the applicant to undertake the proposed response activities. EPA will preauthorize a response action by a non-PRP only when it determines that such an option is the best available means to address a release at a site.

With regard to an application for preauthorization that is submitted by a PRP under a mixed-funding agreement, it is EPA's stated policy that the Agency will utilize a mixed-funding settlement, if appropriate, to settle for less than 100 percent of response costs. Pursuant to CERCLA section 122(a), EPA will consider whether: (1) Mixed funding is in the public interest for the NPL site; (2) the response action can be carried out consistent with the NCP; (3) a mixed-funding agreement will expedite the remedial action; and (4) a mixed-funding agreement will minimize the need for litigation. EPA will generally accomplish preauthorization through a mixed-funding settlement within the

timeframe for settlements established by statute and EPA policy.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

A commenter noted that there does not appear to be an appeal process available to address the denial of preauthorization upon the Agency's failure to issue a PDD. The commenter maintained that this appeal process must be allowed.

Response

The RCP does not provide for an appeal process to address the denial of preauthorization because EPA's preauthorization of a proposed response action pursuant to CERCLA is entirely discretionary. CERCLA section 122(b)(2) provides that decisions regarding the availability of Fund financing for mixed-funding agreements are not subject to judicial review under CERCLA section 122(d).

The Agency will grant preauthorization of a response action through the preauthorization process only if the response action is of sufficient priority to merit Fund expenditure. Section 300.700(d)(3) of the revised NCP provides that: "All applications for preauthorization will be reviewed to determine whether the request should receive priority for funding. EPA, in its discretion, may grant preauthorization of a claim." (Emphasis added).

Although there is no formal process for appealing the Agency's decision to preauthorize a response action, under certain circumstances, EPA may reconsider an application. For example, § 307.23(d) of the RCP provides that if an application for preauthorization was denied because of an insufficient balance in the Fund or the low priority assigned to the response action when weighed against other applications for or uses of the Fund, the applicant may resubmit the application in another fiscal year. Also, if an applicant was denied preauthorization because of deficiencies in the application for preauthorization, the applicant may attempt to correct the deficiencies and resubmit the revised application to the Agency.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

One commenter argued that for a number of reasons, the proposed rule should not require potential claimants who are conducting response actions under mixed-funding settlements to strictly adhere to the Federal Government procurement requirements

relating to allowable costs (i.e., 48 CFR part 31, subparts 31.1 and 31.2). First, the commenter noted that cleanups by PRPs often do not involve government contractors and, therefore, the benefits of these requirements normally associated with government contract work do not apply. Nevertheless, under the proposed rule, PRPs and private contractors involved in mixed-funding cleanups must comply with government procurement cost principles that do not permit, or substantially limit, the recovery of many types of ordinary private business costs. Second, the commenter noted that compliance with government procurement cost principles will, in fact, increase the cost of mixed-funding cleanups because of the additional general and administrative expenses incurred by the PRP. Finally, the commenter stated that the concept of allowability is not relevant to most claims for remedial action costs, because most contracts for remedial construction will be awarded using sealed bidding procedures and will result, therefore, in firm fixed-price arrangements. The commenter noted that under this type of contract arrangement, reimbursement of construction contractors will be based on the contract price, rather than on the actual costs incurred.

In addition, this commenter noted that the proposed rule requires that to qualify for mixed-funding settlements, PRPs must ensure, to the maximum extent practicable, open and free competition in the selection of a private contractor to conduct the cleanup; must provide administrative procedures for the settlement of bid protests, claims disputes, and other related procurement matters; and must establish a subcontract administration system. In conclusion, the commenter recommended that the final rule should substantially streamline any required procurement procedures and tailor them to the necessity of conducting private hazardous waste cleanups quickly and efficiently.

Similarly, another commenter noted that it should be remembered that a PRP submitting claims is not a government contractor, and should not be required to adhere to the same level of detailed procedural and paperwork requirements as are government contractors. This commenter suggested that Federal procurement standards should be applied, if at all, in a flexible manner that seeks to achieve the "spirit," but not the letter, of the Federal Acquisition Regulations.

Response

EPA agrees that PRPs conducting response actions under mixed-funding

settlements should not be required to adhere strictly to the Federal procurement requirements relating to allowable costs. The Agency would like to stress that the proposed RCP did not propose this requirement, nor does the final rule contain such a requirement.

As a guide to applicants, the rule requires that applicants describe proposed procurement procedures that are consistent with the substantive provisions and limitations, or the "spirit," of appropriate Federal procurement requirements (i.e., 40 CFR part 35, subpart O, and 48 CFR part 31, subparts 31.1 and 31.2).

The RCP holds claimants to four major principles:

(1) Procurement transactions must provide, to the maximum extent practicable, open and free competition in selecting contractors, must not unduly restrict or eliminate competition, and, where applicable, must select the lowest responsive, responsible bidder; (2) contracts may be awarded to persons on the List of Parties Excluded from Federal Procurement or Non-Procurement only with EPA's prior approval; (3) all fixed-price contracts for construction must include a "differing site conditions" clause, unless EPA waives the requirement; and (4) procurement practices must be consistent with sound business judgment and good administrative practices.

EPA will use Federal cost principles as a guide in reviewing and adjusting claims. These principles should also provide some assurances to potential claimants as to which and how much of the costs the Agency will reimburse. Applying appropriate Federal cost principles to the procurement of goods and services during the course of response actions under mixed-funding settlements will not impair or prohibit quick and efficient cleanups by private parties. The applicant should, therefore, refer to Office of Management and Budget (OMB) Circular A-122 (for non-profit organizations); OMB Circular A-87 (for States and political subdivisions); and 48 CFR part 31, subparts 31.1 and 31.2 (for profit-making organizations) because the Agency will use these documents as a guide in determining whether costs are "eligible."

The Agency would like to clarify the preauthorization requirement concerning procedures for the settlement of bid protests, claims disputes, and other related procurement matters. The RCP does not require that applicants provide detailed procedures for the settlement of bid protests, claims disputes, and other related procurement

matters that are in compliance, or even consistent, with Federal procurement requirements. EPA recognizes that the Federal requirements are complicated and that it would be burdensome for potential claimants to attempt to adhere to these requirements while conducting a private sector cleanup. The RCP does, however, require that applicants provide a description of the process they will use to settle bid protests, claims disputes, and other related procurement matters. The only requirement regarding this process is that it be a fair and adequate process that is consistent with sound business judgment and good administrative practice.

In addition, EPA has developed and issued guidance on procurement procedures and other management practices that an applicant may adopt to help ensure that costs are eligible for reimbursement from the Fund ("Procurement Under Preauthorization/Mixed-Funding," OSWER Directive 9225.1-01, April 1989). This guidance should be valuable in assisting an applicant in developing procurement procedures that are not inconsistent with appropriate Federal cost principles.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

One commenter discussed the proposed requirement that claims be submitted to EPA only for completed, identifiable phases of a response action. The commenter stated that this requirement is in conflict with an existing PDD, which allows for the filing of claims at specified time intervals after certain expenditure levels are met. This commenter maintained that this requirement seems to suggest that the preauthorization process will be encumbered by the need to negotiate the identity of those "preauthorized phases" at which claims for reimbursement may be submitted. The commenter suggested that the proposed rule be revised to permit the submission of claims at specified time intervals and for amounts that may be appropriate in view of the project requirements.

Other commenters stated that EPA should re-evaluate the provision contained in the proposed rule that the Agency may require a cleanup commitment for an entire site or the completion of all site work before reimbursement is provided for the remediation of a particular operable unit. One commenter noted that with most construction projects, interim payments prior to the completion of a total activity are necessary in order to

finance the completion of an entire operation. Any requirement for a commitment to clean up an entire site on a particular timeline would not promote the public policy goal of cleaning up the high risk areas of a site prior to cleaning up the low risk areas. Another commenter maintained that the deferral of claims submission and payment will certainly decrease the financial value and incentive for PRPs to settle that is created by mixed-funding settlements. These commenters suggested an approach under which the Agency would preauthorize and pay claims upon the completion of any milestones, authorized phases, or operable units agreed upon in the Consent Decree.

Response

The Agency would like to reiterate that PDDs issued before the effective date of the final RCP will remain in full force and effect. Consequently, there will not be any conflict between procedures contained in the rule and previously issued PDDs, including procedures concerning the timing of when claims may be submitted. (See RCP section 307.11(b).)

EPA does not agree that the preauthorization process will become encumbered by the need to negotiate the identity of those "preauthorized phases" at which claims for reimbursement may be submitted. Under the proposed rule, the Agency may preauthorize an entire response action, a stage of a response action (e.g., RD/RA), an operable unit, or a stage of an operable unit. The PDD, therefore, may provide that claims shall be paid from the Fund in the same manner. However, the Agency may also require a commitment to finish site cleanup, or a phase of site cleanup, prior to reimbursement. The purpose of this requirement is to ensure that a project, once initiated, is completed in a timely manner.

Reimbursements by EPA are based upon the completion of discrete, identifiable segments of response activities. In response to this comment, the Agency is revising the RCP, the application for preauthorization, and the claim form to specifically encourage applicants to propose reimbursement based upon cash-flow considerations, completion of phases of work, or discrete activities. The goal of an applicant should be to balance major capital expenditures and the completion of discrete tasks against the number and frequency of claims.

Although EPA has reserved the right to condition the payment of a claim on a commitment to clean up an entire site or on the completion of all site work, all

applications that have been preauthorized to date authorize the submission of multiple claims. In addition, the rule contemplates the submission of multiple claims (e.g., see § 307.30(e) regarding the presentation of subsequent claims to non-settling PRPs). As stated above, the RCP, the application for preauthorization, and the claim form have been revised to facilitate the negotiation of Consent Decree milestones to be completed prior to the submission of a claim.

Final Rule

Section 307.22 is modified as follows:
1. Section 307.22(b)(9) is redesignated as § 307.22(b)(10) and a new § 307.22(b)(9) is added and will read as follows:

"Proposed schedule for the submission of claims;"

2. The section has been renumbered accordingly.

Section 307.23(b)(17) is modified as follows:

"Whether the proposed schedule for filing a claim(s) is based upon the completion of the project, an operable unit, or a discrete phase of the response work."

The Application for Preauthorization is modified as follows:

Section VIII of the application is redesignated as section VIII.A. and a new section VIII.B. is added that requires the applicant to provide a proposed schedule for the submission of claims. The instructions for this new section encourage applicants to propose reimbursement based upon cash-flow considerations and to balance major capital expenditures and the completion of discrete tasks against the number and frequency of claims.

The claim form is modified as follows:

Sections III and IV.A. of the claim form are modified to use the term "preauthorized phase" instead of "operable unit."

Comment

A commenter disagreed with the preauthorization requirement in § 307.23(e) that requires an applicant to obtain the necessary site access for EPA or the lead agency. The commenter noted that under CERCLA, it is EPA, not the PRP, that has the authority to compel access to a site in order to conduct a response action. The commenter also noted that recent additions to the revised NCP confirm EPA's authority to obtain site access on behalf of a PRP who is performing work under a settlement. The commenter stated that by requiring the PRP to obtain access at the risk of losing preauthorization for a mixed-funding agreement, the proposed rule fails to

acknowledge EPA's central role on questions of site access. This commenter suggested, therefore, that this requirement be eliminated for mixed-funding settlements.

Response

EPA believes that this commenter has misinterpreted the requirement concerning site access. It is true that, under CERCLA sections 104(e)(5) and (6), EPA has the legal authority to compel access to a site in order to conduct a response action. Once EPA has secured or the owner has provided such access, the PRP must assure EPA access at all times to the site and any property to which access is required for oversight and monitoring of implementation of the Consent Decree. Section 307.23(e) of the rule provides that "The applicant as a condition of preauthorization shall assure that the lead agency shall have such site access as may be necessary for oversight and monitoring." (Emphasis added). With the Agency's focused approach to oversight of a PRP-conducted response action, the Oversight Official is a representative of EPA who reports to the Remedial Project Manager (RPM) and supports the RPM in monitoring PRP compliance with the Consent Decree, the plans and specifications, and the Construction Quality Assurance and Quality Control Plans. The responsibilities that the RPM may choose to assign to the Oversight Official include:

- Making on-site observations of the work in progress to determine if the work is generally proceeding in accordance with the plans and specifications, and the Construction Quality Assurance and Quality Control Plans; and
- Immediately notifying the authorized representative of the Remedial Action Contractor or PRP of any observed activities presenting imminent and substantial endangerment to the public health or welfare or the environment, and following up the notification with an appraisal of the situation to the RPM.

In order to fulfill these responsibilities, the Oversight Official must be assured of access to the site, and this assurance of access must be given to the Agency at the time that the application for preauthorization is accepted by EPA and the Consent Decree is approved by the Federal district court. The potential claimant is required to provide the Oversight Official with sufficient access to the site so that EPA may fulfill its oversight and monitoring role at the site.

In addition, during the processing of a response claim, EPA will often require access to records that support the claim. Such records are often located within the physical boundaries of the site.

Final Rule

EPA is promulgating the final rule as proposed.

Subpart C—Procedures for Filing and Processing Response Claims

Section 307.30 Requesting Payment from the Potentially Responsible Party

Comment

One commenter stated that the proposed provision in § 307.30(a) that requires a claimant to present a claim to any known PRPs before submitting the claim against the Fund does not make much sense in the context of mixed-funding settlements. This commenter explained that, in many cases, the Agency decides to enter a mixed-funding settlement to pay for the recalcitrant PRPs' share and then to sue the recalcitrant PRPs to recoup its expenditures. Thus, if recalcitrant PRPs are unwilling to join a settlement with EPA, they will most certainly be unwilling to settle with other PRPs later. Therefore, the commenter expressed the opinion that this requirement is generally futile in mixed-funding situations.

Response

The Agency does not agree with this commenter. EPA will utilize the procedures in the rule, which are issued under the authority of CERCLA section 112, to implement its authority to reimburse from the Fund parties who are potentially liable for a release and who agree to conduct a response action pursuant to a mixed-funding agreement under CERCLA section 122(b). CERCLA section 112(a) provides that no claim may be asserted against the Fund unless it has first been presented to any known PRPs. After a claim against non-settling PRPs remains unsatisfied for 60 days after presentation to the non-settling PRPs, the claimant may present the claim to the Fund for payment. The claimant should submit to EPA with his claim a copy of any reply or correspondence received from the non-settling PRPs. In addition, a potential claimant may become aware of other PRPs during the course of a response action or the financial capability of PRPs may change, thus altering the probability of recovery.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

Another commenter encouraged the Agency to clarify the process in

§ 307.30(e) under which a claimant may obtain a formal agreement from EPA concerning the requirement that a claimant must first present a claim to any known PRPs. The proposed rule acknowledged that the repeated submission of a claim to recalcitrant PRPs would generally constitute a futile act. The commenter noted that neither the proposed rule nor the proposed claim form indicate how the claimant is to obtain the formal agreement from EPA under which the claimant does not have to repeat the presentation of claims to recalcitrant PRPs. This commenter suggested that the process be outlined in the final rule, and that it would be useful to specify a time period after which a claimant is entitled to consider the lack of response by the Agency to be a denial of the claim.

Response

EPA does not agree that this process should be codified in the RCP. The inclusion of more detailed procedures in the rule would tend to limit the flexibility of the parties to make such determinations. In response to this comment, however, EPA is revising the claim form and has revised its mixed-funding guidance (cited above) to advise a claimant that he may request a formal agreement from EPA pursuant to § 307.30(e) concerning the presentation of any subsequent claims at the time a claim is presented to any known non-settling PRPs. Thus, if the claimant intends to file separate claims for eligible costs incurred for discrete portions of the RD/RA, he will have to present each of those claims to the other PRPs. In such instances, if the PRP to whom the first claim was presented denied liability, refused to settle, or ignored the request for payment, and EPA agrees that there is no reason to believe that the PRP will honor subsequent claims, the denial of the first claim will be considered to be a denial of any subsequent claims. Therefore, the claimant may seek EPA's agreement at any time a claim is presented. The claimant will be advised of EPA's decision when the claimant is notified in writing regarding the award or denial of the claim.

Final Rule

The claim form is modified as follows:

The instructions for section II.B. of the claim form have been modified to inform the claimant that he may seek EPA's agreement (concerning the presentation of subsequent claims to PRPs) at any time a claim is presented. The claimant will be advised of EPA's decisions when the claimant is notified in writing regarding the award or denial of the claim.

Section 307.32 Verification, Award, and Administrative Hearings

Comment

A commenter raised a number of issues concerning the evaluation and award of response claims. This commenter stated that it is essential that the claims review process be an expeditious, fair, and reasonable one, in which unnecessary "nit picking" is avoided both in determining whether a claim is technically complete (i.e., "perfected") and whether particular costs should be paid. The commenter noted that a balance must be achieved between avoiding wasteful payment of unnecessary costs and erecting an unduly bureaucratic, stringent, and costly claims review process that wastes the resources of both EPA and the PRP.

The commenter also expressed concern that, under the claims review process, EPA employees or contractors who will review the settling PRP's claims may be different from: (1) The EPA employees with whom the mixed-funding settlement and scope of work were negotiated; (2) the EPA employees who oversaw the performance of the remedial action under the Consent Decree; and (3) the EPA employees with whom the PDD was negotiated. The commenter stated that the former may question or disallow reimbursement for work directed or approved by the latter, with potentially unfair results. This commenter maintained, therefore, that it is important that the particular response actions and the resulting costs that are directed or approved by EPA Regional technical personnel are similarly approved by those responsible for reviewing claims for reimbursement of such costs.

Response

The Agency concurs with the commenter's statement that the claims review process should be expeditious and fair, and must not waste the resources of EPA or PRPs. However, the Agency must also comply with section 111(a)(2) of CERCLA and reimburse only claims for "necessary response costs" in "carrying out the NCP." In addition, EPA must fulfill its responsibility as manager of the Fund by ensuring that Fund monies are expended for appropriate purposes consistent with the scope of the preauthorized response action.

EPA cannot guarantee that the Agency personnel involved in the negotiations will also process the response claims. The claims procedures require the contributions of the Office of Regional Counsel, the Regional program office, and a Claims Adjuster. Once a claim is "perfected," the Agency will determine

whether the response action was consistent with the terms and conditions of the Consent Decree; whether the response action was carried out in a manner consistent with the NCP and with the terms and conditions of the PDD; and whether the costs of the response action are otherwise "eligible."

Moreover, the Agency has developed internal guidelines concerning the negotiation of mixed-funding settlements, and the evaluation and award of claims, that will ensure that the process is carried out in a consistent and fair manner throughout each stage on a national level. As provided in the RCP at § 307.32(f), if a potential claimant performs the preauthorized response activities in accordance with the terms and conditions contained in the Consent Decree and the PDD, reimbursement of the costs of these activities will be awarded by the Agency from the Fund. EPA has sought to minimize chance of arbitrary Agency decisions through the preauthorization application process, the terms and conditions of PDDs, guidance that has been developed for all parties, and this rule.

Final Rule

EPA is promulgating the final rule as proposed.

Comment

One commenter maintained that the proposed provision in § 307.32(g) that would deny reimbursement of a claim whenever a PRP claimant compromises and releases his claim against other PRPs without EPA's approval could inhibit the settlement of third-party disputes at Superfund sites. This commenter argued that by adding the requirement of EPA approval, the Agency is interjecting itself into the process of settling private claims and that this requirement will have the adverse effect of slowing down the settlement process and potentially inhibiting such settlements. The commenter recommended that the proposed rule should clarify that EPA approval of a private settlement among PRPs should only be required when the settlement purports to release EPA's own claims.

Response

The Agency must approve a release of liability given to a PRP by a potential claimant only if the release purports to release anyone from liability to the United States. PRPs, of course, may settle their own liability to each other on their own terms, at any time. However, no PRP has the authority to release anyone from liability to the United States.

Only when EPA pays a claim to a PRP does the Agency acquire the right to

recover those costs that have been paid. Section 112(c)(1) of CERCLA provides that payment of any claim shall be subject to the claimant subrogating to the United States all rights of the claimant to the extent that the claimant's response costs are compensated from the Fund.

The Agency is revising the RCP to clarify this provision.

Final Rule

Section 307.32(g) is modified as follows:

"No award will be made on a claim where the claimant has purported to release a potentially responsible party from liability to the United States for the same costs unless EPA has approved the release in advance."

Comment

Several commenters urged EPA to set time limits or goals for the evaluation and award of response claims. One commenter suggested that the Agency specify a time period within which EPA will review and reach a determination on a perfected claim. The commenter believed that 30 to 45 days is a reasonable period of time for this activity. This commenter also noted that there is no apparent reason why it should take EPA 50 days from the time it makes a determination to award a claim to the time it pays the claim. Another commenter maintained that internal responsiveness guidelines are necessary, especially for the first claims that are received, in order to demonstrate that the claims procedures can provide timely decisions for those parties willing to initiate site cleanups on their own.

Response

The time required to review a response claim will vary due to the wide range of site conditions and response activities that must be analyzed during the claims review process. Once a claim is "perfected," the Agency will conduct a detailed review and will award the claim as expeditiously as possible. However, § 307.32(i) of the rule provides that for claims submitted under mixed-funding agreements, once the claim has been "perfected," the Agency must pay the amount due within 60 days or interest on that amount will begin to accrue. However, EPA may request additional information during the course of a detailed review if it is determined that such information is necessary to properly evaluate the claim. In this case, the 60-day time period will be suspended from the date the Agency requests the information until the date the requested information is received.

EPA has modified section 307.32 to make clear the major time limits

specified in the RCP, including those for the payment of interest on some claims, and the impact of an appeal on the payment of a disputed amount.

Final Rule

Section 307.32 is modified as follows:

1. Section 307.32(i)(2) is modified as follows:

"Where the claim is technically complete but EPA requires additional information in order to evaluate the amount claimed, the period as stated in paragraph (1) of this section or the accrual of interest is suspended from the date the Agency requests the information from the claimant until the date the requested information is received."

2. Section 307.32(i)(3) is redesignated as § 307.32(i)(4) and a new § 307.32(i)(3) is added to the rule as follows:

"Where a claim is denied in whole or in part by EPA, and the claimant requests an administrative hearing in accordance with paragraph (c) of this section, interest on the disputed amount begins to accrue 50 days after an award by the Administrative Law Judge, unless an appeal is filed. If either party files an appeal with a Federal district court, interest will not accrue until 20 days after the final judicial decision."

3. The section has been renumbered accordingly.

Comment

Several commenters stated that the proposed rule does not address the issue of whether EPA can and/or will reimburse PRPs for interest on the Fund-share portion of mixed-funding costs for the period of time that those monies may have been advanced by the PRP (e.g., to pay construction contractors). These commenters stressed that a claimant loses investment opportunities by funding remediation costs that will eventually be borne by the Federal Government and, in essence, is lending the Federal Government money while waiting to be paid from the Fund. These commenters urged EPA to revise the rule to provide that interest may begin to accrue at the time costs allocable to the Fund are paid by the claimant.

Response

EPA disagrees with these commenters. Pursuant to section 122(b)(1) of CERCLA, mixed-funding agreements may provide that EPA " * * * will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement * * * ." The statute, as well as the legislative history, however, does not specify a method for the calculation of this interest. EPA evaluated several different alternatives for calculating this interest. In its role as manager of the Fund, the Agency has determined that interest will accrue on amounts due to PRPs if EPA fails to pay the amount due

within 60 days of perfection of the claim as set forth in § 307.32(i) of the RCP. In order to protect finite fund resources, the Agency does not believe that it is an appropriate or efficient use of Fund resources to allow that interest will begin to accrue at the time costs allocable to the Fund are paid by the claimant.

Final Rule

EPA is amending the rule at § 307.32(i)(2) and (3) to add language concerning the payment of interest on claims to PRPs under mixed-funding settlements. (See discussion above.)

Subpart D—Payments and Subrogation

Section 307.41 Subrogation of Claimant's Rights to the Fund

Comment

One commenter discussed the proposed provision in § 307.41(b) that requires a PRP to assist EPA in cost-recovery actions against other non-settling PRPs. The commenter noted that the costs of such assistance may be substantial, and that such costs can be recovered by the Agency as part of ordinary "response costs" from the non-settling PRPs. Therefore, the commenter urged that these cost-recovery assistance costs should be paid for by the Fund, rather than by the PRP who cooperated with EPA.

Response

The Agency does not agree that these costs should be paid for by the Fund as a general rule. In most cases, EPA will initiate cost-recovery actions against the non-settling PRPs and assistance from the claimant will be vital to these cost-recovery actions. Assistance from the claimant, contractors, and subcontractors may include the furnishing of personnel, the testimony of witnesses, or providing documents and any other materials needed to assist EPA in the cost-recovery action. In particular, the claimant's contractors and subcontractors must be available to testify in all proceedings relating to EPA's cost-recovery efforts.

EPA does not believe that it is an appropriate use of Fund resources to pay for the cost-recovery assistance activities of a claimant under a mixed-funding settlement because the PRP would be responsible for these costs, regardless of whether or not he were involved in a mixed-funding settlement. In addition, the claimant may recover these costs from the non-settling PRPs.

However, in certain situations, expenses incurred by the claimant as a result of assistance in cost-recovery actions initiated by the United States will be reimbursed in accordance with applicable procedures (i.e., 28 U.S.C.

1821 as implemented by 28 CFR part 21, which addresses witness fees) or court rules governing appearance fees and travel expenses.

Final Rule

EPA is promulgating the final rule as proposed.

Section 307.42 Fund's Obligation in the Event of Failure of Remedial Actions Taken Pursuant to CERCLA Section 122

Comment

Several commenters supported the concept contained in § 307.42(a) that in the event of the failure of a preauthorized remedial action, the Fund should be available to pay the same proportion of the new remedial action as was applied to the original action. These commenters stated, however, that the regulatory language should be modified to be consistent with the language of CERCLA section 122(b)(4), which provides that the Fund "shall contribute" (not "may contribute") proportionally to the further cleanup. One commenter also stated that the submission of a full new application for preauthorization should not be necessary in such instances, and that the existing PDD should simply be amended to authorize the new work.

Response

The Agency agrees that the regulatory language concerning cost share for the failure of a preauthorized remedial action should be changed to reflect the statutory language of CERCLA section 122(b)(4). Therefore, § 307.42(a) of the final rule has been changed to read: " * * * the Fund shall be available for the costs of any new cleanup required * * * ." (Emphasis added.)

In the event of a failure of a preauthorized remedial action, any modifications to the preauthorized remedial action or additional response costs that would be included under the new cleanup would have to be preauthorized by EPA. These modifications or additional costs must be preauthorized by the Agency through a revised application for preauthorization. This application for preauthorization, however, would only have to reflect revisions to the relevant parts of the application. EPA has determined that this requirement is valuable to both EPA and the applicant since it ensures that there is written documentation of the need for these modifications and, if approved, the Agency's commitment that the costs will be reimbursed if the response action is conducted consistent with the NCP, the Consent Decree, and the new PDD.

Final Rule

Section 307.42(a) is modified as follows:

"In the case of the failure of a completed remedial action taken by a potentially responsible party pursuant to a remedial action preauthorized in connection with a settlement under section 122(b)(1) of CERCLA, the Fund shall be available for the costs of any new cleanup required, but shall not be obligated to a proportion exceeding that proportion contributed by the Fund for the original remedial action."

Appendix A—Application for Preauthorization of a CERCLA Response Action

Comment

One commenter endorsed the prompt publication of the application for preauthorization. This commenter stated that the application is a useful reference document that helps to clarify the application process.

Response

Prior to the promulgation of the final RCP, PRPs have been submitting preauthorization requests to the Agency for approval of proposed response actions under mixed-funding settlement agreements. EPA has been reviewing these preauthorization requests on a case-by-case basis. The Agency has provided these PRPs with a copy of the draft application for preauthorization as a guide for submitting a preauthorization request. However, neither the proposed nor the revised application for preauthorization is legally in effect until the effective date of this final rule.

Final Rule

EPA is promulgating the final rule as proposed. However, EPA is modifying the application for preauthorization to require an applicant to submit a proposed schedule for the submission of claims. (See discussion of § 307.23.)

Comment

One commenter expressed concern over the estimated amount of time required to complete the application for preauthorization. This commenter stated that the estimate set forth in the proposed rule is very low. The commenter also noted that the actual time that is likely to be required to complete the application, as well as the time necessary for the required approval by the Agency, may conflict with the special notice and negotiation deadlines imposed by EPA.

Response

It is difficult to estimate precisely the time required to complete the application for preauthorization because the application has not been officially used and because of the wide range of response activities for which applicants may seek to obtain preauthorization.

Moreover, in light of the capabilities of an applicant, the applicant's management plan, and the hazardous waste problems unique to each site, no two applications for preauthorization are identical and, therefore, the time required to develop these applications will vary accordingly. However, the Agency agrees with the commenter that the estimate of 95 to 173 hours for completing the application for preauthorization is low. Therefore, based on its continuing response claims experience, the Agency is increasing the burden estimate for the application for preauthorization to 186 to 330 hours per response, with an average of 258 hours per response.

It should be noted that, as commenters stated elsewhere, much of the information required by the application, especially under mixed-funding settlements, will be available from existing EPA documents, such as the RI/FS, ROD, or Consent Decree. Also, the Agency has issued guidance (cited above) on the response claims process that addresses the preparation of the application for preauthorization. This guidance will assist applicants in preparing an application for preauthorization and will, consequently, reduce the amount of time necessary to complete the application.

EPA does not believe that the time necessary to complete the application for preauthorization, as well as the time required for review and approval by the Agency, will conflict with the special notice and negotiation deadlines imposed by EPA. Under the CERCLA section 122(e) special notice deadline, EPA may not commence an action under sections 104(a) or 106 of CERCLA for 120 days after providing such notice to a PRP. A PRP has 60 days from the date of receipt of such notice to submit a good-faith offer to EPA. The preauthorization process may begin only after the good-faith offer has been made by the PRP. The Agency has not imposed a deadline for the submission of a final application. In addition, EPA provides in its guidance (cited above) on evaluating mixed-funding settlements that it has set an internal goal of 45 days for the review and approval of an application for preauthorization under a mixed-funding settlement.

Final Rule

The application for preauthorization is modified to increase the burden estimate for completing the application from 95 to 173 hours per response, with an average of 134 hours per response, to an estimate of 186 to 330 hours per response, with an average of 258 hours per response.

Appendix B—Claim for CERCLA Response Action

Comment

One commenter endorsed the prompt publication of the claim form, and stated that the form is useful and helps to clarify the claims process. However, another commenter stated that although the claim form is short in length and general in scope, it consists of a number of open-ended essay questions. The commenter noted that although the form appears to give substantial flexibility to the claimant in explaining and documenting proposed response activities and estimated costs, the form also introduces considerable uncertainty as to the level of detail and extent of documentation that the Agency will require in order to find that claimed costs are adequately explained. This commenter suggested that some guidance should be given as to the amount and level of detail concerning the required information and documentation.

Response

In developing the claim form, the Agency attempted to provide substantial flexibility to claimants regarding the description and documentation of response activities and costs. EPA has developed a "Guidance Manual for Participating in the Response Claims Process: Preauthorizing PRP Remedial Designs/Remedial Actions" (cited above), which includes guidance on completing the claim form, and which specifically addresses the issue of the amount and level of detail of information the claim form requires. This guidance will be available from Agency Headquarters or from any EPA Regional Office.

The Agency is also modifying the claim form to add information requirements concerning the location of cost documentation and any other records and the identification of which Federal cost principles were used by the claimant. These additional requirements will allow EPA to review and reach a decision on submitted claims in a more timely and efficient manner.

Final Rule

The claim form is modified as follows:

1. A new section IV.F. is added to the claim form that requires the claimant to provide the name and address of the location where all cost documentation and any other records relating to the claim will be maintained.

2. A new requirement is added to sections V.B. and C. of the claim form that requires the claimant to specify which of the Federal cost principles were used and to explain the basis for the selection of that principle.

3. Additional modifications to the claim form have been made. (See the discussions of §§ 307.23 and 307.30.)

III. Summary of Supporting Analyses

Proposed and final rules issued by Federal agencies are governed by several statutes and executive orders. These include Executive Order (E.O.) 12291, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

A. Executive Order (E.O.) No. 12291

Executive Order No. 12291 requires that regulations be classified as "major" or "non-major" for purposes of review by the Office of Management and Budget (OMB). A Regulatory Impact Analysis is required for a "major" rule. According to E.O. 12291, "major" rules are regulations that are likely to result in:

1. An annual adverse (cost) effect on the economy of \$100 million or more; or
2. A major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies, or geographical regions; or
3. Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA has determined that this regulation is a "non-major" rule under Executive Order 12291 because it is unlikely to result in any of the economic impacts identified above. Therefore, the Agency has not prepared a Regulatory Impact Analysis for this regulation.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 generally requires that a Regulatory Flexibility Analysis be performed for all rules that are likely to have "significant economic impact on a substantial number of small entities." Today's rule involves reimbursement of the costs of certain parties for responding to a hazardous substance release. This is a benefit authorized by CERCLA, and does not adversely affect the private sector economy. EPA, therefore, certifies that this regulation will not have a significant economic impact on a substantial number of small businesses, organizations, and units of government. EPA certifies that a Regulatory Flexibility Analysis is not necessary.

C. Paperwork Reduction Act

The information collection requirements in this rule have been approved by the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 et seq.

and have been assigned OMB control number 2050-0106.

Public reporting burden for the collection of information under the "Application for Preauthorization of a CERCLA Response Action," is estimated to vary from 186 to 330 hours per response, with an average of 258 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the collection of information.

Public reporting burden for the collection of information under the "Claim for CERCLA Response Action," is estimated to vary from 25 to 59 hours per response, with an average of 42 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimates or any other aspects of this collection of information, including suggestions for reducing the burden, to the following addresses: Chief, Information Policy Branch (PM-223), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, Attention: Desk Officer for EPA.

List of Subjects in 40 CFR Part 307

Administrative practices and procedures, Chemicals, Hazardous materials, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal.

Dated: December 19, 1992.

William K. Reilly,
Administrator.

Appendix to Preamble

Forms applicable to the CERCLA response claims process, EPA Form 2075-3 and EPA Form 2075-4, may be obtained from EPA Headquarters, CERCLA Response Claims, Office of Emergency and Remedial Response, (5203 G) U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Forms may also be obtained from the EPA regional offices at these addresses:

- (a) Region I, John F. Kennedy Federal Building, Boston, Massachusetts 02203
- (b) Region II, 26 Federal Plaza, New York, New York 10278
- (c) Region III, 841 Chestnut Street, Philadelphia, Pennsylvania 19107
- (d) Region IV, 345 Courtland Street, NE., Atlanta, Georgia 30365

(e) Region V, 77 West Jackson Boulevard, Chicago, Illinois 60604

(f) Region VI, 1445 Ross Avenue, Dallas, Texas 75202

(g) Region VII, 726 Minnesota Avenue, Kansas City, Missouri 66101

(h) Region VIII, 999 18th Street, Denver, Colorado 80202

(i) Region IX, 75 Hawthorne Street, San Francisco, California 94105

(j) Region X, 1200 Sixth Avenue, Seattle, Washington 98101

Completed forms must be submitted to the Administrator at EPA Headquarters or his designee.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended by adding part 307 to read as follows:

PART 307—COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) CLAIMS PROCEDURES

Subpart A—General

Sec.

- 307.10 Purpose.
- 307.11 Scope and applicability.
- 307.12 Use of number and gender.
- 307.13 Computation of time.
- 307.14 Definitions.
- 307.15 Penalties.

Subpart B—Eligible Claimants; Allowable Claims; Preauthorization

- 307.20 Who may present claims.
- 307.21 Nature of eligible claims.
- 307.22 Preauthorization of response actions.
- 307.23 EPA's review of preauthorization applications.

Subpart C—Procedures for Filing and Processing Response Claims

- 307.30 Requesting payment from the potentially responsible party.
- 307.31 Filing procedures.
- 307.32 Verification, award, and administrative hearings.
- 307.33 Records retention.

Subpart D—Payments and Subrogation

- 307.40 Payment of approved claims.
- 307.41 Subrogation of claimants' rights to the Fund.
- 307.42 Fund's obligation in the event of failure of remedial actions taken pursuant to CERCLA section 122.

Appendix A to Part 307—Application for Preauthorization of a CERCLA Response Action

Appendix B to Part 307—Claim for CERCLA Response Action

Appendix C to Part 307—Notice of Limitations on the Payment of Claims for Response Actions, Which is to be Placed in the Federal Register Preamble Whenever Sites Are Added to the Final NPL

Appendix D to Part 307—Notice of Limitations on the Payment of Claims for Response Actions, Which is to be Placed in Public Dockets

Authority: 42 U.S.C. 9601 *et seq.*; sections 4 and 9, E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp. p. 193.

Subpart A—General

§ 307.10 Purpose.

This part prescribes the appropriate forms and procedures for presenting claims for necessary response costs as authorized by section 112(b)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (herein referred to as CERCLA, or the Act) (42 U.S.C. 9601 *et seq.*). Such claims may be presented to the Hazardous Substance Superfund (the Fund) established by section 9507 of the Internal Revenue Code of 1986. See section 101(11) of CERCLA.

§ 307.11 Scope and applicability.

(a) The following may be submitted only through the procedures established by this part: claims for responses to a release or substantial threat of release of a hazardous substance into the environment; claims for responses to a release or substantial threat of release of any pollutants or contaminants into the environment, which may present an imminent and substantial danger to public health or welfare; and claims for response actions undertaken pursuant to settlement agreements in which the Federal Government agrees to reimburse a portion of the cost. Under this part, persons may bring claims for necessary costs incurred in carrying out the National Contingency Plan (NCP) (40 CFR part 300) developed under section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*) and revised pursuant to section 105 of CERCLA. Only response actions that EPA has preauthorized are eligible for reimbursement through the claims process of section 112 of CERCLA. Authority for the payment of claims for response costs is provided by section 111(a)(2) of CERCLA. Authority for the reimbursement of certain costs incurred

by parties to a settlement agreement entered pursuant to section 122 of CERCLA is provided by section 122(b) of CERCLA.

(b) This part does not affect the terms and conditions contained in Preauthorization Decision Documents (PDDs) issued prior to the effective date of this part. However, a potential claimant may elect to comply with the provisions of this part, rather than the terms and conditions of a PDD issued prior to the effective date of this part, if he so chooses. Written notice of this election must be provided to EPA by the potential claimant prior to such provision taking effect, but not later than the time of the submittal of any claim to EPA. EPA will provide a written acknowledgement of the potential claimant's election and may revise the PDD as appropriate.

§ 307.12 Use of number and gender.

As used in this part, words in the singular also include the plural and vice versa, and words in the masculine gender also include the feminine, as the case may require.

§ 307.13 Computation of time.

In computing any period of time described or allowed in this part, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or Federal legal holiday, the stated time period shall be extended to include the next business day.

§ 307.14 Definitions.

Terms that are not defined in this section or restated herein, shall have the meaning set forth in section 101 of CERCLA or the 1990 NCP or any final revision thereto. As used in this part, the following words and terms shall have the meanings set forth below:

Act or CERCLA both mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986.

Administrative hearing means an administrative adjudication required by section 112(b)(2) of CERCLA in the event a claimant contests a determination of his claim made by the U.S. Environmental Protection Agency (EPA).

Assistance agreement means the legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose. It is either a grant or

cooperative agreement (see 40 CFR part 35) and will specify: budget and project periods; the Federal share of eligible project costs; a description of the work to be accomplished; and any special conditions.

Claim means a demand in writing for a sum certain presented to the Fund in accordance with sections 111 and 112 of CERCLA.

Claimant means any person who presents a claim to the Fund for reimbursement under section 112(b)(1) of CERCLA.

Contractor claim means the disputed portion of a written demand or written assertion by any contractor who has contracted with a person (i.e., the owner) for the conduct of a preauthorized response action, seeking as a matter of right, the payment of money, adjustment, or interpretation of contract terms, or other relief, arising under or related to a contract, which has been finally rejected or not acted upon by the owner and which is subsequently settled by the owner or is awarded by a third party in accordance with the disputes clause of the contract document.

Eligible claim means any claim that has satisfied the requirements set forth in § 307.21(b).

Facility as defined by section 101(9) of CERCLA, means any:

(1) Building, structure, installation, equipment, pipe or pipeline (including any pipe into sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or

(2) Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Fund means the Hazardous Substance Superfund established by section 9507 of the Internal Revenue Code of 1986.

Hazardous substance as defined by section 101(14) of CERCLA, means:

(1) Any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*);

(2) Any element, compound, mixture, solution, or substance designated pursuant to section 102 of CERCLA;

(3) Any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (42 U.S.C. 6801 *et seq.*) (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress);

(4) Any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act;

(5) Any hazardous air pollutant listed under section 112 of the Clean Air Act (42 U.S.C. 7401 *et seq.*); and

(6) Any imminently hazardous chemical substance or mixture with respect to which the Administrator of EPA (Administrator) has taken action pursuant to section 7 of the Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*). The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under paragraphs (1) through (6) of this definition, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

National Contingency Plan, or NCP means the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) developed under section 311(c) of the Federal Water Pollution Control Act and revised pursuant to section 105 of CERCLA.

Necessary costs means "necessary response costs" as required by section 111(a)(2) of CERCLA for Fund reimbursement of a preauthorized response action. Necessary response costs are costs determined to be:

(1) Required (based upon the site-specific circumstances);

(2) Reasonable (nature and amount do not exceed that estimated or which would be incurred by a prudent person);

(3) Allocable (incurred specifically for the site at issue); and

(4) Otherwise allowable (consistent with the limitations and exclusions under the appropriate Federal cost principles). See OMB Circular A-122 (non-profit organizations); OMB Circular A-87 (States and political subdivisions); and 48 CFR part 31, subparts 31.1 and 31.2 (profit-making organizations).

NPL means the National Priorities List established pursuant to section 105 of CERCLA and 40 CFR 300.425, which consists of uncontrolled hazardous substance facilities in the United States that need to be addressed under CERCLA authorities. Only NPL sites are eligible for Fund-financed remedial action.

Operable unit means a discrete action that comprises an incremental step toward comprehensively addressing site problems. This discrete portion of a remedial response manages migration, or eliminates or mitigates a release, threat of release, or pathway of exposure. The cleanup of a site can be

divided into a number of operable units, depending on the complexity of the problems associated with the site.

Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site. Operable units will not impede implementation of subsequent actions, including final action at the site.

Party means EPA or a claimant.

Perfected means the point at which EPA determines that the written demand for a sum certain (i.e., claim) has the documentation necessary to substantiate the appropriateness of the amounts claimed; i.e., the claim is technically complete.

Person as defined by section 101(21) of CERCLA, means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

Political subdivision means any general purpose unit of a local or State government.

Pollutant or Contaminant as defined by section 101(33) of CERCLA, includes, but is not limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations in such organisms or their offspring. The term does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under section 101(14)(A) through (F) of the Act, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

Preauthorization means EPA's prior approval to submit a claim against the Fund for necessary response costs incurred as a result of carrying out the NCP. The process of preauthorization consists of three steps:

(1) EPA's receipt of the application for preauthorization;

(2) EPA's review and analysis of the application; and

(3) EPA's issuance of the Preauthorization Decision Document, which sets forth the terms and conditions for reimbursement.

Preauthorized response actions are response actions approved through the preauthorization process.

Respond or Response as defined by section 101(25) of CERCLA, means remove, removal, remedy, and remedial action, all such terms (including removal and remedial action) including enforcement activities related thereto.

Response claim means a preauthorized demand in writing for a sum certain for response costs referred to in section 111(a)(2) of CERCLA, including certain costs of actions referred to in section 122(b)(1) of CERCLA.

§ 307.15 Penalties.

(a) If any person knowingly gives a material statement or representation in the application for preauthorization or in the claim that is false, misleading, misrepresented, or misstated, and EPA relies upon such a statement or representation in making its decision, the preauthorization or the award by EPA may be withdrawn following written notice to the claimant.

(b) Any person who knowingly gives, or causes to be given, any false information as part of an application for preauthorization or of a claim (including any person who meets the conditions of paragraph (a) of this section) may, upon conviction, be fined or imprisoned in accordance with CERCLA section 112(b)(1) and other laws.

Subpart B—Eligible Claimants; Allowable Claims; Preauthorization

§ 307.20 Who may present claims.

(a) Subject to the provisions of this subpart, claims for the costs of response actions may be asserted against the Fund by any person other than the United States Government, States, and political subdivisions thereof, except to the extent the claimant is otherwise compensated for the loss. States and political subdivisions may assert such claims if they are potentially responsible parties subject to an agreement reached pursuant to section 122(b)(1) of CERCLA.

(b) Claims presented by an individual must be signed by that individual. If, because of death, disability, or other reasons satisfactory to EPA, the foregoing requirement cannot be fulfilled, the claim may be filed by a duly authorized agent, executor, administrator, or other legal

representative. A claim presented by an entity or an authorized agent, executor, administrator, or other legal representative must be presented in the name of the claimant. The claim must be signed by the authorized agent, executor, administrator, or other legal representative (including the title or legal capacity of the person signing) and be accompanied by evidence of the authority to present a claim on behalf of the claimant as authorized agent, executor, administrator, or other legal representative.

(c) A claim for response costs as to which any release from liability was executed between the claimant and a potentially responsible party may be presented against the Fund to the extent that the claimant obtained EPA's approval prior to executing such release and provided that the other requirements of this part are met.

(d) A foreign claimant may present a response claim to the Fund, to the same extent that a United States claimant may assert a claim, if:

(1) The requirements of § 307.21 and § 307.22 are met; and

(2) The release of a hazardous substance occurred in the navigable waters of the United States, including the territorial sea, or in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident; and

(3) The claimant is not otherwise compensated for the loss; and

(4) The hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331 *et seq.*), or the Deepwater Port Act of 1974, as amended (33 U.S.C. 1501 *et seq.*); and

(5) Recovery is authorized by a treaty or an executive agreement between the United States and the foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.

§ 307.21 Nature of eligible claims.

(a) Claims may be asserted against the Fund for necessary costs incurred for response actions due to a release or substantial threat of release of a hazardous substance into the environment; a release or substantial threat of release of pollutants or contaminants into the environment that may present an imminent or substantial danger to public health or welfare; or

actions taken by a potentially responsible party subject to an agreement reached pursuant to section 122(b)(1) of CERCLA. Claims must be filed in accordance with § 307.22. Claims may be asserted for the costs of removal actions, remedial planning activities, and remedial actions.

(b) Costs will be considered to be eligible under this section if:

(1) The response action is preauthorized by EPA pursuant to § 307.22;

(2) The costs are incurred for activities within the scope of EPA's preauthorization;

(3) The response action is conducted in a manner consistent with the NCP; and

(4) The costs incurred are necessary costs pursuant to § 307.11 of this part.

(c) Money in the Fund may be used for paying any claim under this section for expenses incurred for the payment of contractor claims either through settlement of such claims or an award by a third party to the extent EPA determines that:

(1) The contractor claim arose from work within the scope of the contract at issue and the contract was for preauthorized response activities;

(2) The contractor claim is meritorious;

(3) The contractor claim was not caused by the mismanagement of the claimant;

(4) The contractor claim was not caused by the claimant's vicarious liability for the improper actions of others;

(5) The claimed amount is reasonable and necessary;

(6) The claim for such costs is filed by the claimant within 5 years of completion of the preauthorized response action; and

(7) Payment of such a claim will not result in total payments from the Fund in excess of the maximum amount for which claims were preauthorized.

(d) An award by a third party on a contractor claim under paragraph (c) of this section should include:

(1) Findings of fact;

(2) Conclusions of law;

(3) Allocation of responsibility for each issue;

(4) Basis for the amount of award; and

(5) The rationale for the decision.

(e) Money in the Fund may not be used for paying any claim under this section for expenses incurred for procurement transactions that were not conducted in a manner that provided to the maximum extent practicable, open and free competition; unduly restricted or eliminated competition; and did not provide where applicable for the award

of contracts to the lowest responsive, responsible bidder where the selection was made principally on the basis of price.

(f) Money in the Fund may not be used for paying any claim under this section for expenses incurred by a person operating pursuant to a procurement contract or assistance agreement with the United States.

(g) Money in the Fund may not be used for paying any claim under this section for expenses incurred for the payment of persons who are on the "List of Parties Excluded From Federal Procurement or Non-Procurement" at the time the contract is awarded, unless EPA approval is obtained in advance.

(h) Unless EPA waives this requirement prior to the award of a construction contract, money in the Fund may not be used for paying any claim under this section for expenses incurred under such a construction contract that does not contain a "differing site conditions" clause equivalent to the following:

(1) The contractor shall promptly, and before such conditions are disturbed, notify the claimant in writing of:

(i) Subsurface or latent physical conditions at the site differing materially from those listed in this contract, or

(ii) Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.

(2) Upon notification by the construction contractor, the claimant shall promptly investigate the conditions. If the claimant finds that conditions materially differ and will cause an increase or decrease in the contractor's cost or the time required to perform any part of the work under its contract, whether or not changed as a result of such conditions, the claimant shall make an equitable adjustment and modify the contract in writing.

(3) No claim of the contractor under the differing site conditions clause shall be allowed unless the contractor has given the notice required in paragraph (h)(1) of this section. However, the claimant may extend the time prescribed in paragraph (h)(1) of this section.

(4) No claim by the contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

(i) Where money in the Fund has been used to pay for any response costs under this section, no other claim may be paid out of the Fund for the same costs.

§ 307.22 Preauthorization of response actions.

(a) No person may submit a claim to the Fund for a response action unless that person notifies the Administrator of EPA or his designee prior to taking such response action and receives preauthorization by EPA. In order to obtain preauthorization, any person intending to submit a claim to the Fund must fulfill the following requirements before commencing a response action:

(1) Notify the lead agency through the National Response Center (as described in 40 CFR 300.125), if there is acute threat of fire, explosion, or direct human contact with hazardous substances, pollutants, or contaminants or other emergency situation, to determine if there is sufficient time to submit an application for preauthorization;

(2) Submit an application for preauthorization (EPA Form 2075-3, found at Appendix A of this part) to the Administrator or his designee; and

(3) Obtain the approval of the Administrator or his designee before initiating the response action.

(b) All applications for preauthorization must include, where available:

(1) A description of the location and nature of the release or threatened release of a hazardous substance or pollutant or contaminant (e.g., type and location of vessel or facility, population at risk, routes of exposure);

(2) A description of the nature and quantity of the hazardous substance or pollutant or contaminant which has been or may be released, including whether the substance is on the list of hazardous substances set forth pursuant to section 102 of CERCLA;

(3) The identity of any potentially responsible parties known to the applicant (including the applicant), and any contact with such parties, including, but not limited to, any correspondence, agreements, or litigation with such parties;

(4) Evidence of the applicant's eligibility to file a claim pursuant to § 307.20;

(5) An explanation of why the proposed response action is necessary, and how the proposed action is consistent with 40 CFR 300.700(d)(4)(ii);

(6) A description of the applicant's capability (including financial and technical capability) to implement the proposed response action;

(7) Proposed schedule of activities;

(8) Projected costs of response activities, with the basis for those projections (projections shall be based on actual anticipated costs without a contingency for unanticipated conditions);

(9) Proposed schedule for the submission of claims;

(10) The proposed contracting procedures;

(11) Proposed procedures for project management, EPA oversight, and reporting of progress of the project; and

(12) The assurances of timely initiation and completion.

(c) Applications for preauthorization to undertake a removal action shall, in addition to the requirements in paragraph (b) of this section, include:

(1) A summary or copy of the preliminary assessment; and

(2) A description of the proposed removal action for which the claim will be made, which environmental requirements are applicable or relevant and appropriate, and how the removal will comply with such requirements.

(d) Applications for preauthorization to undertake a remedial investigation and feasibility study shall, in addition to the requirements in paragraph (b) of this section, include:

(1) The scope of the proposed study;

(2) A proposed site sampling plan and quality assurance procedures;

(3) The plan for the development of alternatives;

(4) Approaches to consideration of alternatives to land disposal;

(5) Plans for initial screening of alternatives;

(6) Proposed procedures for the detailed analysis of alternatives; and

(7) Proposed considerations in selection of the remedy.

(e) Applications for preauthorization to undertake a remedial alternative other than that selected by EPA, or where EPA has not selected a remedy, shall, in addition to the requirements in paragraph (b) of this section, include a discussion of how the proposed remedy:

(1) Differs from the one selected by EPA, if applicable;

(2) Achieves protection of public health and welfare and the environment and complies with legally applicable or otherwise relevant and appropriate Federal, State, and local requirements pursuant to 40 CFR 300.400(g) or waivers to those requirements in 40 CFR 300.430(f)(1)(ii)(C). The application shall also include a discussion of pertinent Federal and State guidance, advisories, and criteria;

(3) Will be cost-effective as set out in section 121(a) of CERCLA and 40 CFR 300.430(f)(1)(ii)(D);

(4) Mitigates and minimizes future risks;

(5) Improves the reliability of the remedy;

(6) Utilizes new or innovative technology, if appropriate;

(7) Employs treatment that reduces the volume, toxicity or mobility of the hazardous substances;

(8) Impacts projected costs; and

(9) Takes into account Appendix D of 40 CFR part 300.

(f) Applications for preauthorization to undertake a remedial action, including those described in paragraph (e) of this section, shall in addition to the requirements in paragraph (b) of this section, include:

(1) A description of the proposed remedial action for which the claim will be made;

(2) A proposed site sampling plan and quality assurance procedures;

(3) Documentation of reasonable effort to obtain the cooperation of the State or Indian Tribe;

(4) A bond or other financial assurance to cover the costs of necessary long-term operation and maintenance of the response action or written assurance from the State to provide such long-term operation and maintenance;

(5) Proposed procedures using sealed bidding to select the construction contractor, or an explanation of why the applicant intends to use any other method; and

(6) Documentation showing that the response will be carried out in accordance with applicable or relevant and appropriate environmental requirements. Documentation should include the potential impacts on any environmentally sensitive areas.

(g) Claims of business confidentiality may be asserted for information submitted to EPA under this subpart. Information claimed confidential will be disclosed by EPA only to the extent permitted by CERCLA, this subpart, and part 2, subpart B, of this chapter.

(1) Any claim of business confidentiality must accompany the information when it is submitted to EPA. Claims must be asserted as prescribed on the forms. Items claimed confidential on the forms and attachments to the forms must be clearly marked by circling or bracketing them.

(2) The applicant or response claimant must provide EPA with two copies of its submittal if any information is claimed confidential.

(i) One copy of the submittal must be complete, with items claimed confidential clearly marked in accordance with paragraph (g)(1) of this section.

(ii) The second copy must be complete except that all information claimed as confidential in the first copy must be deleted. EPA may make this second copy available to the public.

(iii) If the applicant does not provide a redacted copy, the application for

preauthorization is incomplete. If the claimant does not provide a redacted copy, the claim against the Fund will not be perfected by EPA. EPA will not process such submittals until it receives the redacted copy.

(3) If a submitter of a response claim or an application for preauthorization does not assert a claim of business confidentiality for information at the time the information is submitted to EPA, the Agency may make the information public without further notice to the submitter.

(h) In addition to the foregoing, an application for preauthorization filed by a potentially responsible party for partial reimbursement of response costs shall include:

(1) A copy of the settlement agreement, or the most recent draft of any pending agreement, reached between such parties and the Federal Government; and

(2) If the application is to undertake a remedial investigation and feasibility study, an affirmation that the applicant will not directly or indirectly benefit from the preauthorization as a response action contractor, or as a person hired or retained by such a contractor with respect to the site at issue and an agreement to reimburse the Fund for any costs incurred under, or in connection with, the oversight contract or arrangement for the remedial investigation and feasibility study.

(i) If it is subsequently determined that the preauthorized response actions require modification or if it appears that project costs will exceed approved costs, a revised application for preauthorization must be approved by EPA before different, or additional, actions can be undertaken, if such actions are to be eligible for compensation from the Fund.

(j) Unless otherwise specified and agreed to by EPA, the terms, provisions, or requirements of a court judgment, Consent Decree, administrative order (whether unilateral or on consent), or any other consensual agreement with EPA requiring a response action do not constitute preauthorization to present a claim to the Fund.

§ 307.23 EPA's review of preauthorization applications.

(a) EPA shall review each preauthorization application and will notify the applicant of the decision to grant or deny preauthorization. Decisions to grant preauthorization will be memorialized in a PDD.

(b) Each application for preauthorization must include information sufficient for EPA to determine whether the response will be

consistent with 40 CFR 300.700(d). EPA will evaluate applications based on the following non-exclusive list of criteria, as appropriate:

(1) Whether the release is within the scope of CERCLA;

(2) The seriousness of the problem or importance of the response activity when compared with competing demands on the Fund;

(3) Whether there is sufficient time to process the request for preauthorization (e.g., if a removal action is proposed);

(4) Whether the party liable for the release or threat of release of the hazardous substance is unknown, or if known, has been notified of the application for preauthorization and is unwilling or incapable of performing the response in a reasonable period of time;

(5) Whether the State, a political subdivision, or an Indian Tribe is willing to undertake the response action through a contract or a cooperative agreement;

(6) The cost and effectiveness of the proposed response actions when compared with other alternatives;

(7) Whether proposed response can be carried out in accordance with the NCP and other environmental requirements;

(8) The applicant's eligibility to file a claim; his capabilities, experience, and technical expertise; and his knowledge and familiarity with the NCP and relevant guidance;

(9) Whether the party is proposing to conduct a cleanup through an administrative order or a Consent Decree with the Government regarding the site for which the request is made (if the applicant is a potentially responsible party);

(10) Whether the applicant, if he is a potentially responsible party seeking to undertake a remedial investigation and feasibility study, has affirmed that he will not directly or indirectly benefit from the preauthorization as a response action contractor, or as a person hired or retained by such a contractor with respect to the site at issue, and agrees to reimburse the Fund for any cost incurred under, or in connection with, the oversight contract or arrangement for the remedial investigation and feasibility study;

(11) Whether the proposed costs are eligible and the applicant has proposed appropriate procurement, contract management, project management, financial management and documentation procedures;

(12) Whether the applicant has met the necessary assurances, financial responsibilities, and other requirements;

(13) Provisions for long-term operation and maintenance of the site, if appropriate;

(14) Whether the applicant has consulted with the State or Indian Tribe on the proposed response action;

(15) The applicant's proposed procedures for oversight and the reporting of project issues and progress;

(16) Cooperation of the applicant at any earlier stage of response activity; and

(17) Whether the proposed schedule for filing a claim(s) is based upon the completion of the project, an operable unit, or a discrete phase of the response work.

(c) The Administrator may grant preauthorization for all or part of a proposed response action, but not less than a stage of an operable unit or of a response action.

(1) The Administrator may set a limit on the amount that may be claimed as reimbursement from the Fund for any response action.

(2) The Administrator may condition the preauthorization on such inspection, monitoring, reporting, safety, and long-term operation and maintenance requirements as he deems necessary. The costs of such requirements may not necessarily be reimbursed from the Fund.

(3) The Administrator may condition the preauthorization on such time period for starting and completing the response action as he may deem necessary.

(4) The Administrator may condition the preauthorization on such financial or other assurance from the claimant or other entity as he may deem necessary to ensure completion of work at the site.

(5) The Administrator will not subject potentially responsible parties who may wish to undertake a remedial investigation and feasibility study to a lesser standard of liability nor will he give such parties preferential treatment in EPA's review of applications for preauthorization.

(d) If EPA denies a preauthorization because of an insufficient balance in the Fund or the low priority assigned to the response action when weighed against other applications or uses of the Fund, the applicant may resubmit the application in another fiscal year. If preauthorization is denied because of the inability of the applicant to demonstrate his experience and capabilities, the applicant may resubmit the application form only after correcting the deficiencies, or by proposing an alternative approach.

(e) If EPA grants preauthorization, the applicant may begin the approved response action subject to the terms and

conditions contained in the PDD. The applicant, as a condition of preauthorization, shall assure that the lead agency shall have such site access as may be necessary for oversight and monitoring.

(f) If the applicant is unable to initiate or complete the preauthorized response action, the applicant shall immediately notify EPA in writing.

(g) EPA will not grant preauthorization for any response actions where:

(1) The proposed action is not a response action authorized under CERCLA;

(2) There is a significant threat to the public health or the environment caused by acute threat of fire, explosion, direct human contact with a hazardous substance, or other similar hazardous situations requiring immediate action, and there is insufficient time to process an application for preauthorization;

(3) The proposed response is a remedial action and the site is not on the NPL; or

(4) The action is to be performed by a State, political subdivision, Indian Tribe through an assistance agreement with the United States, or a person operating pursuant to a contract with the United States.

(h) EPA will deny preauthorization to a person whom the Agency believes is a liable party under section 107 of CERCLA unless negotiations are underway aimed at reaching a judicial or administrative settlement. Such parties may be preauthorized under this paragraph to submit claims to the Fund for response costs up to the maximum amount specified in the PDD.

Subpart C—Procedures for Filing and Processing Response Claims

§ 307.30 Requesting payment from the potentially responsible party.

(a) A claimant must present all claims to any person who is known to the claimant and who may be liable under section 107 of CERCLA at least 60 days before filing a claim against the Fund. The presentation to the potentially responsible party must be a written request for payment, delivered either by certified mail (return receipt requested) or in such a manner as will establish the date of receipt. At a minimum this request must contain:

- (1) The name of the claimant (commercial entity or individual);
- (2) The name, title, and address of any authorized representative;
- (3) The location of the release and cleanup;
- (4) The date of the release, if known;
- (5) The owner of the property, if other than the claimant;

(6) A description of the response action taken; and

(7) The amount of the request (in dollars);

(8) If applicable, notice of intent to file a subsequent application for preauthorization or claim against the Fund for additional operable units or for a stage of a response action.

(b) Where the potentially responsible party is unknown, the claimant must make a good-faith effort to identify the potentially responsible party prior to submitting a claim. If the potentially responsible party is identified, the claimant must then comply with the procedures of § 307.30(a). Where a potentially responsible party cannot be identified, the claimant may submit a claim to the Fund pursuant to § 307.31. Claims submitted under this paragraph must be accompanied by documentation of efforts to identify potentially responsible parties.

(c) If the claimant and the potentially responsible party agree to a settlement involving a release from liability, the claimant may submit a claim against the Fund for any costs that are not recovered provided the claimant complies with the provisions of § 307.20(c), which require EPA's prior approval of such releases from liability.

(d) If the claim is denied by the potentially responsible party, or has not been satisfied after 60 days of presentation to such party, the claimant may submit a claim to the Fund in accordance with § 307.31.

(e) If the first claim was denied by the potentially responsible party or not responded to, and EPA agrees that there is no reason to believe that subsequent claims would be honored by such potentially responsible party, the denial of the first claim, or lack of response, shall be considered denial of every subsequent claim.

§ 307.31 Filing procedures.

(a) A response claim must be submitted on EPA Form 2075-4 and must include:

(1) Documentation showing that the claimed response activities were preauthorized by EPA;

(2) Documentation showing that the response activity was accomplished in a manner consistent with the PDD, noting any deviation from preauthorized activities;

(3) Documentation that a search to identify potentially responsible parties was conducted in accordance with § 307.30 and of any contacts with such parties; and

(4) Substantiation that all claimed costs are necessary costs.

(b) Claimants (or their authorized representatives) may amend their claims at any time before final action by EPA. Amendment of claims after final action by EPA will be allowed only at EPA's discretion. Each amendment must be submitted in writing and must be signed by the claimant or authorized representative. The time limitations of § 307.32(i) refer to the date by which an amendment is filed.

(c) Claimants may not pursue both an action in court against potentially responsible parties and a claim against the Fund at the same time for the same response costs. EPA will return claims presented under this subpart when the Agency determines that a claimant has initiated an action for recovery of the same response costs, in court, against a party potentially liable under section 107 of CERCLA.

§ 307.32 Verification, award, and administrative hearings.

(a) Upon receipt of a response claim, EPA will verify that it complies with all filing requirements. Where the claim is incomplete or has significant defects, EPA will return the claim to the claimant with written notification of its deficiencies.

(b) A claim returned to the claimant for failure to comply with the filing requirements may be resubmitted to EPA.

(c) For purposes of this part, a response claim is deemed perfected when EPA determines that the claim complies fully with the specified filing requirements; i.e., the claim is technically complete. When the claim is perfected, a notice will be provided to the claimant of EPA's receipt and acceptance of the claim for evaluation.

(d) EPA may adjust claims and in making a determination whether costs are allowable, EPA will be guided by the Federal cost principles (non-profit organizations—OMB Circular A-122; States and political subdivisions—OMB Circular A-87; profit-making organizations—48 CFR part 31, subparts 31.1 and 31.2).

(e) In evaluating claims, EPA will determine whether the claimant has settled and satisfactorily completed in accordance with sound business judgment and good administrative practice all contractual and administrative matters arising out of agreements to perform preauthorized response actions. This includes the issuance of invitations for bids or requests for proposals, selection of contractors, approval of subcontracts, settlement of protests, claims disputes, and other related procurement matters. EPA will examine how the claimant

assured (e.g., by the use of a subcontract administration system) that work was performed in accordance with the terms, conditions, and specifications of such agreements.

(f) Awards will be made:

(1) Only for necessary costs of completing the response action or stage of an operable unit or of a response action;

(2) Only to the extent that the response actions were preauthorized by EPA pursuant to § 307.23;

(3) Only to the extent that the cleanup was performed effectively, as provided in 40 CFR 300.120(e)(3) and 300.400(h); and

(4) Only to the extent that the cleanup was performed in compliance with the terms and conditions of the PDD.

(g) No award will be made on a claim where the claimant has purported to release a potentially responsible party from liability to the United States for the same costs unless EPA has approved the release in advance.

(h) Where a response action is determined to have been ineffective due to acts or omissions of the claimant, his employees or agents, or any third party having a contractual relationship with the claimant, payment of the claim will be adjusted accordingly. EPA may require the claimant to submit any additional information needed to determine whether the actions taken were reasonable and necessary.

(i) For claims submitted in connection with a settlement reached under section 122(b)(1) of CERCLA only, interest will be paid on amounts due if EPA fails to pay the amount within 60 days of a perfected claim.

(1) Interest shall accrue on the amounts due the claimant where EPA fails to pay the claim for the preauthorized response action within 60 days of EPA's receipt of a perfected claim.

(2) Where the claim is technically complete but EPA requires additional information in order to evaluate the amount claimed, the period as stated in paragraph (i)(1) of this section or the accrual of interest is suspended from the date the Agency requests the information from the claimant until the date the requested information is received.

(3) Where a claim is denied in whole or in part by EPA, and the claimant requests an administrative hearing in accordance with paragraph (o) of this section, interest on the disputed amount begins to accrue 50 days after an award by the Administrative Law Judge, unless an appeal is filed. If either party files an appeal with a Federal district court,

interest will not accrue until 20 days after the final judicial decision.

(4) The rate of interest paid on a claim is the rate of interest on investments of the Fund established by Subchapter A of Chapter 98 of the Internal Revenue Code of 1954.

(j) For claims submitted in connection with a settlement reached under section 122(b) of CERCLA, a preauthorized potentially responsible party will be entitled to full reimbursement only where the response action is conducted in complete satisfaction of the requirements set forth in the consent order or decree.

(k) Future site-specific actions required by preauthorized potentially responsible parties, and any future obligations on the Fund, shall be governed by § 307.42.

(l) Any withdrawal of preauthorization will be preceded by written notice from EPA. The application for preauthorization will be deemed invalid and no award will be made from the Fund where the claimant is determined by EPA to be liable under section 107 of CERCLA for the costs for which the claim is made, and the application for preauthorization did not disclose that the claimant may be a person described as follows:

(1) The owner and operator of a vessel or a facility;

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

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

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

(m) If EPA determines that it cannot complete its evaluation of a claim because of insufficient information, it will request the necessary information from the claimant. If EPA determines that it cannot complete its evaluation of a claim because the records, documents, and other evidence were not maintained in accordance with generally accepted accounting principles and practices consistently applied, or were for any

reason inadequate to demonstrate that claimed costs are necessary costs, EPA will adjust the claim accordingly. Further consideration of such amounts will depend on the adequacy of subsequent documentation. Any additional information requested by EPA must be submitted within 30 days, unless a different period of time is specified by EPA. The failure of the claimant to provide in a timely manner the requested information without reasonable cause may be cause for denial of the claim.

(n) Once the claim is perfected, EPA will proceed to:

- (1) Make an award on the claim; or
- (2) Decline to make an award.

(o) If the claimant is dissatisfied either with EPA's denial of a claim or with the amount of an award, the claimant may request that EPA arrange an administrative hearing in accordance with section 112(b) of CERCLA. The request for an administrative hearing must occur within 30 days of being notified of EPA's decision.

(p) Notice of an award under paragraph (f) of this section will be given by First Class Mail within five (5) days of the date of the decision. Payment of approved claims will be made according to § 307.40.

§ 307.33 Records retention.

A claimant receiving an award from the Fund is required to maintain all cost documentation and any other records relating to the claim, and to provide EPA with access to such records. These records must be maintained until cost recovery is initiated by EPA. If, after ten (10) years from the date of award of the final claim, EPA has not initiated a cost recovery action, the claimant need no longer retain the records. The claimant shall, however, notify EPA of the location of the records, and allow EPA the opportunity to take possession of the

records before they are destroyed. The claimant shall cause to be inserted in all agreements between itself and contractors performing work at the site a clause providing for the same requirement to maintain records and to provide access to records as that required of the claimant.

Subpart D—Payments and Subrogation

§ 307.40 Payment of approved claims.

(a) Payment of claims will be made, as applicable, within:

- (1) 50 days of EPA's decision to make an award, if the claimant does not request an administrative hearing;
- (2) 50 days of an award by an administrative tribunal if no appeal of such award is taken; or
- (3) 20 days of the final judicial decision of any appeal taken.

(b) Payment of a claim shall not be seen as EPA's final acceptance of the claimant's response action. Final acceptance shall await EPA's determination that the response action was conducted in accordance with the terms and conditions of the PDD or the consent order or decree, as applicable.

§ 307.41 Subrogation of claimants' rights to the Fund.

(a) The United States acquires by subrogation all rights of the claimant to recover the amount of the claim paid by the Fund from the person or persons liable under section 107 of CERCLA for the release giving rise to the response action.

(b) Claimants shall assist in any cost recovery action that may be initiated by the United States. The claimant and the claimant's contractors shall furnish the personnel, services, documents, and materials needed to assist EPA in the collection of evidence to document work performed and costs expended by the claimant or the claimant's

contractors at the particular site in order to aid in cost recovery efforts. The claimant and the claimant's contractors shall also provide all requested assistance in the interpretation of documents detailing work and costs that may be needed as evidence, and shall testify on behalf of the United States in any judicial or administrative cost recovery proceeding regarding the response costs claimed. All of the claimant's contracts for implementing the PDD shall expressly require their contractors to provide this cost recovery assistance.

§ 307.42 Fund's obligation in the event of failure of remedial actions taken pursuant to CERCLA Section 122.

(a) In the case of the failure of a completed remedial action taken by a potentially responsible party pursuant to a remedial action preauthorized in connection with a settlement under section 122(b)(1) of CERCLA, the Fund shall be available for the costs of any new cleanup required, but shall not be obligated to a proportion exceeding that proportion contributed by the Fund for the original remedial action.

(b) The Fund is not obligated by preauthorization of a response action to reimburse the claimant for subsequent remedial actions if those subsequent remedial actions are necessary as a result of the failure of the claimant, his employees or agents, or any third party having a contractual relationship with the claimant to properly perform authorized activities or otherwise comply with the terms and conditions of the PDD, and the Consent Decree or order regarding the site cleanup entered into by EPA and the claimant.

Appendix A to Part 307—Application for Preauthorization of a CERCLA Response Action



United States Environmental Protection Agency
Washington, DC 20460

Form Approved, OMB No. 2050-0106
Expiration Date 12-31-94

Application for Preauthorization of a CERCLA Response Action

General Instructions: Complete all items in ink or by typewriter. If an item is not applicable to your preauthorization request, write "N/A" in the appropriate space. Attach typewritten sheets for additional information. Specific instructions are presented on page 3 of this form.

I. Introductory Material

A. Name, Title and Address of Applicant(s):

B. Name of Site:

C. Eligibility:

- ☐ Individual ☐ PRP
☐ Firm ☐ Other
☐ Foreign Applicant

D. Name, Title and Address of Agent (if any) Authorized to Represent the Applicant:

II. Relates to Actual or Threatened Release of a Hazardous Substance, Pollutant or Contaminant

A. Date/time (am/pm) of release (if known):

B. Location of the release:

C. Is the release or threat of release at an NPL site? ☐ Yes ☐ No If yes, what is the site name on the NPL?

D. Provide a short description of the release or threat of release:

E. Did you contact the National Response Center? ☐ Yes If yes, provide the date and the manner of the notice:

☐ No If no, explain why not:

III. Relates to Potentially Responsible Parties (PRPs)

A. Are you a person whom EPA previously identified as a PRP for the site in question? ☐ Yes ☐ No

If yes, provide date of notice letter:

B. If you have not been identified as a PRP, do you fall within one of the four categories of potentially liable parties set forth in section 107(a) of CERCLA? ☐ Yes ☐ No

If yes, describe why.

C. Is this application to be approved in the context of a consent order or decree? ☐ Yes ☐ No

If yes, provide information as to the status of the settlement negotiations, provide the name of the relevant EPA contact person, and attach the most recent draft of any settlement agreement.

D. Have you identified any PRPs for the release or threat of release in question? ☐ Yes ☐ No

If yes, attach a list of known PRPs and describe the results of any contacts with them.

If no, describe efforts to identify PRPs.

IV. Relates to Proposed Response Action

A. Briefly summarize the proposed response action and attach a schedule of major response activities.

B. Identify which provisions of the National Contingency Plan (NCP) are applicable for the proposed types of response activity (e.g., removal, RI/FS) and describe how the proposed action will be conducted in accordance with those provisions.

C. Address how the proposed response action will be consistent with the NCP with regard to the following performance standards:

1. Worker training, health and safety, and the safety of the public.
2. Community relations plan.
3. Compliance with legally applicable, or relevant and appropriate, Federal and State environmental requirements (ARARs).

V. Relates to Applicant's Capabilities

Describe your capabilities to carry out the proposed response actions.

VI. Relates to State or Indian Tribe Consultation

Has a letter signed by the designated State or Indian Tribe official been attached? ☐ Yes ☐ No If no, explain.

VII. Relates to Long-Term Operations and Maintenance (O&M) (if applicable)

☐ I will provide a bond or other financial assurance for O&M. ☐ The State has agreed to provide for O&M.

Attach documentation to support your assertion.

VIII. Relates to Projected Costs

A. Provide the projected costs for each proposed response activity and attach an explanation of why each of these costs is "necessary."

1. _____	\$ _____
2. _____	\$ _____
3. _____	\$ _____
4. _____	\$ _____
TOTAL	\$ _____

B. Provide a proposed schedule for the submission of claims.

IX. Relates to Project Management

A. Describe the management structure to be put in place to implement the proposed project and to control financial matters.

B. Describe your procedures for comprehensively documenting the work performed and the costs incurred for all phases of the proposed response action.

C. Describe your procedures for reporting to EPA on the progress of the proposed project and for EPA oversight.

D. Describe your proposed procurement procedures.

Certification

I certify that all information herein is true to the best of my knowledge. I agree to supply additional information, as requested, in support of this application and access to the site for purpose of inspection.

Signature of Applicant

Date

CERCLA Penalty for Presenting Fraudulent Claim

Any person who knowingly gives or causes to be given false information as a part of a claim against the Hazardous Substance Superfund may, upon conviction, be fined in accordance with the applicable provisions of Title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. (42 USC 9612 (b)(1))

Civil Penalty for Presenting Fraudulent Claim

The claimant is liable to the United States for a civil penalty of \$2,000 and an amount equal to two times the amount of damages sustained by the Government because of the acts of that person, including costs of the civil action.

Criminal Penalty for Presenting Fraudulent Claim or Making False Statements

The claimant will be charged a maximum fine of not more than \$10,000 or be imprisoned for a maximum of 5 years, or both. (See 62 Stat. 698, 749; 18 USC 287, 1001)

INSTRUCTIONS TO APPLY FOR PREAUTHORIZATION OF A CERCLA RESPONSE CLAIM

This form is to allow parties to apply for EPA preauthorization of a claim against the Hazardous Substances Superfund (Fund) as authorized by sections 111(a)(2) and 112 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). EPA preauthorization is required before a party can begin response work if that party desires Fund reimbursement of his/her response costs. The regulatory procedures for obtaining preauthorization from EPA are found at 40 CFR Part 307. The public reporting burden for the completion of this form is estimated to vary between 186 and 330 hours—averaging 258 hours per application. These estimates include the time needed to review instructions, search existing data services, gather and maintain the data needed for completing and reviewing the collection of information. Any comments concerning the burden estimate (including suggestions for reducing the burden) or any other aspect of this form should be sent to the following addresses:

Chief, Information Policy Branch, PM-223
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

and
Office of Information and Regulatory Affairs
Office of Management and Budget
726 Jackson Place, N.W.
Washington, D.C. 20503
Attention: Desk Officer for EPA

The applicant bears the burden for demonstrating that scarce Fund resources should be utilized for this project. Consequently, all preauthorization applications should be factually thorough, well-documented and based on sound analysis. Due to the complexity of the issues involved, it is in the applicants' best interest to organize the submission so that it can be easily read by EPA officials.

In many cases, the spaces provided on this form will be insufficient for a full presentation of the information solicited. In such circumstances, the applicant shall attach typewritten sheets and provide clear cross-references between the items on this form and the attachments.

A number of items will also require that the applicants provide appendices. In these appendices, the applicants shall supply sufficient documentation to support the statements presented in the form. Since it would be impractical and undesirable to include all supporting data, the appendices should usually consist of detailed summaries of the primary data. However, the original documents should be identified, catalogued and available for presentation, if requested. As with the attachments, the applicant shall provide clear cross-references between this form and the appendices.

Applicants should consult 40 CFR section 307.22(g) to assert any claims of business confidentiality.

When completed this form should be sent to:
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460
Attention: Director, Office of Emergency and Remedial Response (OS-220)

The sections below provide instructions for particular items on the claim form.

- I. A. Provide the name, title and address of the person(s) submitting this application. If the claim is submitted by a group of persons who have created a legal entity to act as claimant, information should be provided concerning the identity and location of both the entity and the constituent parties.
- B. Self-explanatory.
- C. Check all that apply.
- D. "Agent" refers to any duly authorized agent, executor, administrator or other legal representative of the applicant. If this preauthorization application is submitted by such an agent, he/she must present evidence of authority to so represent the applicant. (See 40 CFR Section 307.20).
- II. A-C. Self-explanatory.
- D. This description must include the following information: the type of vessel and facility; the type and quantity of hazardous substance (including whether the substance is listed under CERCLA section 102); and a description of the surrounding population and/or environmental risk.
- E. Self-explanatory.
- III. A. Check whether you are a person who EPA previously identified as a potentially responsible party (PRP).
- B. Check whether you have reason to believe, without regard to whether a defense under Section 107(b) may be available, that you may be a person described as follows:
 - 1) the owner or operator of a vessel or facility
 - 2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
 - 3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substance, or
 - 4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person, from which there is a release, or a threatened release of a hazardous substance, which causes the incurrence of response costs.
- C. If you checked YES for item A or B and NO for this item, explain why this application is not to be approved in the context of a consent order or decree. Describe the status of any settlement negotiations.
- D. List all PRPs known to you. Describe any contacts with PRPs and any reply from such parties. If PRPs are unknown, describe efforts to locate PRPs.
- IV. A. Self-explanatory.
- B. Describe the response action(s) that is the subject of this request (e.g., removal, RI/FS, selection of remedy, design, construction), and methods proposed for carrying out such actions, including site sampling plan and quality assurance procedures. Address the requirements contained in 40 CFR 307.22.
- C. Worker/community health and safety plan. The worker plan must comply with OSHA Safety and Health standards at 29 CFR Part 1910.120. The community plan must address the protection of area residents from the physical, chemical and/or biological hazards particular to the site and the selected response.
Community Relations Plan. The applicant need not develop a plan if the response action is of short duration or a community relations plan already exists for the site at issue.
ARARs. See 40 CFR Sections 300.400(g), 300.430(f)(3)(iv).
- V. Include a discussion of financial and technical/scientific capabilities.
- VI. If a letter of cooperation signed by the designated State or Indian Tribe is not attached to an application to undertake a remedial action, explain efforts made by the applicant to obtain such cooperation.
- VII. Self-explanatory.
- VIII. A. The figures provided on the form should be the overall cost for a particular type of response activity (e.g., removal, RI/FS, design). Documentation should be attached to support each cost figure. In addition, the applicant must explain why each of the proposed costs is "necessary." "Necessary" costs are those which are 1) required, 2) reasonable, 3) allowable and 4) allocable according to Federal cost principles. Federal cost principles are presented in the following documents: OMB Circular A-87 (State and local government and Federally recognized Indian Tribes); OMB Circular A-122 (non-profit organizations); 48 CFR sections 31.1, 31.2 (profit-making organizations).
- B. A proposed schedule for the submission of claims should be provided. Applicants are encouraged to propose reimbursement based upon cash-flow considerations. The goal of an applicant should be to balance major capital expenditures and the completion of discussed tasks against the number and frequency of claims.
- IX. Self-explanatory.



United States Environmental Protection Agency
Washington, DC 20460

Claim for CERCLA Response Action

Form Approved. OMB No. 2050-0106
Expiration Date 12-31-94

General Instructions: Complete all items in ink or by typewriter. If an item is not applicable to your claim, write "N/A" in the appropriate space. Attach typewritten sheets for additional information. Specific instructions are presented on page 3 of this form.

I. Introductory Material

A. Name, Title and Address of Claimant(s):

B. Name of Site:

C. Preauthorization Decision Document (PDD):

Number: _____

Date: _____

(attach copy)

D. Name, Title and Address of Agent (if any) Authorized to Represent the Claimant:

II. Relates to Potentially Responsible Parties (PRPs)

A. Has the claimant made a reasonable effort to identify any PRPs (other than any who may be parties to this claim)? Describe those efforts.

B. Has the claimant presented a request for reimbursement to known PRPs (other than any who may be parties to the claim)?

☐ Yes ☐ No

Attach names, addresses and dates of presentation. Describe any responses.

C. If a partial settlement was reached with PRPs after presentation of the claim as described in II.B., did EPA approve any release?

☐ Yes ☐ No If no, explain.

D. Is there any action pending in court regarding this site or response actions?

☐ Yes ☐ No If yes, explain.

III. Relates to Claims for a Preauthorized Phase

A. Is this a claim for a preauthorized phase? ☐ Yes ☐ No

If no, provide the completion date of the subject response action and skip B, C, D and E.

B. How many claims are authorized in the PDD?

C. For which preauthorized phase are you filing a claim at this time?

D. Is completion of the next preauthorized phase on schedule?

☐ Yes ☐ No If no, explain.

E. Estimated date for submitting claim for the next preauthorized phase.

IV. Relates to Response Action

A. Was the response/preauthorized phase completed in accordance with the PDD? ☐ Yes ☐ No If yes, skip B

B. Was a modification to the preauthorization request submitted to and approved by EPA?

☐ Yes -- Supply number and date _____

☐ No -- Explain how and why response differs from PDD.

C. Was the response completed in accordance with the Statement of Work and the Work Plan? ☐ Yes ☐ No If yes, skip D

D. Explain how and why the response differs from the Statement of Work and/or the Work Plan.

E. Address how each of the PDD terms and conditions were met (in the order that they appear in the PDD). Provide documentation of such adherence in an appendix.

F. Provide the name and address of the location where all cost documentation and any other records relating to the claim will be maintained.

V. Relates to Amount of Response Claim**A. Provide the following summary information:****Re: Current Claim Submission.**

Type of Response Activity(ies) Represented by Claim - _____
Total Eligible Response Costs Represented by Claim - \$ _____
Percentage of Claimed Costs to Total Response Costs - _____ %
Dollar Amount of Reimbursement Claimed - \$ _____

Re: Any Past Claim Awards Under the Subject PDD:

Number of Previous Claims - _____
Total Sum of Previous Awards - \$ _____

Re: PDD:

Reimbursement Cap Set For All Claim Submissions - \$ _____

B. Provide the following breakdown of the eligible response costs asserted in this claim submission:

Labor \$ _____
Travel \$ _____
Equipment \$ _____
Materials and Supplies \$ _____
Contractual Services \$ _____
Other Direct Costs \$ _____
Indirect Costs \$ _____

TOTAL RESPONSE COSTS \$ _____

With the exception of contractual services, provide detailed summaries of the components of each of the above cost categories. Address how the costs incurred were required under the PDD and reasonable, allowable and allocable according to Federal cost principles. Specify which of the Federal cost principles were used and explain the basis for that selection.

C. Provide a cost breakdown of all contractual services performed for this claim submission. Explain how the incurred costs were required under the PDD and reasonable, allowable and allocable according to Federal cost principles. Specify which of the Federal cost principles were used and explain the basis for that selection.**Certification**

I certify that all information herein is true to the best of my knowledge. I agree to supply additional information, as requested, in support of this application and access to the site for purpose of inspection.

Signature of Claimant

Date

CERCLA Penalty for Presenting Fraudulent Claim

Any person who knowingly gives or causes to be given false information as a part of a claim against the Hazardous Substance Superfund may, upon conviction, be fined in accordance with the applicable provisions of Title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. (42 USC 9612 (b)(1))

Civil Penalty for Presenting Fraudulent Claim

The claimant is liable to the United States for a civil penalty of \$2,000 and an amount equal to two times the amount of damages sustained by the Government because of the acts of that person, including costs of the civil action.

Criminal Penalty for Presenting Fraudulent Claim or Making False Statements

The claimant will be charged a maximum fine of not more than \$10,000 or be imprisoned for a maximum of 5 years, or both. (See 62 Stat. 698, 749; 18 USC 287, 1001)

INSTRUCTIONS FOR SUBMITTING A CLAIM FOR A CERCLA RESPONSE ACTION

This form is for claims against the Hazardous Substances Superfund as authorized by sections 111 (a)(2) and 112 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). Claims can only be awarded for reasonable response costs incurred pursuant to a preauthorization decision document (PDD) issued by EPA. The regulatory procedures for obtaining preauthorization from EPA and for the submission and award of claims are found at 40 CFR Part 307.

The public reporting burden for the completion of this form is estimated to vary between 25 and 59 hours -- averaging 42 hours per claim. These estimates include the time needed to: review instructions, search existing data sources, gather and maintain the data needed, and complete and review the collection of information. Any comments concerning the burden estimate (including suggestions for reducing the burden) and any other aspect of this form should be sent to the following addresses:

Chief, Information Policy Branch, PM-223
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

and

Office of Information and Regulatory Affairs
Office of Management and Budget
726 Jackson Place, N.W.
Washington, D.C. 20503
Attention: Desk Officer for EPA

The claimant bears the burden for demonstrating that his response costs should be reimbursed. Consequently, all claim submissions should be factually thorough, well-documented and based on sound analysis. Due to the complexity of the issues involved, it is in the claimant's best interest to organize the submission so that it can be easily read by EPA officials.

In many cases, the spaces provided on this form will be insufficient for a full presentation of the information solicited. In such circumstances, the claimant shall attach typewritten sheets and provide clear cross-references between the items on this form and the attachments.

A number of items will also require that the claimants provide appendices. In these appendices, the claimant shall supply sufficient documentation to support the statements presented in the form. Since it would be impractical and undesirable to include all supporting data, the appendices should usually consist of detailed summaries of the primary data. However, the original documents should be identified, catalogued and available for presentation, if requested. As with the attachments, the claimant shall provide clear cross-references between this form and the appendices.

Claimants should consult 40 CFR Section 307.22 (g) to assert any claims of business confidentiality.

When completed, this form should be sent to: U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460
Attention: Director, Office of Emergency and Remedial Response (OS-220)

The sections below provide instructions for particular items on the claim form.

- I. A. Provide the name, title and address of the person(s) submitting this claim. If the claim is submitted by a group of persons who have created a legal entity to act as claimant, information should be provided concerning the identity and location of both the entity and the constituent parties.
- B. Provide the site name as it appears on the PDD.
- C. Supply the number and date of the PDD for this claim. A copy of the PDD shall also be provided in an appendix. If the claimant has been granted preauthorization to modify the PDD, these amendments must be described and copies provided.
- D. "Agent" refers to any duly authorized agent, executor, administrator or other legal representative of the claimant. If this claim is submitted by such an agent, he/she must present evidence of authority to so represent the claimant.
- II. A. Self-explanatory.
- B. Pursuant to 40 CFR Section 307.33(e), if 1) the first claim was denied by the responsible party or not responded to within 60 days, and 2) EPA agrees that there is no reason to believe that subsequent claims would be honored by such responsible party, the denial of the first claim, or lack of response, shall be considered a denial of every subsequent claim. The claimant may seek EPA's agreement at any time a claim is presented. The claimant will be advised of EPA's agreement when the claimant is notified in writing regarding the award or denial of the claim.
- C.-D. Self-explanatory.
- III.-IV. Self-explanatory.
- V. A. Self-explanatory.
- B. This item is concerned with the actual response costs incurred during the time period represented by this claim submission -- not the percentage of those response costs for which the claimant is seeking reimbursement. Federal cost principles are presented in the following documents: OMB Circular A-87 (State and local governments and Federally recognized Indian Tribes); OMB Circular A-122 (non-profit organizations); 48 CFR 31.1, 31.2 (profit-making organizations). If the claim represents more than one stage of response activity, indicate this on the form and provide similar cost breakdown in an appendix. These instructions are applicable to Item V.C. below.
- C. Contractual services will vary depending on the response action performed and the operable unit represented by the claim submission. Typical categories of response activity include:
 - Security
 - Groundwater sampling
 - Construction
 - Administrative Expenses
 - Materials
 - Operation & Maintenance.

Appendix C to Part 307—Notice of Limitations on the Payment of Claims for Response Actions, Which is to be Placed in the Federal Register Preamble Whenever Sites Are Added to the Final NPL

Limitations on the Payment of Claims for Response Actions

Sections 111(a)(2) and 122(b)(1) of CERCLA authorize the Fund to reimburse certain parties for necessary costs of performing a response action. As is described in more detail at [insert January 21, 1993 citation of publication of this rule], 40 CFR part 307, there are two major limitations placed on the payment of claims for response actions. First, only private parties, certain potentially responsible parties (including States and political subdivisions), and certain foreign entities are eligible to file such claims. Second, all response actions under sections 111(a)(2) and 122(b)(1) must receive prior approval, or "preauthorization," from EPA.

Appendix D to Part 307—Notice of Limitations on the Payment of Claims for Response Actions Which is to be Placed in Public Dockets

Statutory Limitations on the Payment of Claims for Response Actions Filed Pursuant to Sections 111(a)(2) and 122(b)(1) of CERCLA

The Comprehensive Environmental Response, Compensation, and Liability

Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (42 U.S.C. 9601 *et seq.*) authorizes a number of mechanisms for responding to a release, or threat of release, of hazardous substances or pollutants or contaminants. One of these mechanisms is response claims. Section 111(a)(2) of CERCLA authorizes the Environmental Protection Agency (EPA or the Agency) to compensate claimants for necessary response costs if certain conditions are met. Section 122(b)(1) of CERCLA authorizes EPA to reimburse certain potentially responsible parties for a portion of the costs of response actions conducted pursuant to a settlement agreement. These conditions are outlined below.

First, only private parties, parties to section 122(b)(1) agreements (including States and political subdivisions thereof) and foreign entities are eligible for payment through the response claims mechanism. Federal, State, and local government units, and Indian Tribes can receive funding for response activities through other authorities of section 111(a) or section 123 of CERCLA.

Second, eligible claimants can only be reimbursed for costs that are incurred in carrying out the National Contingency Plan (NCP), 40 CFR part 300. In order to be in conformity with the NCP, all claims must receive prior approval, or "preauthorization," from EPA. This

means that before response work is initiated, the party must:

- (1) Notify EPA of its intent to file a claim;
 - (2) Demonstrate that the release merits priority consideration;
 - (3) Propose activities to remedy the release that can be carried out consistent with the NCP; and
 - (4) Demonstrate the capabilities necessary to carry out such activities in a safe and effective manner.
- In order for potentially responsible parties to be eligible for reimbursement they must conduct the response actions as specified in a Consent Decree or administrative order. Only if EPA preauthorizes a response action can the party begin work, and later file a claim for reimbursement of costs.

The limitations placed on the payment of claims for response actions and the procedures for filing such claims are described in more detail at [insert January 21, 1993 citation of publication of this rule], 40 CFR part 307. Additional information can be obtained by contacting William O. Ross, Office of Emergency and Remedial Response (5203 G), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (703) 603-8798, or the RCRA/CERCLA Hotline, (800) 424-9346 (or (703) 920-9810 in the Washington, DC metropolitan area).

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