

104TH CONGRESS
1ST SESSION

H. R. 1616

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to provide a process for the allocation of liability among potentially responsible parties at Superfund sites.

IN THE HOUSE OF REPRESENTATIVES

MAY 11, 1995

Mr. UPTON (for himself and Mr. BOUCHER) introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to provide a process for the allocation of liability among potentially responsible parties at Superfund sites.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. ALLOCATION OF LIABILITY AT MULTIPARTY**
2 **FACILITIES UNDER SUPERFUND.**

3 The Comprehensive Environmental Response, Com-
4 pensation, and Liability Act of 1980 is amended by insert-
5 ing the following new section after section 126:

6 **“SEC. 127. ALLOCATION AT MULTIPARTY FACILITIES.**

7 “(a) SCOPE.—

8 “(1) POST-INTRODUCTION RODS.—For each
9 non-federally owned facility listed on the National
10 Priorities List involving 2 or more potentially re-
11 sponsible parties for which the President selects a
12 remedial action on or after February 3, 1995, the
13 Administrator shall initiate the allocation process
14 under this section. This paragraph shall not apply to
15 response actions selected prior to such date.

16 “(2) PRE-INTRODUCTION RODS.—For each non-
17 federally owned facility listed on the National Prior-
18 ities List involving 2 or more potentially responsible
19 parties, for any remedial action selected by the
20 President before February 3, 1995, the Adminis-
21 trator shall initiate the allocation process under this
22 section, if requested to do so by a potentially respon-
23 sible party which has resolved its liability to the
24 United States with respect to the remedial action or
25 which is performing the remedial action pursuant to
26 an order issued under section 106(a).

1 “(3) OTHER FACILITIES.—The Administrator,
2 as the Administrator deems appropriate, may initi-
3 ate the allocation process under this section for any
4 facility other than a facility referred to in paragraph
5 (1) or (2) involving 2 or more potentially responsible
6 parties.

7 “(4) EXCLUDED FACILITIES.—The allocation
8 process under this section shall not apply to any of
9 the following:

10 “(A) A facility for which there has been a
11 final settlement, decree, or order that deter-
12 mines all liability or allocated shares of all po-
13 tentially responsible parties.

14 “(B) A facility at which all of the poten-
15 tially responsible parties are liable or potentially
16 liable as facility owners or operators pursuant
17 to section 107(a)(1) or (2).

18 “(5) MULTIPLE REMEDIAL ACTIONS.—An allo-
19 cation under this section, shall apply to all remedial
20 actions selected by the President on or after Feb-
21 ruary 3, 1995, for a facility (but not to those reme-
22 dial actions described in paragraph (2)), unless the
23 allocator determines that the allocation should ad-
24 dress only one or more of such remedial actions.

1 “(6) MULTIPLE FACILITIES.—Where appro-
2 priate, the Administrator may initiate a single allo-
3 cation process under this section for more than 1 fa-
4 cility.

5 “(7) EFFECT OF ALLOCATION.—An allocation
6 performed pursuant to paragraph (2) or (3) of this
7 section shall not be construed to require—

8 “(A) payment of an orphan share pursuant
9 to this section; or

10 “(B) the conferral of reimbursement rights
11 pursuant to this section.

12 “(8) SETTLEMENT OFFERS AFTER COMMENCE-
13 MENT OF LITIGATION.—The provisions of this sec-
14 tion shall not apply to any offer of settlement made
15 after expiration of the moratorium period under sub-
16 section (b).

17 “(b) MORATORIUM ON COMMENCEMENT OR CON-
18 TINUATION OF SUITS.—

19 “(1) MORATORIUM.—No person may assert any
20 claim for response costs pursuant to section 107 of
21 this Act or commence any civil action seeking recov-
22 ery of any response costs in connection with a re-
23 sponse action for which an allocation is required
24 under subsection (a)(1) or (2), or for which the Ad-
25 ministrator has initiated an allocation under sub-

1 section (a)(3), until 90 days after issuance of the
2 allocator's report under subsection (h) or (m),
3 whichever is later.

4 “(2) STAY OF EXISTING ACTIONS.—If a claim
5 for response costs pursuant to section 107 of this
6 Act or an action seeking recovery of response costs
7 in connection with a response action for which an al-
8 location is to be performed under this section is
9 pending—

10 “(A) upon the date of enactment of the
11 Superfund Reform Act of 1994, or

12 “(B) upon initiation of an allocation,
13 the action or claim shall be stayed until 90 days
14 after the issuance of the allocator's report under
15 subsection (h) or (m), unless the court determines
16 that a stay will result in manifest injustice.

17 “(3) STATUTE OF LIMITATIONS.—Any applica-
18 ble limitations period with respect to a cause of ac-
19 tion subject to paragraph (1) shall be tolled from the
20 earlier of the following until 180 days after the issu-
21 ance of the allocator's report under subsection (h) or
22 (m) has been issued by the allocator:

23 “(A) The date of listing of the facility on
24 the National Priorities List.

1 “(B) The commencement of the allocation
2 process pursuant to this section.

3 “(c) COMMENCEMENT OF ALLOCATION.—

4 “(1) RESPONSIBLE PARTY SEARCH.—At all fa-
5 cilities subject to this section, the Administrator
6 shall, as soon as practicable, but not later than 60
7 days after the commencement of the remedial inves-
8 tigation, initiate a thorough investigation and search
9 for all potentially responsible parties, using his au-
10 thorities under section 104. Any person may submit
11 information to the Administrator concerning any po-
12 tentially responsible party at the facility, and the
13 Administrator shall consider such information in
14 carrying out the responsible party search.

15 “(2) NOTIFICATION OF DE MINIMIS PARTIES.—
16 As soon as practicable after receipt of sufficient in-
17 formation, but not more than 12 months after the
18 commencement of the remedial investigation, the
19 Administrator shall take each of the following ac-
20 tions:

21 “(A) The Administrator shall notify any
22 potentially responsible party who the Adminis-
23 trator determines is eligible for an expedited
24 final settlement in accordance with section
25 122(g)(1)(A) of its eligibility, based on informa-

1 tion available to the Administrator at the time
2 the determination is made. Any such informa-
3 tion that is not confidential shall, to the extent
4 practicable, be made available by the Adminis-
5 trator to the party at the time of the settlement
6 offer.

7 “(B) The Administrator shall submit a
8 written settlement offer to each party notified
9 under subparagraph (A) no later than 60 days
10 after such notification.

11 “(3) PRELIMINARY NOTICE TO OTHER PAR-
12 TIES.—As soon as practicable after receipt of suffi-
13 cient information, but not later than 18 months
14 after commencement of the remedial investigation,
15 the Administrator shall—

16 “(A) notify any party not previously noti-
17 fied under paragraph (2) who the Adminis-
18 trator determines is eligible for an expedited
19 final settlement in accordance with section
20 122(g)(1)(A) of its eligibility, based on informa-
21 tion available to the Administrator at the time
22 the determination is made and submit a written
23 settlement offer to each party notified pursuant
24 to this subparagraph no later than 60 days
25 after such notification;

1 “(B) issue a list of all potentially respon-
2 sible parties preliminarily identified by the Ad-
3 ministrator to all such parties;

4 “(C) notify the public, in accordance with
5 section 117(d), of the list of potentially respon-
6 sible parties identified pursuant to subpara-
7 graphs (A) and (B) by the Administrator; and

8 “(D) make available all responses to the
9 Administrator’s information requests, as well as
10 other relevant information concerning the facil-
11 ity and potentially responsible parties, to the
12 notified parties, to the extent it is available to
13 the Administrator.

14 The Administrator shall not make available any
15 privileged or confidential information, except as oth-
16 erwise authorized by law. The Administrator shall
17 take the actions specified in this paragraph within 9
18 months after the date of enactment of this section
19 for all facilities eligible for allocation under sub-
20 section (a)(1) or (a)(2) for which the responsible
21 party search required by a paragraph (1) was sub-
22 stantially complete prior to the date of the enact-
23 ment of this section.

1 “(4) STATUS OF PARTIES.—At the time of pro-
2 posing the list of potentially responsible parties
3 under paragraph (3), the Administrator shall—

4 “(A) identify parties that are eligible for
5 expedited settlement pursuant to section
6 122(g);

7 “(B) identify parties who are not eligible
8 for such expedited settlement; or

9 “(C) determine that there is insufficient
10 information to ascertain whether or not the
11 party is entitled to such expedited settlement.

12 “(5) NOMINATION OF PARTIES.—(A) For 60
13 days after information has been made available pur-
14 suant to paragraph (3), the parties identified by the
15 Administrator and members of the affected commu-
16 nity shall have the opportunity to identify and nomi-
17 nate additional potentially responsible parties or oth-
18 erwise provide information relevant to the facility or
19 such potentially responsible parties. This period may
20 be extended by the Administrator for an additional
21 30 days upon request of any person.

22 “(B) Any proposal for the addition of any po-
23 tentially responsible party shall be supported by full
24 disclosure to the Administrator of all available infor-

1 mation concerning that party's liability and con-
2 tribution of hazardous substances to the site.

3 “(6) LIST OF ALLOCATION PARTIES.—(A)
4 Within 60 days after the end of the period specified
5 in paragraph (5)(A) for the proposal of additional
6 parties, the Administrator shall—

7 “(i) issue a list of parties subject to the al-
8 location process (hereinafter referred to in this
9 section as the ‘allocation parties’);

10 “(ii) identify in writing, as to each of the
11 proposed additional parties, which parties the
12 Administrator has determined, in the Adminis-
13 trator's sole discretion:

14 “(I) to be eligible for expedited settle-
15 ment pursuant to section 122(g),

16 “(II) not to be eligible for such expe-
17 dited settlement, and

18 “(III) for whom insufficient informa-
19 tion exists to determine whether or not the
20 party is eligible for such expedited settle-
21 ment; and

22 “(iii) identify (in writing supported by
23 brief explanation) those parties as to which the
24 Administrator has determined, in the Adminis-
25 trator's sole discretion, that there is an inad-

1 equate basis in law or fact to determine that
2 the party is potentially liable.

3 For each party identified under clause (iii), the Ad-
4 ministrator shall further identify whether that party,
5 if liable, would be eligible for an expedited settle-
6 ment.

7 “(B) At the time of issuance of the list of par-
8 ties provided for in subparagraph (A), the Adminis-
9 trator shall provide the potentially responsible par-
10 ties who received notice under this paragraph with
11 a list of neutral parties who are not employees of the
12 United States and who the Administrator deter-
13 mines, in the Administrator’s sole discretion, are
14 qualified to perform an allocation at the facility.

15 “(C) De minimis parties the Administrator
16 identifies as potentially liable but entitled to expe-
17 dited settlement pursuant to this section, shall not
18 be subject to, or assigned a share in, the allocation
19 (except to the extent required to determine the or-
20 phan share pursuant to subsection (h)), unless that
21 party fails to reach an agreement with the President
22 on settlement terms within 30 days after the offer.

23 “(D) If the Administrator determines that there
24 is an inadequate basis in law or fact to conclude that
25 a party is liable based on the information presented

1 by the nominating party or otherwise available to
2 the Administrator, the determination shall have the
3 following effect:

4 “(i) With respect to a party that the Ad-
5 ministrator has determined to be—

6 “(I) exempt from liability pursuant to
7 section 107(a)(6)(A) or (B); or

8 “(II) not liable on some other basis
9 but who, if liable, would be eligible for an
10 expedited settlement,

11 the Administrator’s determination shall mean
12 that the party shall not be subject to, and shall
13 not be assigned a share in, the allocation.

14 “(ii) With respect to all other parties, the
15 Administrator’s determination shall be accorded
16 deference by the allocator. For such parties the
17 allocator shall consider the Administrator’s de-
18 termination together with the allocation factors
19 listed in subsection (h)(2).

20 “(E) The Administrator’s determinations for
21 purposes of this subsection shall not be subject to
22 judicial review, nor shall any determination or expla-
23 nation provided for purposes of the allocation be ad-
24 missible for any purpose in an action commenced by

1 the United States against the party that is the sub-
2 ject of the determination or any other party.

3 “(F) The allocator may assign a zero share to
4 any party the allocator deems should receive such a
5 share in consideration of the allocation factors in-
6 cluding the Administrator’s determinations under
7 subparagraph (C).

8 “(G) If a party is included in the allocation
9 pursuant to the nomination of a potentially respon-
10 sible party pursuant to subsection (c)(5), but as-
11 signed a zero share by the allocator, that party’s
12 costs of participating in the allocation (including
13 reasonable attorneys’ fees) shall be borne by the
14 party who proposed the addition of the party to the
15 allocation.

16 “(d) DE MINIMIS SETTLEMENT OFFER.—(1) Within
17 30 days after the final list of parties is issued pursuant
18 to paragraph (6) of subsection (c), the Administrator shall
19 submit a written settlement offer to any party identified
20 as a potentially responsible party pursuant to this section
21 who the Administrator has determined to be eligible for
22 an expedited final settlement in accordance with section
23 122(g)(1)(A), and who has not entered into a settlement
24 with the United States regarding the matters being ad-
25 dressed by the allocation.

1 “(2) The President shall not include any premia pur-
2 suant to section 122(g) in a settlement offer made pursu-
3 ant to paragraph (1) more than 60 days after the date
4 the offer is required to be made pursuant to paragraph
5 (1) to a party that is a small business, as defined in sec-
6 tion 101(47).

7 “(e) SELECTION OF ALLOCATOR.—

8 “(1) PROPOSAL OF ADDITIONAL CAN-
9 DIDATES.—Any party identified by the Adminis-
10 trator under subsection (c) may propose any person
11 whom such party deems qualified for selection as an
12 allocator in addition to those proposed from the list
13 provided under subsection (c)(6)(B).

14 “(2) SELECTION OF ALLOCATOR BY ALLOCA-
15 TION PARTIES.—(A) The allocation parties shall se-
16 lect an allocator from the list of allocators proposed
17 by the Administrator or under paragraph (1) by the
18 following voting method with each allocation party
19 having a single vote:

20 “(i) Each allocation party, with the Ad-
21 ministrator voting for the identified but insol-
22 vent or defunct parties, shall numerically rank
23 the individuals on the final list of proposed
24 allocators, with a ranking of 1 indicating first
25 preference, and forward its vote to the Adminis-

1 trator within 30 days of the issuance of the
2 final list of allocators pursuant to subsection
3 (c)(6)(B).

4 “(ii) The proposed allocator who receives
5 the lowest combined numerical score, taking
6 into account all votes submitted to the Adminis-
7 trator pursuant to clause (i), and who agrees to
8 serve as allocator, shall be determined to be the
9 allocator.

10 “(B) The Administrator may cast the votes of
11 identified but insolvent or defunct parties.

12 “(3) PEREMPTORY STRIKE.—The Adminis-
13 trator may reject any allocator selected by the allo-
14 cation parties if the proposed allocator is not on the
15 list provided under paragraph (6)(B) of subsection
16 (c). In the case of any such rejection, the allocation
17 parties shall select the allocator in order of numeri-
18 cal ranking in accordance with this subsection.

19 “(4) SELECTION OF ALLOCATOR BY EPA.—If
20 the allocation parties do not select an allocator pur-
21 suant to this subsection within 30 days after receipt
22 of the list provided under paragraph (2), the Adminis-
23 trator shall select the allocator, except that if the
24 Administrator rejects 4 or more allocators selected
25 by the allocation parties, the Administrator shall ini-

1 tiate a new allocator selection process under this sec-
2 tion.

3 “(f) CONTRACT.—Following selection of the allocator,
4 the Administrator shall enter into a contract with the se-
5 lected allocator for the provision of allocation services, and
6 immediately make available all responses to information
7 requests, as well as other relevant information concerning
8 the facility and potentially responsible parties, to the allo-
9 cator. The Administrator has the authority to use the pro-
10 cedures set forth in section 109(e) to obtain the services
11 of a neutral professional for use in conducting allocation
12 procedures under this section, whether or not the neutral
13 professional actually conducts such allocation procedures.

14 “(g) POTENTIALLY RESPONSIBLE PARTY SETTLE-
15 MENT.—At any time prior to the issuance of an allocation
16 report as described in subsection (h), any group of poten-
17 tially responsible parties may submit to the allocator a pri-
18 vate allocation for the remedial action. If such private allo-
19 cation meets all of the following criteria, the allocator shall
20 promptly adopt it as the allocation report:

21 “(1) The private allocation is a binding alloca-
22 tion of 100 percent of the past, present, and future
23 recoverable costs of the remedial action or operable
24 unit.

1 “(2) The private allocation does not allocate
2 any share of response costs to any person who is not
3 a signatory to the proposed private allocation or, in
4 the case of any orphan share, unless the United
5 States is a signatory to the proposed private alloca-
6 tion.

7 “(3) The signatories to the proposed private al-
8 location waive their contribution rights with respect
9 to the remedial action against all other potentially
10 responsible parties at the facility.

11 “(h) ALLOCATION DETERMINATION.—

12 “(1) SETTLEMENT AND ALLOCATION RE-
13 PORT.—Following issuance of the final list of alloca-
14 tion parties pursuant to subsection (c)(6)(A)(i), the
15 allocator shall initiate and conduct an allocation
16 process that shall culminate in the issuance of a
17 written report, with a nonbinding, equitable alloca-
18 tion of the percentage shares of responsibility of all
19 allocation parties, including the orphan share, for
20 the facility, and provide such report to the allocation
21 parties and the Administrator. The allocator shall
22 provide the report to the allocation parties and the
23 Administrator within 180 days of the issuance of the
24 list of allocation parties pursuant to subsection
25 (c)(6) or the date of the contract for allocation serv-

1 ice pursuant to subsection (f), whichever is later.
2 Upon request, for good cause shown, the Adminis-
3 trator may grant the allocator additional time to
4 complete the allocation, not to exceed 90 days.

5 “(2) FACTORS IN THE ALLOCATION.—The allo-
6 cator shall prepare a nonbinding, equitable allocation
7 of percentage shares for the facility based on the fol-
8 lowing factors:

9 “(A) The amount of hazardous substances
10 contributed by each allocation party.

11 “(B) The degree of toxicity of hazardous
12 substances contributed by each allocation party.

13 “(C) The mobility of hazardous substances
14 contributed by each allocation party.

15 “(D) The degree of involvement of each al-
16 location party in the generation, transportation,
17 treatment, storage, or disposal of the hazardous
18 substance.

19 “(E) The degree of care exercised by each
20 allocation party with respect to the hazardous
21 substance, taking into account the characteris-
22 tics of the hazardous substance.

23 “(F) The cooperation of each allocation
24 party in contributing to the response action and

1 in providing complete and timely information
2 during the allocation process.

3 “(G) Such other factors that the Adminis-
4 trator determines are appropriate by published
5 guidance. Any such guidance shall be consistent
6 with this Act and shall be published only after
7 notice and opportunity for public comment. An
8 alleged failure of the allocator to consider 1 or
9 more additional factors set forth in such guid-
10 ance shall not be deemed unlawful conduct or
11 procedural error for purposes of subsection
12 (l)(2) or (3).

13 “(3) CONDUCT OF ALLOCATION PROCESS.—The
14 allocator shall conduct the allocation process and
15 render a decision based solely on the provisions of
16 this section, including the allocation factors specified
17 in paragraph (2). Each party to the allocation shall
18 be afforded an opportunity to be heard (either orally
19 or in writing, at the allocator’s discretion), and an
20 opportunity to comment on a draft allocation report.
21 The allocator shall not be required to respond to
22 comments.

23 “(4) IDENTIFICATION OF ORPHAN SHARES.—

24 “(A) COMPONENTS OF ORPHAN SHARE.—

25 The allocator may determine that a percentage

1 share for the facility is specifically attributable
2 to an orphan share. The orphan share shall
3 consist only of the following:

4 “(i) Shares attributable to hazardous
5 substances that the allocator determines,
6 on the basis of information presented, to
7 be specifically attributable to identified but
8 insolvent or defunct allocation parties who
9 are not affiliated with any viable allocation
10 party.

11 “(ii) The difference between the ag-
12 gregate shares that the allocator deter-
13 mines, on the basis of the information pre-
14 sented, is specifically attributable to alloca-
15 tion parties that are contributors of munic-
16 ipal solid waste subject to the limitations
17 in section 107(a)(6), and the share actu-
18 ally assumed by those parties in any settle-
19 ments with the United States pursuant to
20 section 122(g), including the fair market
21 value of in-kind services provided by a mu-
22 nicipality.

23 “(iii) The difference between the ag-
24 gregate share that the allocator deter-
25 mines, on the basis of information pre-

1 sented, to be specifically attributable to al-
2 location parties with a limited ability to
3 pay response costs and the share actually
4 assumed by those parties in any settle-
5 ments with the United States pursuant to
6 section 122(g).

7 “(B) UNATTRIBUTABLE SHARES.—Shares
8 attributable to hazardous substances that the
9 allocator cannot attribute to any identified
10 party shall be distributed among the allocation
11 parties, including the orphan share.

12 “(i) ANSWERS AND CERTIFICATIONS TO
13 ALLOCATOR’S INFORMATION REQUESTS.—

14 “(1) SUBPOENAS AND INFORMATION RE-
15 QUESTS.—Where necessary to assist in determining
16 the allocation of shares, the allocator may request
17 information or documents from any allocation party
18 in accordance with paragraphs (2) or (5) of section
19 104(e), and require by subpoena the attendance of
20 persons or the production of documents, or other in-
21 formation in accordance with section 104(e)(7). Any
22 allocation party to whom a request is directed shall
23 include in the response a certification by a respon-
24 sible representative or authorized representative that
25 satisfies the requirement of section 104(e)(3). The

1 allocator may also request the Administrator to uti-
2 lize the authorities of paragraph (2) and to exercise
3 any information-gathering authority of the Adminis-
4 trator under this Act.

5 “(2) POWERS OF THE ALLOCATOR.—In addi-
6 tion to the information-gathering authority set forth
7 in paragraph (1), the allocator shall have the au-
8 thority to schedule meetings and require the attend-
9 ance of allocation parties at such meetings; to re-
10 quire that allocation parties wishing to present simi-
11 lar legal or factual positions consolidate their pres-
12 entations; to obtain or employ support services, in-
13 cluding secretarial and clerical services, computer
14 support services, and legal and investigative services;
15 and to take any other actions necessary to conduct
16 a fair, efficient, and impartial allocation process.

17 “(j) CIVIL AND CRIMINAL PENALTIES.—

18 “(1) CIVIL PENALTIES.—Where the allocator is-
19 sues an administrative subpoena or information re-
20 quest pursuant to subsection (i), a party who unrea-
21 sonably fails to comply with the subpoena or request
22 shall be subject to a civil penalty not to exceed
23 \$25,000 for each day of noncompliance.

24 “(2) ENFORCEMENT.—The allocator may seek
25 enforcement of an administrative subpoena or infor-

1 mation request pursuant to subsection (i)(1), and
2 shall seek such enforcement by requesting that the
3 Attorney General commence an action to enforce the
4 subpoena or request. The Attorney General, within
5 30 days after receiving such request from the allo-
6 cator, shall—

7 “(A) notify the allocator that the Attorney
8 General will commence an action to enforce the
9 subpoena or information request;

10 “(B) notify the allocator that the Attorney
11 General will not seek enforcement of the sub-
12 poena or request because the subpoena or re-
13 quest is barred by law or would result in annoy-
14 ance, embarrassment, oppression, or undue bur-
15 den or expense to the party to whom it was is-
16 sued; or

17 “(C) notify the allocator that the Attorney
18 General has insufficient information on which
19 to determine whether an enforcement action is
20 appropriate.

21 “(3) FAILURE OF ATTORNEY GENERAL TO RE-
22 SPOND.—If the Attorney General fails to provide
23 any response to the allocator within 30 days of a re-
24 quest for enforcement of a subpoena or information
25 request, the allocator may retain counsel to com-

1 mence a civil action to enforce the subpoena or in-
2 formation request.

3 “(4) PENALTY.—If the Attorney General or al-
4 locator prevails in an action to enforce an allocator’s
5 subpoena or information request, the party who
6 failed to comply shall be subject to a sanction that
7 may include civil penalties as provided in paragraph
8 (1). The court shall require such party to pay the
9 reasonable expenses, including attorney’s fees,
10 caused by the failure to comply, unless the court
11 finds that the failure was substantially justified or
12 that other circumstances make an award of expenses
13 unjust.

14 “(5) CRIMINAL.—Any person who knowingly
15 makes any false material statement or representa-
16 tion in the response to an allocator’s information re-
17 quest or subpoena issued pursuant to subsection (i)
18 shall be deemed to have made a false statement on
19 a matter within the jurisdiction of the United States
20 within the meaning of section 1001 of title 18, Unit-
21 ed States Code.

22 “(k) DOCUMENT REPOSITORY; CONFIDENTIALITY.—

23 “(1) DOCUMENT REPOSITORY.—The allocator
24 shall establish and maintain a document repository

1 containing copies of all documents and informa-
2 tion—

3 “(A) provided by the Administrator pursu-
4 ant to this section,

5 “(B) provided or generated by the alloca-
6 tion parties, or

7 “(C) generated by the allocator during the
8 allocation.

9 The documents and information in the document re-
10 pository shall be available only to the parties to the
11 allocation process for review and copying at their
12 own expense, subject to the confidentiality provisions
13 of paragraph (2). The Administrator shall provide to
14 the allocator all information obtained under section
15 104(e), including information entitled to protection
16 under section 1905 of title 18, United States Code,
17 or exempt from disclosure pursuant to section
18 552(a) of title 5, United States Code. An allocation
19 party shall not assert any privilege as a basis for
20 withholding any information from the allocator.

21 “(2) CONFIDENTIALITY.—All documents and
22 materials submitted to the allocator or placed in the
23 document repository, together with the record of any
24 information generated or obtained during the alloca-
25 tion process, shall be confidential. The allocator,

1 each allocation party, the Administrator, and the At-
2 torney General shall maintain such documents and
3 materials, together with the record of any informa-
4 tion generated or obtained during the allocation, as
5 confidential and are prohibited from using any such
6 material in any other matter or proceeding, and
7 shall not be subject to disclosure under section 552
8 of title 5, United States Code. Such material shall
9 not be discoverable or admissible in any other Fed-
10 eral, State, or local judicial or administrative pro-
11 ceedings, except—

12 “(A) a new allocation pursuant to sub-
13 section (m) or (n) for the same remedial action,
14 or

15 “(B) an initial allocation for a different re-
16 medial action at the same facility.

17 Nothing in this section shall be construed to author-
18 ize any person, including the allocator, to withhold
19 any documents or information from Congress, or any
20 duly authorized Committee thereof, or limit in any
21 manner the right of Congress, or any duly author-
22 ized Committee thereof, to obtain such documents or
23 information. Any person disclosing such documents
24 or information to Congress shall notify the person

1 who produced such documents or information of the
2 fact of such disclosure pursuant to paragraph (5).

3 “(3) DISCOVERABILITY AND ADMISSIBILITY.—
4 Notwithstanding the foregoing, if the original of any
5 document or material submitted to the allocator or
6 placed in the document repository was, in the hands
7 of the party which provided it, otherwise discover-
8 able or admissible, then such original document, if
9 subsequently sought from such party, shall remain
10 so. If a fact generated or obtained during the alloca-
11 tion was, in the hands of a witness, otherwise discov-
12 erable or admissible, then such fact, if subsequently
13 sought from such other party, shall remain so.

14 “(4) NO WAIVER OF PRIVILEGE.—The submis-
15 sion of, documents, or information pursuant to the
16 allocation process shall not be deemed to be a waiver
17 of any privilege, applicable to such documents or in-
18 formation under any Federal or State law or rule of
19 discovery or evidence.

20 “(5) PROCEDURE WHEN DISCOVERY IS
21 SOUGHT.—Any person, including the United States
22 and any Federal, State, or local agency, department
23 or instrumentality, receiving any request for a state-
24 ment, document, or material submitted, or for the
25 record of any allocation proceeding, shall promptly

1 notify the person who originally submitted such item
2 and, except in the case of a request from the Con-
3 gress or a duly authorized committee thereof, shall
4 provide such submitting person the opportunity to
5 assert and defend the confidentiality of such item.
6 No person shall release or provide a copy of the item
7 to any person not a party to such allocation, other
8 than the Congress or a duly authorized committee
9 thereof, except as may be required by court order.

10 “(6) CIVIL PENALTY FOR VIOLATION OF CON-
11 FIDENTIALITY.—Any person who fails to maintain
12 the confidentiality of any statements, documents or
13 information generated or obtained during an alloca-
14 tion proceeding, or who releases any such informa-
15 tion in violation of this section shall be subject to
16 civil penalties of up to \$25,000 per violation. Such
17 penalties may be sought in a civil action initiated by
18 the Attorney General on behalf of the United States,
19 or any allocation party adversely affected by the fail-
20 ure to maintain confidentiality.

21 “(l) REJECTION OF ALLOCATOR’S REPORT.—The
22 Administrator and the Attorney General of the United
23 States may reject the allocator’s report if they jointly de-
24 termine that—

1 “(1) no rational interpretation of the facts be-
2 fore the allocator, in light of the factors required to
3 be considered, would form a reasonable basis for the
4 shares assigned to the parties;

5 “(2) the allocation was affected by bias, fraud,
6 or unlawful conduct; or

7 “(3) the allocation was substantially and di-
8 rectly affected by procedural error.

9 The allocator’s report may not be rejected after the United
10 States has accepted a settlement offer (excluding de
11 minimis or other expedited settlements under section
12 122(g)) based on the allocation. The Administrator and
13 the Attorney General shall make any such determination
14 within 180 days after the receipt of the first offer based
15 on the allocator’s report. The determinations of the Ad-
16 ministrator and the Attorney General under this sub-
17 section shall not be judicially reviewable. No such deter-
18 mination may be delegated to any officer or employee of
19 the Environmental Protection Agency or the Department
20 of Justice below the level of an Assistant Secretary or Act-
21 ing Assistant Secretary with authority for implementing
22 this Act at the Environmental Protection Agency or the
23 Department of Justice.

24 “(m) SECOND ALLOCATION.—If the United States
25 rejects an allocator’s report, the parties shall select a new

1 allocator pursuant to subsection (e) to perform, on an ex-
2 pedited basis, a new allocation based on the same record
3 available to the first allocator. The moratorium on com-
4 mencement of litigation and tolling of statutes of limita-
5 tion set forth in subsection (b) shall be extended until 90
6 days after the issuance of the second allocation report. If
7 the United States rejects the second allocation the Presi-
8 dent may, following the expiration of the moratorium on
9 commencement of litigation, commence an action under
10 section 107.

11 “(n) NEW INFORMATION.—Any settling party, in-
12 cluding the United States, may seek a new allocation pur-
13 suant to subsection (h), where that party presents clear
14 and convincing information or the United States otherwise
15 determines on the basis of clear and convincing informa-
16 tion that—

17 “(1) the allocator did not have information con-
18 cerning 35 percent or more of the materials contain-
19 ing hazardous substances at the facility, and that
20 this information has been discovered subsequent to
21 the issuance of the allocator’s report; or

22 “(2) the allocator did not have information con-
23 cerning a person not subject to the allocation who
24 contributed 15 percent or more of materials contain-
25 ing hazardous substances at the facility, and that

1 this information has been discovered subsequent to
2 the issuance of the allocator's report.

3 Determinations by the United States pursuant to this sub-
4 section shall not be subject to judicial review.

5 “(o) SETTLEMENT FOLLOWING ALLOCATION.—

6 “(1) ACCEPTANCE OF OFFERS.—If, within 90
7 days after issuance of the allocator's report for an
8 allocation conducted under subsection (a)(1), an al-
9 location party—

10 “(A) makes a written offer to settle with
11 respect to the response action based on the per-
12 centage share specified by the allocator and on
13 the additional terms and conditions of settle-
14 ment (other than the allocated percentage
15 share) that are acceptable to the President, and

16 “(B) is not in default on any information
17 requests under this Act,

18 then the President shall not seek a higher percent-
19 age share other than the premia authorized by this
20 section, unless the President has rejected the offer
21 on a basis other than the percentage share, or unless
22 the Administrator and the Attorney General have re-
23 jected the allocation report pursuant to subsection
24 (l).

1 “(2) EXPLANATION OF REFUSAL TO SETTLE.—
2 If the Administrator and the Attorney General de-
3 termine not to settle on the basis of the allocation,
4 they shall provide the allocation parties and mem-
5 bers of the affected community with a written expla-
6 nation of the Administrator’s determination.

7 “(3) SETTLEMENT PROVISIONS.—Settlements
8 based on allocated shares shall include each of the
9 following:

10 “(A) A waiver of contribution rights
11 against all parties who are potentially respon-
12 sible parties for the response action, as well as
13 a waiver of any rights to challenge any settle-
14 ment the President enters into with any other
15 potentially responsible party.

16 “(B) Covenants not to sue, consistent with
17 section 122(f), and provisions regarding per-
18 formance or adequate assurance of performance
19 of response actions addressed in the settlement.

20 “(C) A premium determined on a site spe-
21 cific basis and subject to the limitations set
22 forth in paragraph (4), that compensates for
23 the United States litigation risk with respect to
24 potentially responsible parties who have not re-
25 solved their liability to the United States, ex-

1 cept that no such premium shall apply if all
2 parties settle or the settlement covers 100 per-
3 cent of response costs.

4 “(D) Contribution protection, consistent
5 with section 113(f), regarding matters ad-
6 dressed in the settlement. Such settlement does
7 not discharge any of the other potentially re-
8 sponsible parties unless its terms so provide,
9 but it reduces the potential liability of the oth-
10 ers by the amount of the settlement.

11 “(E) Provisions through which the settling
12 parties shall receive reimbursement from the
13 Fund for any response costs incurred by such
14 parties in excess of the aggregate of their allo-
15 cated share and any premia required by the set-
16 tlement. Such right to reimbursement shall not
17 be contingent on the United States recovery of
18 response costs from any responsible person not
19 a party to any settlement with the United
20 States.

21 “(4) The premium authorized by paragraph
22 (3)(C) for litigation risk shall not exceed the follow-
23 ing:

24 “(A) Five percent of the total costs as-
25 sumed by a settling party, where settlements

1 (and any orphan share identified by the allo-
2 cator) account for 80 percent or more of re-
3 sponsibility at the facility.

4 “(B) Ten percent of the total costs as-
5 sumed by a settling party, where settlements
6 (and any orphan share identified by the allo-
7 cator) account for more than 60 percent and
8 less than 80 percent of responsibility at the fa-
9 cility.

10 “(C) Fifteen percent of the total costs as-
11 sumed by a settling party, where settlements
12 (and any orphan share identified by the allo-
13 cator) account for more than 40 percent and
14 less than 60 percent of responsibility at the fa-
15 cility.

16 “(D) Twenty percent of the total costs as-
17 sumed by a settling party, where settlements
18 (and any orphan share identified by the allo-
19 cator) account for 40 percent or less of respon-
20 sibility at the facility.

21 The Administrator shall have authority to promul-
22 gate regulations to modify the premia percentages
23 established in this subsection. The Administrator
24 may not propose a rule before the date 36 months
25 after the enactment of this section, and no such rule

1 may take effect before the date 48 months after the
2 enactment of this section. Such rule must be based
3 upon an administrative record establishing that such
4 modification is necessary to reflect actual experience
5 regarding the litigation risk faced by the United
6 States in proceeding against nonsettling parties
7 under this section.

8 “(5) AUTHORIZATION OF REIMBURSEMENT.—
9 In any settlement in which a party agrees to per-
10 form response work in excess of its share, the Ad-
11 ministrator shall have authority to carry out his
12 duty to reimburse settling parties under this section
13 pursuant to such reasonable procedures as the Ad-
14 ministrator may prescribe.

15 “(6) REIMBURSEMENT CLAIMS.—The Adminis-
16 trator shall require all claims for reimbursement to
17 be supported by—

18 “(A) documentation of actual costs in-
19 curred; and

20 “(B) sufficient information to enable the
21 Administrator to determine whether such costs
22 were reasonable.

23 The Administrator may require independent auditing of
24 any claim for reimbursement.

25 “(p) POST-ALLOCATION LITIGATION.—

1 “(1) IN GENERAL.—The United States may
2 commence an action under section 107 against any
3 person liable under that section who has not resolved
4 its liability to the United States following allocation,
5 on or after 90 days following issuance of the
6 allocator’s report. In any such action, such person
7 shall be liable in accordance with section 107 for all
8 response costs not recovered through settlements
9 with other persons. Such recoverable costs shall in-
10 clude any federally funded orphan share identified in
11 accordance with subsection (h), but shall not include
12 any shares allocated to Federal, State, or local gov-
13 ernmental agencies, departments, or instrumental-
14 ities. Defendants in any such action may implead
15 only allocation parties who did not resolve their li-
16 ability to the United States. The Administrator and
17 the Attorney General shall issue guidelines to ensure
18 that the relief sought against de minimis parties
19 under principles of joint and several liability will not
20 be grossly disproportionate to their contribution to
21 the facility. The application of such guidelines is
22 committed to the discretion of the Administrator
23 and the Attorney General.

24 “(2) CERTIFICATION.—In commencing any ac-
25 tion under section 107 following allocation, the At-

1 torney General must certify, in the complaint, that
2 the United States has been unable to reach a settle-
3 ment that would be in the best interests of the Unit-
4 ed States. This certification shall not be subject to
5 judicial review.

6 “(3) DEFENDANTS.—No person may commence
7 an action under section 107 or otherwise seek con-
8 tribution against any person who was not identified
9 as an allocation party pursuant to subsection (c) or
10 subsequently identified as a potentially liable party
11 under subsection (n) (relating to new information).

12 “(4) ADMISSIBILITY OF ALLOCATOR’S RE-
13 PORT.—The allocator’s report shall not be admissi-
14 ble in any court for any purpose, except as set forth
15 in this section. The allocator’s report, subject to the
16 rules and discretion of the court, may be admissible
17 solely for the purpose of assisting the court in mak-
18 ing an equitable allocation of response costs among
19 the relative shares of nonsettling liable parties.

20 “(5) COSTS OF ALLOCATION PROCEDURE ON
21 ORPHAN SHARE.—

22 “(A) INCLUDED AS COSTS OF RE-
23 SPONSE.—The costs of implementing the alloca-
24 tion procedure set forth in this section, includ-
25 ing reasonable fees and expenses of the allo-

1 cator, shall be considered necessary costs of re-
2 sponse for purposes of this Act.

3 “(B) ORPHAN SHARE.—The costs attrib-
4 utable to any funding of orphan shares identi-
5 fied by the allocator pursuant to subsection
6 (e)(4) also shall be considered necessary costs
7 of response for purposes of this Act, and shall
8 be recoverable from liable parties who do not
9 resolve their liability on the basis of the alloca-
10 tion.

11 “(6) REJECTION OF SHARE DETERMINATION.—
12 In any action by the United States under this title,
13 if the United States has rejected an offer of settle-
14 ment that is consistent with subsection (o) and that
15 was presented to the United States prior to the expi-
16 ration of the moratorium period set forth in sub-
17 section (b), the offeror shall be entitled to recover
18 from the United States the offeror’s reasonable costs
19 of defending the action after the making of the offer
20 (including reasonable attorneys’ fees) if the ultimate
21 resolution of liability or allocation of costs with re-
22 spect to the offeror (taking into account all settle-
23 ments and reimbursements with respect to the facil-
24 ity other than those attributable to insurance or in-

1 demnification), is as, or more, favorable to the
2 offeror than the offer based on the allocation.

3 “(q) REIMBURSEMENT FOR UAO PERFORMANCE.—

4 “(1) REIMBURSEMENT.—Parties who satisfac-
5 torily perform work under an administrative order
6 issued under section 106(a) with respect to a reme-
7 dial action for which an allocation is required by
8 subsection (a)(1), shall be entitled to reimbursement
9 for the reasonable and necessary costs of work they
10 perform in excess of the share assigned to them in
11 the allocation in accordance with the provisions of
12 this section, provided that the allocation report is
13 not rejected by the United States and, that, at the
14 end of the moratorium following the allocation, the
15 performing party, in consideration of such reim-
16 bursement—

17 “(A) agrees not to contest liability for all
18 response costs not inconsistent with the Na-
19 tional Contingency Plan to the extent of the al-
20 located share;

21 “(B) receives no covenant not to sue;

22 “(C) agrees that its reimbursement shall
23 be reduced by an amount equal to the maxi-
24 mum litigation risk premium provided for in
25 subsection (o)(4) based on the total allocated

1 shares of the allocation parties who have not
2 reached settlements with the United States by
3 the end of the moratorium on commencement
4 of actions provided in subsection (b);

5 “(D) waives contribution rights against all
6 parties who are potentially responsible parties
7 for the response action, as well as waives any
8 rights to challenge any settlement the President
9 enters into with any other potentially respon-
10 sible party.

11 “(2) OFFSET.—Any and all reimbursement pro-
12 vided to a performing party for work in excess of its
13 share is subject to equitable offset or reduction by
14 the Administrator upon a finding of a failure to per-
15 form any aspect of the remedy in a proper and time-
16 ly manner.

17 “(3) TIME OF PAYMENT.—Any and all reim-
18 bursement to a performing party for work in excess
19 of its share shall be paid after work is completed,
20 but no sooner than completion of the construction of
21 the remedial action.

22 “(4) LIMIT ON ORPHAN SHARE FUNDING.—The
23 amount of orphan share funding available to the
24 performing party shall be further limited as follows:

1 “(A) Performing parties who fully waive
2 their right to challenge remedy selection at the
3 end of the moratorium following allocation shall
4 be entitled to full reimbursement of costs in ex-
5 cess of the party’s share and attributable by the
6 allocator to the orphan share paid in nominal
7 dollars after the work is completed, but no
8 sooner than completion of the construction of
9 the remedial action.

10 “(B) Performing parties who retain their
11 right to challenge the remedy shall be reim-
12 bursed for 90 percent of orphan share funding,
13 paid in nominal dollars after the work is com-
14 pleted, but no sooner than completion of the
15 construction of the remedial action, unless the
16 orphan share is less than 20 percent of respon-
17 sibility at the site, in which case such parties
18 shall be reimbursed only 80 percent of the or-
19 phan share.

20 For purposes of this subsection ‘nominal dollars’
21 means actual dollars spent by the performing party,
22 without increase for interest or inflation.

23 “(5) NONORPHAN SHARE REIMBURSEMENT.—
24 Reimbursement for work in excess of the performing
25 party’s allocated share but that is not attributable to

1 the orphan share shall be paid in nominal dollars
2 after work is completed, but no sooner than comple-
3 tion of the construction of the remedial action, pro-
4 vided that the performing party is entitled to all in-
5 terest (prejudgment and post judgment, whether re-
6 covered from a party or earned in a site account)
7 that has accrued on money recovered by the United
8 States from other parties for such work at the time
9 construction of the remedy is completed.

10 “(6) REIMBURSEMENT CLAIMS.—The Adminis-
11 trator shall require that all claims for reimburse-
12 ment be supported by—

13 “(A) documentation of actual costs in-
14 curred; and

15 “(B) sufficient information to enable the
16 Administrator to determine whether such costs
17 were reasonable.

18 The Administrator may require independent auditing
19 of any claim for reimbursement.

20 “(r) FUNDING OF ORPHAN SHARES.—From funds
21 available in the Fund in any given fiscal year, and without
22 further appropriation action, the President shall make re-
23 imbursements from the Fund, to eligible parties for costs
24 incurred and equitably attributable to orphan shares de-
25 termined pursuant to this section, provided that Fund fi-

1 nancing of orphan shares shall not exceed \$300,000,000
2 in any fiscal year. Reimbursements made under this sub-
3 section shall be subject to such terms and conditions as
4 the President may prescribe.

5 “(s) PROCEDURES.—The Administrator, after con-
6 sultation with the Attorney General, may promulgate rules
7 (or guidance) of Agency organization, procedure, and
8 practices but shall not have additional authority, except
9 as specifically set forth in this section, to promulgate rules
10 or publish guidance to restrict the allocator’s discretion
11 in the conduct of the allocation.

12 “(t) ROLE OF FEDERAL AGENCIES.—Federal depart-
13 ments, agencies, or instrumentalities that are identified as
14 potentially responsible parties shall be subject to, and be
15 entitled to the benefits of, the allocation process provided
16 by this section to the same extent as any other party.

17 “(u) REPRESENTATION OF THE UNITED STATES
18 AND AFFECTED STATES.—The Administrator and the At-
19 torney General, and a representative of any State that
20 may be responsible for a portion of the orphan share, shall
21 be entitled to review all documents and participate in any
22 phase of the allocation proceeding.

23 “(v) ANNUAL REPORT.—The President shall report
24 annually to Congress on the administration of the alloca-
25 tion scheme under this section, and provide information

1 comparing allocation results with actual settlements at
2 multiparty facilities.

3 “(w) SAVINGS PROVISIONS.—(1) Nothing in this sec-
4 tion shall in any way limit or affect the President’s author-
5 ity to exercise the powers conferred by section 103, 104,
6 105, 106, or 122 of this title, or to commence an action
7 against a party where there is a contemporaneous filing
8 of a judicial consent decree resolving that party’s liability;
9 or to file a proof of claim or take other action in a proceed-
10 ing under title 11 of the United States Code.

11 “(2) The procedures established in this section shall
12 not be construed to modify or affect in any way the prin-
13 ciples of retroactive, strict, joint and several liability under
14 this title.

15 “(3) Nothing in this section shall limit or affect—

16 “(A) the Administrator’s obligation to perform
17 an allocation for facilities that have been the subject
18 of partial or expedited settlements;

19 “(B) the ability of a potentially responsible
20 party at a facility to resolve its liability to the Unit-
21 ed States or other parties at any time before initi-
22 ation or completion of the allocation process;

23 “(C) the validity, enforceability, finality, or
24 merits of any judicial or administrative order, judg-
25 ment, or decree that is issued, signed, lodged, or en-

1 tered with respect to liability under this Act or that
2 authorizes modification of any such order, judgment
3 or decree; or

4 “(D) the validity, enforceability, finality or mer-
5 its of any preexisting contract or agreement relating
6 to any allocation of responsibility or any sharing of
7 response costs under this Act.”.

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