

A Tale of Two Sites: How Insured Fixed-Price Cleanups Expedite Protections, Reduce Costs, and Help the EPA, the SEC and the Public

By

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This article compares two waste oil Superfund sites virtually identical in size and character but vastly different in policy approach and cleanup results. The first site employed an Insured Fixed-Price Cleanup (IFC) and, as a result, was cleaned up in nineteen months, at forty percent below estimated costs and with no litigation. At the second site, where an IFC has not been used, cleanup has been stalled for years, estimates of future cleanup costs rise yearly as the site contamination spreads, and more has already been spent on attorneys' fees and other transaction costs than was required to clean up the IFC Site in its entirety. The IFC Site is now being used as public fields and open space; at the non-IFC Site, no beneficial use is foreseeable for years. At the IFC Site, the cleanup was funded solely by the Potentially Responsible Parties (PRPs) who had sent the waste to the Site; at the non-IFC Site, the public has footed the lion's share of the bill. Finally, at the IFC Site, the PRPs identified and set aside from the start funding and insurance for more than twice the estimated cleanup costs; at the non-IFC Site, the Securities & Exchange Commission (SEC) and public have virtually no assurance that the PRPs have even identified, much less set aside, even half of the government-estimated cleanup costs.

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IFCs are a relatively new tool and any of several reasons might discourage or even prevent their use at a particular site. Still, at sites where IFCs are well-suited, they offer enormous public and private benefits. This article is written to urge policymakers in general — at EPA, the SEC, Congress, and the states — to consider IFCs as a way past existing obstacles to Superfund cleanups. It urges policymakers to enact guidance, regulations, and/or statutes to encourage the use of IFCs as an environmental tool. Three specific regulatory suggestions are outlined at the end.

When an IFC was first proposed five years ago for the IFC Site that is the focus of this article—the Portland Bangor Waste Oil (PBWO) Superfund Site in Wells, Maine—the Wall Street Journal foresaw the use of IFCs as holding the potential to “end the tangle of Superfund litigation” and otherwise provide public benefits.¹ In 2000, immediately following judicial entry of the PBWO settlement, officials from the State of Maine hailed the settlement as “revolutionary.”² Finally, in 2002, following the completion of the PBWO cleanup, the Boston Globe revealed that the Wall Street Journal and the State of Maine's prognoses were on the mark: “The Portland-Bangor Waste Oil site was once one of Maine's most polluted and poisonous eyesores. . . . Today it is a grassy field where the community will host games for children and choose a name for the site from a school contest”³

Five years into their history, IFCs have proven to be an important environmental tool by the results at the PBWO Site and at over 50 other sites. The PBWO Site cleanup was directed by the State of Maine. The non-IFC Site, by contrast, is being led by EPA. Presently, most IFC sites are not federal sites of any kind. This article discusses why policymakers, both state and federal, should encourage IFCs.

I. The Two Sites

A. PBWO. The site where an IFC achieved a timely and cost-effective cleanup—with adequate funds and insurance provided up front—is the Portland Bangor Waste Oil (PBWO) Superfund Site in Wells, Maine.

As set forth more fully in the judicial consent decree entering the *PBWO* settlement, *State of Maine v. U.S. and Settling Nonfederal Defendants*, No. 00-64-B-C (D. Me. May 30, 2000), approximately 3,000 PRPs had allegedly sent their waste oil to the site. The decree was entered on May 30, 2000. Approximately 60% of the PRPs contributed about \$15M, an amount that the Cleanup Contractor (TRC Companies, Inc.) believed was sufficient under an IFC model to complete the cleanup and purchase enough insurance and bonding to cover potential costs increases up to \$30M. Nineteen months later—less than 1/5 the average federal cleanup time—the cleanup was done, and less than a year after that, a site-naming contest was held by the local elementary school and a community celebration held on the site's new fields.⁴ Nowhere else in Superfund's twenty-two-year history has a cleanup of this size and complexity been accomplished with such speed and obvious public benefits.⁵

B. *Beede*. By contrast, roughly fifty miles to the west of the PBWO cleanup, progress at the Beede Waste Oil Superfund Site (*Beede*) cleanup has languished for years. The majority of the *Beede* site PRPs (as measured by their respective waste volumes) collectively asked EPA to allow the same Cleanup Contractor and Insurer that accomplished the PBWO IFC to try an IFC at *Beede*. Whether consciously or not, EPA has discouraged the IFC effort, through refusals to meet, imposition of changing conditions, and in other ways.⁶ In the interim, EPA's mostly-administrative costs have grown to over \$20M, the plumes have spread, and the PRPs have spent millions of dollars on attorneys' fees and other non-cleanup costs, precisely the type of costs that Congress and Presidents have long identified as perhaps the most critical problem in the Superfund Program.

Decades have passed since the regulators were first put on notice of the *Beede* Site's problems, yet cleanup still remains years away and with no identified plans for any beneficial re-use. Whereas an IFC allows all PRPs to settle from the outset, EPA has allowed only the smallest of the *Beede* PRPs to settle (less than

ten percent of the total by waste volume). Moreover, those PRPs who were allowed to settle were required to do so at a price roughly twenty percent more than they could have under an IFC, because EPA's approach does not reflect any of the cost advantages presented by an IFC (discussed in Section III, below). The purpose here is not to "bash" the specific regulators involved at the *Beede* Site. As noted, IFCs are a relatively new tool and common misconceptions about them remain (see Section VI, below). Moreover, two EPA Regions (Regions II and IX) have been very receptive to, and have in fact implemented (though the Region IX model is somewhat different from that which is proposed here). The point of this article is to encourage policymakers in general to consider IFCs where appropriate as a cost-effective and environmentally sound solution.

II. The Mechanics of an Insured Fixed-Price Cleanup (IFC)

The mechanics of an IFC are probably best explained through the use of a hypothetical. Assume a Site (Site X) that has an EPA estimated cleanup cost of \$100M and where the waste came from sixty PRPs, fifty of whom each sent one percent of the waste (and therefore likely qualify as "De Minimis" PRPs under EPA's Policies⁸), and ten of whom each sent five percent of the waste (and therefore are considered "Major" PRPs). In a nutshell, the PRPs transfer into a "Cleanup Account" sufficient funds to accomplish the entire cleanup. The sufficiency of the funds is first triplechecked by three independent entities—the Contractor, the Insurer, and the Government—each of whom has a vested incentive to ensure the adequacy of the funds. (The separate incentives of these three entities to ensure adequacy of funding is explained in Section IV.B). Simultaneously, the PRPs collectively purchase an insurance policy that provides at least twice the estimated costs of the cleanup. Thus, at the \$100M Site X, the PRPs might put \$100M into the Cleanup Account plus pay the Insurer a \$20M premium in order to obtain another \$100M in cleanup costs through insurance. In this way, for \$120M, the PRPs have assured EPA that \$200M in cleanup costs will be available.

In return for the \$20M premium, the Insurer is obligated to EPA to: (1) hold the estimated cleanup costs in the Cleanup Account and pay those funds to the Contractor only as the cleanup is accomplished; and (2) provide another \$100M in cleanup costs if the costs exceed the amount held in the Cleanup Account. The Insurer has every motivation to limit the amount paid to the Contractor (*i.e.*, pay only those costs that are reasonably incurred), because if the \$100M in the Cleanup Account is used up before the cleanup is complete, the Insurer must provide up to another \$100M to complete the cleanup. If the Insurer fails in this, EPA can look to the Major PRPs for completion of the cleanup. In most cases — and under the policy approach advocated in this article — the government gives up nothing under an IFC; it loses no rights with respect to any PRP, and it gains rights with respect to a new and voluntary PRP — the Cleanup Contractor. The Contractor voluntarily becomes a PRP and thus remains entirely subject to the government's control, forever, with respect to the type and adequacy of the cleanup. If the Contractor becomes bankrupt or fails in any other respect, the government still has the balance of the \$100M in the Cleanup Account *plus* another \$100M in Insurance Proceeds. Finally, if the Cleanup Account and Policy are exceeded, then just as the government can do under today's settlement policies, the government can still pursue the Major PRPs.⁹ The *only* PRPs who get a full release are the De Minimis PRPs — the same ones that get full releases under today's policies. Bottom line: The government merely gains a new and voluntary PRP and gives up none of its authority with respect to the pre-existing PRPs. Further details concerning the mechanics can be found in the *PBWO* Consent Decree.¹⁰

III. Public and Private Cost Savings

Under an IFC, cost savings are achieved in at least four significant ways:

1. Lower Premium for Equal Coverage.

Continuing with the \$100M Site X hypothetical, under EPA's Settlement Policy, each individual Major PRP who settled under EPA's current policies would

need \$7.5M to settle with EPA. This number is reached by taking the PRP's five percent share of \$100M to get \$5M and then adding to that number a fifty percent premium to protect EPA in case of cost overruns up to \$200M.¹¹ De Minimis PRPs—who today are eligible to obtain complete releases from EPA with no chance of reopeners—are typically required to pay a one hundred percent premium, thus increasing their one percent contribution (\$1M) to a total contribution of \$2M. Total contributions from all PRPs would be \$175M. By contrast, through the private insurance market, the PRPs could buy insurance that similarly covered cost increases of up to one hundred percent (*i.e.*, up to \$200M), but only pay a fifteen to twenty-five percent premium for that coverage. The government would still have the \$200M in available cleanup funds, but for a total cost of around \$120M. Collective savings would be \$55M, or over thirty percent.

As an aside, it is worth noting that, given the availability of this less costly means to obtain protection against cost overruns, EPA's demand that PRPs pay fifty to one hundred percent premiums for coverage that could be purchased for far less in the private market is arguably not allowed under Section 107(a) of the statute, since that provision allows EPA to recover only costs that are "necessary." 42 U.S.C. § 9607(a).

2. Increased Efficiencies in the Cleanup.

The next saving comes from the increased efficiencies of a cleanup done by a single PRP instead of a collective effort by tens, hundreds, or even thousands of PRPs. These savings can be from fifteen to forty percent of the total. Even though the Contractor/PRP remains fully under EPA's direction and must perform the cleanup just as (and as long as) EPA dictates, the IFC model (where the cleanup is done by a single-PRP) enables both the Contractor and the EPA to operate far more efficiently than multiple PRPs can under the traditional approach. At the *PBWO* Site, the Cleanup Contractor accomplished a government-estimated \$25M cleanup for less than \$15M. At the *Beede* Site, the same contractor promised to perform the government-estimated \$46M cleanup for \$40M, even while purchasing insurance to cover cost increases up to \$92M.

3. *Private Transaction Costs Avoided.*

The U.S. General Accounting Office (GAO) has estimated that PRPs spend as much as \$1 in litigation and other transaction costs for every \$2 they spend on the actual cleanup.¹² While this estimate was provided in 1994, the author of this article is unaware of any GAO or other government-sanctioned estimates since then. Some improvements have been made, particularly with EPA's increased use of De Minimis settlements and other administrative reforms. Still, the problem remains, more acutely at some sites than others. At the Keystone Landfill in Pennsylvania, collective legal costs were estimated to exceed the original estimate of cleanups costs.¹³ For purposes of this article, the point is that IFCs can be accomplished with *no* litigation, as happened at the PBWO site. While some legal fees will still be incurred (*e.g.*, to negotiate and enter the settlement), they are only a small fraction of what they could be otherwise.

4. *Public Transaction Costs Avoided.*

At the *Beede* Site, EPA has already spent over \$20M, most of it in the form of transaction costs, such as organizing the PRPs. EPA's own cost model states that, Region by Region, EPA spends twenty-nine to fifty-four percent just in indirect costs (rent, administration, and the like).¹⁴ At the PBWO site, these costs were almost entirely avoided, since the government obtained an early settlement for full relief and left it to the Cleanup Contractor to organize the PRPs and then carry on their work. Although the government remains entirely in control of the Contractor, interacting with one Contractor is, of course, far less costly and far more efficient than interacting with hundreds or thousands of PRPs.

IV. IFCs Promote the Policies of EPA and the SEC

IFCs are not only legal—as evidenced by the court's entry of the *PBWO* decree—but they promote existing EPA and SEC policies and goals.

A. *EPA Policies and Goals*

The ways in which IFCs meet EPA's policies and goals of expediting cleanups and the cost savings were discussed above. This section provides a summary of the goals, it cites EPA Guidance documents that state them, and it discusses the manner in which IFCs meet them.

- EPA has an identified goal of preserving the Superfund (unfortunately, the fund will run out of money next month¹⁵) and encouraging private party cleanups.¹⁶ Because IFCs use only private funds (from PRPs), and because IFC cleanups are done by the PRPs (or the Cleanup Contractor as their agent), IFCs advance these two government goals.

- EPA seeks to minimize its own legal and administrative costs and to focus instead on achieving prompt cleanups.¹⁷ IFCs expedite settlements and enable the EPA to interact with just one PRP (the Contractor) instead of multiple pre-existing PRPs.

- Perhaps in recognition of the fact that most Superfund PRPs did not break the law or act irresponsibly in any other way, EPA has a stated policy goal of reducing PRPs' legal and other transaction costs.¹⁸ IFCs advance this goal because they avoid litigation and promote early settlements, and because through an IFC the pre-existing PRPs pass off to the Contractor the task of interacting with the government during the cleanup.

B. *SEC Policies and Goals*

For over three decades, scholars and other entities have urged the SEC to do more to require publicly traded companies to disclose their environmental liabilities.¹⁹ Despite those calls, one EPA report found that seventy-four percent of companies failed to comply with SEC reporting requirements with respect to environmental liabilities.²⁰ A group of foundations and investment managers, concerned about the hidden costs of environmental liabilities and the effect on their portfolios, urged that the SEC enforce more stringently

the environmental disclosure rules, noting that "the environmental accounting loopholes have not been closed."²¹

Where IFCs are used, they correct this problem. As noted in Section II, before an IFC is implemented, the PRPs must collectively identify how much it will cost to clean up the site *and* insure it against cost overruns. They then collectively set aside those funds by placing the anticipated cleanup costs in a Cleanup Account (more formally called a "commutation" or "experience" account) and also pay the premium for an insurance policy to protect against cost overruns. Thus, under the hypothetical Site X discussed above, the PRPs would at the outset put \$100M into the Cleanup Account and also pay a premium (*e.g.*, \$20M) to obtain insurance to cover costs of up to \$200M. Because the funds required for the Cleanup Account and the policy premium are both funded up front, necessarily the PRPs are identifying and setting aside adequate cleanup funds from the outset.

IFCs also offer an improved method for ensuring that the amount needed for the Cleanup Account is adequately estimated. The amount is not determined solely by the PRPs. As noted above, it is triple-checked by at least three outside entities, each having a vested interest in ensuring that the amount is adequate. First, the Contractor will not agree to take over the cleanup obligations unless it has independently determined that the Cleanup Account has enough funds to pay for it. Second, the Insurer will not agree to insure against cost overruns unless the Insurer is reasonably confident that overruns will not occur. In short, market incentives drive both the Contractor and the Insurer to independently ensure the adequacy of the Cleanup Account. Finally, before an IFC is allowed to proceed, the state or EPA (and often a court) must approve it. That approval will not be given unless the state or EPA (or court) has independently satisfied itself that the Cleanup Account is adequately funded.

Further, the SEC and public are given still greater assurance because, in addition to the Cleanup Account, IFCs have access to insured funding of twice the amount (and sometimes more) of the Cleanup Account.

Finally, in most cases, the SEC and public are given a third layer of protection, which is a full indemnity from the Cleanup Contractor. The degree of protection this third layer offers will depend, of course, on the assets of the Contractor. This article is not suggesting that this third layer of protection is sufficient in itself. The indemnity does, however, add to the protections offered by the separate Cleanup Account and the Insurance, and for this reason it is a net plus for the SEC and the investing public.

V. IFCs Address Government Critiques of the Superfund Program

Findings by the GAO and other government entities over the years show that the problems experienced at the *Beede* Site are neither new nor unique. Many of the problems can be blamed on the structure of the Superfund statute, which was passed hurriedly in December 1980, during the "lame duck" months of the Carter Administration. While much has been done already to improve the Superfund Program, much remains to be done. IFCs are an important tool to overcome many of the problems.

Transaction Costs. As noted above, the GAO has reported that, at Superfund sites, PRPs spend as much as \$1 in litigation and other transaction costs for every \$2 they spend on actual cleanup.²² While some improvement has been made on this number (*e.g.*, the 1995 administrative reforms encouraging *De Minimis* Settlements), IFCs can vastly reduce these transaction costs because they are accomplished from the outset without litigation and because the settlement is offered from the outset to *all* PRPs — small and large.

Delay in Cleanup. In 1998, the GAO found that EPA took an average of 9.4 years from the discovery of the contamination to get a site added to the National Priorities List, and another 8 to 10 years to complete the cleanup.²³ The PBWO remedy was completed in less than one-fourth of that time. There are two reasons for this expedition: (1) a single Contractor-PRP can work far more efficiently than a multi-party PRP group; and (2) the Contractor-PRP has a

vested interest in expediting the cleanup in order to expedite its payments (which are held in a "Cleanup Account" and paid out only as the cleanup is accomplished). It is important to remember, however, that since the Contractor becomes a statutory PRP, EPA will always remain in control of the speed and scope of the cleanup.

A common misconception is that EPA might have to sue the Insurer, or step back in and pay for the entire cleanup if the Insurer and the Contractor were to become insolvent. It would not, at least not under the type of IFC that is discussed in this article. That is because all of the Major PRPs would remain liable to the EPA, and thus EPA could look to them if the Insurer and the Contractor were insolvent or otherwise failed in their obligations. In fact, because IFCs accelerate settlements (largely because the PRPs get a better deal for less money, as described in Section III), EPA is in a *better* position with respect to the PRPs because EPA will not need to sue them — the Major PRPs will have already settled and be bound by a Consent Decree.

Measurable Improvement in Reform. In 2000, the GAO reviewed sixty-two EPA administrative reforms and found that forty-two "did not have a fundamental effect," another six "did not have measures to demonstrate [results]," and another seven had no demonstrated achievements. In all, of sixty-two reforms, only seven had fundamental and measurable effects.²⁴ IFCs have fundamental effects (e.g., lower costs, faster cleanups, greater assurances of funding), all of which are measurable.

Promoting the "Polluter Pays" Principle. IFCs do not rely on the Superfund, but instead use only PRP funds, thus promoting EPA's goal of having the "polluter" pay, rather than the taxpaying public. Furthermore, and related to the "delay in cleanup" principle above, by collecting private funds around a settlement structure that encourages the expedition of cleanup, IFCs expedite cleanups. The problem of delays through lack of public funding is even more acute now that the Superfund has run out of virtually all of its money.

EPA's Inspector General found that shortages in the public funding had led EPA to "slow[] the cleanup of thirty-three highly contaminated hazardous waste sites because of funding shortfalls."²⁶ A Knight Ridder analysis issued in April of this year found that the number of Superfund cleanups completed in fiscal years 2001 and 2002 fell forty-one percent compared with the annual average for the previous eight years. While not a panacea, IFCs' private-funding mechanism helps avoid this.

VI. Common Questions or Misconceptions Regarding IFCs

This section briefly addresses common questions and/or misconceptions regarding IFCs and also identifies sites where they are best applied.

1. *What Factors Make a Site a Good Candidate for an IFC?*

The best sites are those where the expected cleanup costs are \$5M or higher. Where costs are below that, the Contractor's expected margin is not large enough to justify the risks it is taking. Other factors that favor IFCs are (a) a large number of PRPs, or high transaction costs for any other reason, since IFCs reduce or avoid transaction costs; and (b) an outside need for cost certainty—such as a merger, acquisition, or sale—since IFCs provide all sides enormous cost certainty.

2. *Do IFCs Compromise the "Polluter Pays" Principle?*

No. In fact they promote it. IFCs—and the insurance behind them—are entirely funded by PRPs. IFCs reduce the government's (and thus the public's) costs.

3. *Can IFCs Be Done Under Today's Regulatory Framework?*

Yes. IFCs can and already have been accomplished, both at the state and federal level. Yet for reasons that are not always clear, IFCs have not been used as much as they could have.

4. *Does the Government Still Determine the Cleanup Parameters?*

Yes. As noted, the government loses no rights. An IFC merely adds a PRP—albeit a voluntary and well-funded PRP. The government tells the Contractor/PRP what the cleanup should be, and when and whether the cleanup is done.

5. *Will the Government Have to Sue an Insurance Company?*

No. As noted above, the government loses no rights under an IFC. Just as happens under settlements today, under an IFC the government reserves the right to sue all Major PRPs. EPA has expressly insisted on that right, and PRPs have agreed to it. At the same time, to provide the PRPs with increased certainty and to avoid transaction costs, two EPA Regions have said that they will look first to the Contractor/PRP (as funded by the Insurer). If the Contractor fails to meet its obligations, the government can pursue the PRPs.

VII. Regulatory Suggestions

As noted, IFCs are already allowable by law, and they promote public policy, both environmental and financial. What's needed is something to encourage their broader use, particularly at federal sites. Three possible policy tools are (1) a policy presumption favoring the consideration of IFCs; (2) specific numeric goals to encourage the use of IFCs within a stated time frame; and (3) creation and implementation of Guidance.

1. *Policy Presumption.* Under EPA's current settlement policies, Regions are guided to use specific settlement premiums as *presumptive* starting points: one hundred percent premium when the PRPs obtain a full release, and fifty percent when the PRPs obtain a release that is subject to "re-openers" (e.g., if the remedy fails). See Section III(1), above. While the Regions are not firmly bound by these presumptions, where the presumptions are departed from, the Regions are directed to explain the departure in writing.²⁶ The same approach could be used for IFCs. Whereas they should not be required at every site,

given the many public benefits that IFCs can bring, policymakers could reasonably ask that they be considered.

2. *Numeric Goals.* In the mid-1990's when EPA began implementing its Brownfield initiative—designed to convert contaminated and abandoned, idled, or underused industrial and commercial sites to productive use—it set specific numeric goals, with deadlines. Specifically, EPA challenged itself to implement fifty Brownfield cleanups within the first two years.²⁷

Policymakers should set similar numeric goals in the IFC context. Even a far more modest goal would be an enormous help. Specifically, EPA Headquarters and the SEC could challenge each of the ten EPA Regions to implement at least one IFC within the next eighteen months (or by the end of 2004). In case some Regions miss this target, EPA Headquarters could challenge itself to ensure that a missed Region's target is made up by an additional IFC elsewhere, so the public is assured of at least ten IFCs nationwide by the end of 2004.

3. *Creation and Implementation of Guidance.* Finally, when EPA began implementing its Brownfield initiative, it expressly identified as a goal for the year 1995 the development of new Guidance.²⁸ The danger of identifying this regulatory step is that the Guidance could take months or even years to create, and so this step, taken alone, could actually postpone the use of IFCs. However, if as it did with Brownfields, EPA combines this step with a concurrent step of identifying a numeric goal, then in the long run this step will likely facilitate the widespread use of IFCs where they are appropriate.

Conclusion

With now over five years of hindsight, the 1998 Wall Street Journal has been proven right. IFCs do end the tangle of Superfund litigation; they can reduce costs to the public and the PRPs; they can expedite cleanups; and they can provide unique and presently unavailable assurances to the SEC. Given the enormous and demonstrated policy benefits, EPA and the SEC should take active steps to promote the use of IFCs.

ENDNOTES

¹ John J. Fialka, *Experiment May Point the Way to Ending Tangle of Superfund Litigation Around U.S. Superfund Law*, WALL ST. J., Apr. 29, 1998, at A-24.

² BNA DAILY ENV'T REP., June 8, 2000, at A-6.

³ David Arnold, *Speedy Dump Site Cleanup Celebrated*, B. GLOBE, Oct. 26, 2002, at B-3.

⁴ *Id.*

⁵ Further information concerning the PBWO settlement can be found in the decree reflecting the settlement and implementing the cleanup, cited above.

⁶ Further information concerning these obstacles can be found in the April and May 2002 correspondence found at <www.beedesettlement.com>, last visited August 25, 2003.

⁷ The Region II IFC obtained court approval in June 2003, one month after the initial publication of this article. *United States v. Mattiace Industries*, No. 03-CV-1101 (E.D.N.Y. June 16, 2003). Consistent with the policy model discussed in this article, the Major PRPs in *Mattiace* were not given full cash-outs. Thus, EPA retains the right to pursue the major PRPs directly if the contractor fails in its obligations or the insurance policy proves inadequate.

⁸ Although this rule may vary (e.g., depending on the toxicity of one's waste), the median cut-off for De Minimis status is one percent. U.S. EPA, *Streamlined Approach for Settlements With De Minimis Waste Contributors Under CERCLA Section 122(g)(1)(A)*, OSWER Dir. #9834.7-1D (July 30, 1993).

⁹ For reasons that were unique to that case, the PBWO decree provided a full release to the Major PRPs as well as the De Minimis PRPs. The full release to the Majors was required to obtain the participation of enough of them to accomplish the cleanup; the state agreed to this requirement for the reasons stated in Dennis Harnish's comments following this article. As noted above in note 7, at *Mattiace* (and at virtually every other IFC site), a full release to the Majors has not been required.

¹⁰ *State of Maine v. U.S. and Settling Nonfederal Defendants*, No. 00-64-B-C (D. Me. May 30, 2000).

¹¹ See, e.g., U.S. EPA, *Standardizing The De Minimis Premium* (July 7, 1995) (noting "presumptive premium figures" of "100 percent for a settlement without a cost reopener and 50 percent for a settlement with a cost reopener").

¹² GAO, *Superfund Legal Expenses for Cleanup-Related Activities of Major U.S. Corporations*, GAO/RCED-95-46, at 1 (Dec. 1994).

¹³ BNA DAILY ENV'T REP., Oct. 22, 1999, at B-1.

¹⁴ EPA Guidance, *Accounting for Indirect Costs Associated With Superfund Site-Specific Activities* (May 26, 2000).

¹⁵ See Eric Pianin, *Superfund to Run Out of Money, GAO Says*, WASH. POST, Sept. 3, 2003, at A15 (The Superfund "trust

fund . . . will run out of money next month . . . according to a new General Accounting Office study.").

¹⁶ EPA, *Interim CERCLA Settlement Policy*, OSWER Dir. 9835.0, at *5 (Dec. 5, 1984) ("[i]n many circumstances, cleanups can be started more quickly when private parties do the work themselves, rather than provide money to the Fund. It is therefore preferable for private parties to conduct cleanups themselves."); see also EPA, *Addendum to The "Interim CERCLA Settlement Policy" Issued on December 5, 1984*, at *3 (Sept. 30, 1997) ("EPA should provide strong incentive for parties to conduct cleanups rather than wait until EPA pursues cost recovery claims."). [Please note that asterisked cites are to Policy pages as the documents appear on EPA's website].

¹⁷ See *Interim CERCLA Settlement Policy*, at *7 ("[s]ubstantial resources should not be invested in negotiations with de minimis contributors, in light of the limited costs that may be recovered, the time needed to prepare the necessary legal documents, the need for Headquarters review, potential res judicata effects, and other effects . . .").

¹⁸ See, e.g., 63 Fed. Reg. 24784, 24792 (May 5, 1998).

¹⁹ E.g., Theodore Sonde and Harvey Pitt, *Utilizing Federal Securities Laws To "Clear The Air! Clean The Sky! Wash The Wind!"* 16 *How. L.J.* 906 (1971); National Research Council, *Innovative Technologies in Toxic Waste Cleanup Need Federal Boost* (1997).

²⁰ See EPA, Office of Enforcement and Compliance Assurance, *Enforcement Alert*, vol. 4, no. 3 (Oct. 2001); see also The Rose Report, *The Environmental Fiduciary: The Case for Incorporating Environmental Factors Into Investment Management* (Fall 2002).

²¹ David Bank, *Group Urges Enforcing Rules of Environmental Disclosure*, WALL ST. J., Aug. 22, 2002, at B2.

²² GAO, *Superfund: Legal Expenses for Cleanup-Related Activities*, GAO/RCED-95-46 (Dec. 1994).

²³ GAO, *Superfund: Times to Complete Site Listing And Cleanup*, GAO/RCED-98-74 (Feb. 4, 1998).

²⁴ GAO, *Superfund: Extent to Which Most Reforms Have Improved The Program Is Unknown*, GAO/RCED-00-118 (May 2000).

²⁵ Dan Morgan, *Hazardous Waste Site Cleanup Delayed, EPA Inspector Reports*, WASH. POST, July 2, 2002, at A2.

²⁶ See, e.g., EPA Guidance, *Standardizing the De Minimis Premium* (July 7, 1995).

²⁷ Office Of Technology Assessment, Congress of the United States, *State of the State on Brownfields: Programs for Cleanup and Reuse of Contaminated Properties*, OTA-BP-ETI-153, at 25 (June 1995); EPA Guidance, *The Brownfield Economic Redevelopment Initiative*, 9230.0-30, at 13 (Sept. 1995) (setting forth schedule for Brownfield pilots).

²⁸ *Id.* at 25.

FROM THE STATE'S PERSPECTIVE

By

Dennis Harnish*

The Portland Bangor Waste Oil (PBWO) site was created by the mishandling of thousands of gallons of waste oil that had been collected over the years from military and other federal sources, from state and local governmental units, and from literally thousands of Maine businesses and individuals. Although the business did not do a very good job of handling waste oil, it did a far better job of keeping records regarding its nearly 3,000 customers. We obtained these records and then contracted with TechLaw to arrange the information by customer and enter it into a database. We chose TechLaw because it has experience doing similar work for U.S. EPA.

TechLaw used this database to develop an allocation list based upon the gallons of waste oil brought to the site from the premises of each customer. This list disclosed that the federal entities, collectively, had contributed about one third of the waste oil to the site. No other party had contributed as much as one percent. Since the federal government was the only major potentially responsible party (PRP), the notice of potential responsibility sent by the Maine Department of Environmental Protection (DEP) did not result in the creation of a trustee committee comprised of major PRPs. The federal government had already stated that it would pay its fair share of the cleanup costs but would not serve on a cleanup committee. No other PRP considered itself to be a major PRP.

Into this confusing picture entered the environmental contractor, TRC. As Mr. Hill noted, the PBWO site agreement did not exactly fit the model described. The PRPs insisted on "cashing out," *i.e.*, receiving releases

without the usual reopener clauses, upon entering into separate contracts with TRC and paying their allocated share to TRC. The state agreed to this unusual and risky approach for several reasons. With 2,900 PRPs, litigation would have been a nightmare (even if we sued only the federal government under strict and several liability and it brought in thousands of other defendants); there was no committee of major PRPs or any probability that one would be formed; our technical folks were pretty confident about the nature of the remedial action; the agreement called for insurance guaranteeing the cleanup in an amount equal to twice the projected cleanup costs and the state would be able to directly sue the insurance company and was not required to file a reach and apply action. Moreover, as Mr. Hill's article notes, it was very much in the interest of both TRC and the insurer to clean up the site on time and on budget.

In sum, the IFC approach worked at the PBWO Site because the state had built the groundwork for allocating liability among the various PRPs and because the state, TRC, and the insurer were able to accurately estimate the cleanup costs for the site. It also worked because the PRPs were willing to pay for insurance covering twice the projected cleanup costs, and the state was willing to provide full releases to the PRPs because of this added protection.

These supplementary thoughts should not be interpreted as suggesting that either the Maine DEP or the Maine Attorney General do not approve of the IFC approach to cleanups of contaminated sites. This approach worked well at the PBWO Site when traditional approaches failed. Certainly, the IFC approach has the potential to reduce transaction costs and expedite cleanups at other sites throughout the country. It is even more to be desired from a state perspective if the major PRPs remain on the hook until the issuance of a certification of completion, as suggested in Mr. Hill's hypothetical. We would recommend that our sister states and U.S. EPA consider such an approach in an appropriate case.

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